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Litigating Secrets: Comparative Perspectives on the State Secrets Privilege

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**Litigating Secrets: Comparative Perspectives on the State Secrets Privilege**

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**Abstract**

The Article considers the history and use of the state secrets privilege in the United States and the ongoing congressional efforts to reform the use of the privilege. Although numerous articles have addressed the application of the state secrets privilege in the United States, this Article breaks new ground by examining the history and use of the privilege in other nations which confront serious national security threats. This Article considers the modern application the privilege in Scotland, England, Israel and India—an analysis which contextualizes both the current use of the U.S. privilege and the efforts at legislative reform. Such comparative analysis is necessary to fully understand the transnational implications of the U.S. application of the state secrets privilege, which have recently come to light in litigation involving both the United States and England.

This Article concludes that domestic reform efforts continue to be necessary to achieve an appropriate application of the privilege which balances national security with the need to preserve the rule of law, individual rights, liberty interests and government accountability. The Article further suggests that reforms should explicitly account for alleged human rights abuses by the government in determining whether a claim of privilege should be upheld.
Litigating Secrets: Comparative Perspectives on the State Secrets Privilege

Sudha Setty *

INTRODUCTION

The state secrets privilege is a common law evidentiary privilege which enables the government to prevent disclosure of sensitive state secrets in the course of litigation. The claim of privilege by the government, if upheld by a court, can result in anything from the denial of a discovery request for a particular document to the outright dismissal of a suit. Some describe the state secrets privilege as the “most powerful secrecy privilege available to the president and the executive branch.”¹ Its scope is coextensive with any kind of information classified as “secret” or a higher level of secrecy,² and applies to both criminal and civil lawsuits.

The privilege has been invoked by every administration since the Supreme Court acknowledged its existence in the 1953 case of

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² Weaver, supra note ___, at 7-8.
United States v. Reynolds, which was based in large part on English precedent. The privilege has never been clarified by statute; Congress undertook reform efforts in 2008 due to a concern that the Bush administration overreached in its claims of privilege and sought more dismissals during the pleadings stage, and that courts have not used a uniform standard to assess those claims.³

Congress reintroduced reform legislation in February 2009⁴ after the Obama administration appeared to adopt the Bush administration’s stance in favor of a broad and sweeping invocation and application of the state secrets privilege.⁵ As with many other initiatives related to the prosecution of the war on terror, the question of the appropriate application of the privilege turns on issues of national security balanced with the need to preserve the rule of law, individual rights, liberty interests and government accountability. Reform continues to be necessary to restore the long-term appropriate balance between these competing interests.

This Article considers the reform efforts in the context of the experience of other nations and draws several comparative conclusions: that the current application of the privilege follows English precedent and modern English practices, although English courts have recently expressed dismay at the broad application of the privilege by the U.S. government. Indian practices are more restrictive on information disclosure than the current or proposed practices in the U.S. Other legal systems that take precedent from

³ Introduction by Senator Kennedy of S. 2533, the State Secrets Protection Act, Cong. Rec. S198-S201 (Jan. 23, 2008).
⁵ Editorial, Continuity of the Wrong Kind, N.Y. Times, Feb. 11, 2009, at A30 (disagreeing with the Obama administration’s decision to continue the Bush administration invocations of the state secrets privilege to have litigation against the government dismissed at the pleadings stage).
the British system—including Scotland and Israel—mandate a more limited application of the state secrets privilege and conform generally to the standards contained in the 2008 proposed legislation. Israel further explicitly accounts for allegations of government human rights abuses in determining whether a case involving national security matters ought to be heard by the courts.

Part I of this Article details the efforts to reform the state secrets privilege and addresses the motivation behind these proposed reforms in the U.S., namely the desire to curb perceived executive branch overreaching, create a uniform and workable judicial standard, and reassert the rule of law in the adjudication of national security litigation. This Part discusses some of the most prominent cases in which the state secrets privilege has been invoked, where allegations of gross violations of human and civil rights have been quashed by invocation of the privilege. This Part also considers and ultimately rejects concerns that a more restrictive privilege may lead to the unnecessary dissemination of sensitive information and may infringe on the constitutional rights of the Executive branch.

Part II examines the history of the U.S. state secrets privilege, including its origins in the UK, the intended balancing test set forth in Reynolds, and the subsequent expansion of the invocation of the privilege since Reynolds. Although Reynolds sets forth a specific balancing test for determining whether a claim of privilege should be applied, that test has been abdicated in most instances. As currently applied, almost any invocation of the state secrets privilege is accepted at face value and without examination of the documents over which the privilege is being claimed.

Part III examines from a comparative perspective how the state secrets privilege has evolved in other countries, including Scotland, England, Israel and India. These countries offer a spectrum of responses as to the appropriate application of a state secrets privilege and each strikes a different balance among the interests of national security, liberty and the rule of law.
Finally, Part IV considers how the U.S. treatment of the state secrets privilege fits into the comparative context. Here, I conclude that in the interest of creating a better balance between the rule of law and national security concerns, the U.S. should not only consider reforming and clarifying the privilege, but also should consider adding an additional element advising courts to consider the human rights interests that may be at stake in a particular lawsuit.

I. WHY REFORM THE STATE SECRETS PRIVILEGE?

In January 2008, a bipartisan group of senators introduced the State Secrets Protection Act,\(^6\) calling for the passage of a “safe, fair, and responsible state secrets privilege Act.”\(^7\) In March 2008, a group of representatives introduced its own State Secret Protection Act of 2008,\(^8\) seeking to establish “safe, fair, and responsible procedures and standards for resolving claims of state secret privilege.”\(^9\) Representative Jerrold Nadler, Chairman of the House Judiciary Subcommittee on the Constitution, Civil Rights and Civil Liberties, described the need to reform the privilege as follows:

> “If you have an administration that is abusing civil liberties…improperly arrests someone…improperly tortures that person…one presumes that that administration will not prosecute itself [or] its own agents for those terrible acts.

> “The normal remedy in American law—the only remedy I know of—is for that person, once recovered from the

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\(^{6}\) S. 2533 (Jan. 22, 2008). If passed into law, this would mark the first time Congress has attempted to codify any aspect of the state secrets privilege. See Petition for Writ of Certiorari, El-Masri v. United States, May 30, 2007, at 1.


\(^{8}\) H.R. 5607 (March 13, 2008).

torture, to sue for various kinds of damages and in court elucidate the facts…and get some justice and perhaps bring out to light what happened so that that administration would not do it again or the next one wouldn’t.

“If, however, that lawsuit can be dismissed right at the pleadings stage by…the assertion of state secrets, and if the court doesn’t look behind the assertion…and simply takes it at face value…the government says state secrets would be revealed and it would harm the national security if this case went forward, therefore case dismissed, which seems to be the current state of the law—if that continues and we don’t change that, what remedy is there ever to enforce any of our constitutional rights?”

Although the impetus for legislative reform appeared to weaken with the election of President Obama, recent invocations of the privilege by the Obama administration and pressure applied by the Obama administration to foreign governments making their own state secrets determinations have prompted Congress to reintroduce similar legislation in February 2009.

By re-assessing the privilege, Congress is taking an important first step toward providing additional rule of law protections against executive branch overreaching, maintaining the judicial role in executive oversight, and strengthening the protections for

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11 Mark Mazzetti and William Glaberson, Obama Issues Directive to Shut Down Guantanamo, N.Y. Times, Jan. 22, 2009, at A1 (quoting Obama administration representatives as highlighting the importance of “protecting our national security, respecting the Geneva Conventions and the rule of law, and respecting the existing institutions of justice in this country”).
individual litigants bringing suit against the government. In doing so, Congress appropriately took into account the changing national security landscape in the years since cementing of U.S. privilege in United States v. Reynolds.

A. United States v. Reynolds: The Domestic Standard is Established

The formal acknowledgement of the state secrets privilege in the U.S is, perhaps surprisingly, rather recent. The 1953 case of United States v. Reynolds stands as the seminal case in which the U.S. approach to invocations of the state secrets privilege was established.

In Reynolds, the family members of three civilians killed in the crash of a military plane sought compensation from the government for wrongful death. The government asserted the state secrets privilege in response to a document request by plaintiffs for the flight accident report. The trial court directed the government to produce the report to the court for a determination of privilege. When the government refused, the judge made an adverse inference and ordered a $250,000 judgment for the plaintiffs. The Third Circuit affirmed the decision, noting that a court should diligently refuse to accept blindly all claims of privilege; instead, a

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13 William G. Weaver & Robert M. Pallitto, State Secrets and Executive Power, 120 Pol. Sci. Q. 85, 90 (2005) (arguing that the courts should clarify the privilege to enhance these protections against executive branch overreaching).
14 345 U.S. 1 (1953).
16 Reynolds, 345 U.S. at 3-4. The government also cited to Air Force Regulation No. 62-7(5)(b), which precluded disclosure of such reports outside the authorized chain of command without the approval of the Secretary of the Air Force. Id. at 3-4, n. 4.
17 Reynolds, 345 U.S. at 5.
18 Reynolds, 345 U.S. at 5.
court should conduct an *ex parte* examination of the evidence to make an individualized privilege determination.\textsuperscript{19}

The Supreme Court reversed, although it agreed with part of the Third Circuit’s reasoning, noting that the greater the necessity for the allegedly privileged information in presenting the case, the greater the need for the court to “probe in satisfying itself that the occasion for invoking the privilege is appropriate.”\textsuperscript{20} The Court further reasoned that “judicial control over the evidence in a case cannot be abdicated to the caprice of executive officers.”\textsuperscript{21} However, the Court acknowledged the strength of the evidentiary privilege of the executive,\textsuperscript{22} and noted in passing that some commentators believed the privilege to be constitutionally grounded as well.\textsuperscript{23}

The Court ultimately upheld the right of the government to refuse to provide evidence and laid out a more deferential analytical framework by which future courts should evaluate a claim of privilege: (1) the claim must be asserted by the head of the department which has the responsibility for the information and evidence in question;\textsuperscript{24} (2) the court has the responsibility to determine whether the disclosure in question would pose a reasonable danger to national security;\textsuperscript{25} (3) the court should take into account the plaintiff’s need for information to litigate its case;\textsuperscript{26} (4) the court should, if necessary, undertake an *ex parte, in camera* review of the information at issue to determine whether a reasonable danger exists;\textsuperscript{27} and (5) if the court determines that the “reasonable danger” standard is met, the privilege is absolute—it cannot be overcome by the plaintiff’s showing of a need for the

\textsuperscript{19} 192 F.2d 987, 996-97 (3d Cir. 1953).
\textsuperscript{20} Reynolds, 345 U.S. at 11.
\textsuperscript{21} Reynolds, 345 U.S. at 9-10.
\textsuperscript{22} Reynolds, 345 U.S. at 5-6.
\textsuperscript{23} Reynolds, 345 U.S. at 6, n. 9.
\textsuperscript{24} Reynolds, 345 U.S. at 7-8.
\textsuperscript{25} Reynolds, 345 U.S. at 10.
\textsuperscript{26} Reynolds, 345 U.S. at 10-11.
\textsuperscript{27} Reynolds, 345 U.S. at 11.
information, whether the case involves issues of human rights or any other countervailing considerations.28

Given the ease with which the government could satisfy the low “reasonable danger” standard, the Reynolds court decided that the trial court did not need to examine the flight accident report over which the government was claiming the privilege, noting that “this is a time of vigorous preparation for national defense.”29 If it had ordered disclosure for the court’s review, it may have discovered what was revealed only when the report was de-classified in the 1990s: that there were no military secrets, as claimed by the government, in the report, but there was evidence that the plane lacked standard safeguards that might have prevented its crash—the very negligence on which the family members in Reynolds based their lawsuit.30 The decision by the Reynolds Court to decline to at least ascertain whether the document in question contained the information claimed to be privileged was a fundamental and determinative flaw—one that has been replicated by many courts in the intervening years.31

Reynolds is the only instance in which the Supreme Court has articulated a standard for the state secrets privilege; given the dearth of U.S. precedent,32 the Court based its reasoning on numerous other sources, including the English case33 of Duncan v.

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28 Reynolds, 345 U.S. at 11.
29 Reynolds, 345 U.S. at 10 (concluding that, given the “circumstances of the case,” no need to review the accident report existed).
30 Keefe, supra note ___. Cf. Herring v. United States, 424 F.3d 384 (3d. Cir. 2005) (holding that the United States did not commit a fraud on the court in its representations during the Reynolds litigation).
31 See Weaver & Pallitto, supra note ___. (noting that courts have looked at the underlying documents in fewer than one-third of cases in which the state secrets privilege was asserted).
32 Reynolds, 345 U.S. at 7.
Cammel Laird, decided in 1942. Cammel Laird’s acknowledgement of a robust evidentiary privilege available to the executive was not, however, the only basis on which the Reynolds court made its decision; the Court also considered other sources, such as earlier U.S. cases involving various privileges and Wigmore’s treatise on evidence. Wigmore noted the need for a state secrets privilege, but cautioned—even then, in 1940—that the privilege “has been so often improperly invoked and so loosely misapplied that a strict definition of its legitimate limits must be made,” and that courts, not the executive branch itself, were the appropriate decision makers regarding the privilege.

In Reynolds, the Supreme Court established a standardized doctrine by which to evaluate claims of a state secrets privilege that balanced national security matters with adherence to the rule of law and attention to rights of individual litigants. However, the balancing test set forth in Reynolds has often been subsumed

(continued…)


Reynolds, 345 U.S. at 7, n. 11.

John Henry Wigmore, Evidence in Trials at Common Law, vol. 8, at §2212a (3rd ed. 1940); see also Reynolds, 345 U.S. at 6-7.

Id.

Wigmore further commented, “Shall every subordinate in the department have access to the secret, and not the presiding officer of justice? Cannot the constitutionally coordinate body of government share the confidence? The truth cannot be escaped that a Court which abdicates its inherent function of determining the facts upon which the admissibility of evidence depends will furnish to bureaucratic officials too ample opportunities for abusing the privilege.” Id. at § 2378.

See also Ilann M. Maazel, The State Secrets Privilege, New York Law Journal, July 24, 2008, at 3 (noting that the Reynolds doctrine was initially “narrow and sensible”).
by a judicial tendency to uphold claims of privilege without engaging in a meaningful analysis of the underlying evidence or the government’s claimed need for nondisclosure. In recent years, that tendency has come under scrutiny as the current war on terror has led to numerous lawsuits in which national security programs have been implicated.

B. Impetus for Reform

Congress took up the question of the privilege in 2008 for several reasons. First, the war on terror has led to highly controversial actions such as the National Security Agency’s warrantless wiretapping program as well as the extraordinary rendition of individuals by the Central Intelligence Agency. Second, the unprecedented level of secrecy within the George W. Bush

41 Weaver & Pallitto, supra note ___. This judicial tendency is analyzed in further detail in Part II, infra.

42 Although the Obama administration has already begun to modify significantly the administration stance on many of the issues surrounding the war on terror and the prosecution of alleged terrorists and enemy combatants, it is unclear how administration intelligence programs will ultimately be structured. See Sheryl Gay Stolberg, Great Limits Come with Great Power, Ex-Candidate Finds, N.Y. Times, Jan. 25, 2009, at A22 (detailing the hurdles to fulfilling President Obama’s campaign promises regarding, among other areas, reform of national security policies); Adam Liptak, Early Test of Obama View on Power Over Detainees, N.Y. Times, Jan. 3, 2009, at A1.

43 See, e.g., Sudha Setty, No More Secret Laws: How Disclosure of Executive Branch Legal Policy Does Not Let the Terrorists Win, 57 Kan. L. Rev. ___, ___ (2009). One significant shift in information disclosure is the difference in treatment of requests under the Freedom of Information Act (FOIA) between the Clinton administration and the Bush administration. Compare Memorandum from John Ashcroft, Attorney General, on the Freedom of Information Act to the Heads of all Federal Departments and Agencies (Oct. 12, 2001), available at http://www.usdoj.gov/oip/011012.htm (stating that “[w]hen you carefully consider FOIA requests and decide to withhold records, in whole or in part, you can be assured that the Department of Justice will defend your decisions unless they lack a sound legal basis”), with Memorandum from Janet Reno, Attorney General, on the Freedom of Information Act to the Heads of Departments and Agencies (Oct. 4, 1993), available at http://www.usdoj.gov/oip/foia_updates/Vol_XIV_3/page3.htm (noting that “[t]he Department of Justice will no longer defend an agency’s withholding of information merely because there is a ‘substantial legal basis’ for doing so. (…continued)
administration has led to suspicions that the government is not necessarily acting in good faith in invoking the privilege and that such trends may persist in future administrations. Further, a “mosaic theory” of terrorist activity would create a broad protection over large swaths of relevant information that may not, at least regarding individual documents, satisfy the Reynolds standard. Third, many critics see the state secrets privilege as a broad and expansive means for executive branch over-reaching in which the bad actions of the administration are withheld from private litigants and the judicial system, and covered up before Congress and the public.

(continued…)

Rather, in determining whether or not to defend nondisclosure decisions, we will apply a presumption of disclosure”). Congress’s attempts to strengthen FOIA in December 2007 were undermined by the Bush administration’s efforts to have disputes mediated by the Department of Justice, as opposed to the less partisan National Archives. See Editorial, The Cult of Secrecy at the White House, N.Y. Times, Feb. 7, 2008.

44 Rep. Shapiro, Hearing on State Secrets Privilege Claim, Part 4, House Judiciary Committee on the Constitution, Civil Rights and Civil Liberties, July 31, 2008 (noting the need for reform of the privilege, since “courts need to look at the invocation of the state secrets privilege skeptically and make sure it is really being raised to protect national security and not to shield government officials from legal and political accountability”). In the government’s brief in the case of New York Times v. United States, 403 U.S. 713 (1971), then-Solicitor General Erwin Griswold wrote that “in the present case high government officials have explained the reasons for their concern; that judgment is enough to support the Executive Branch’s conclusion, reflected in the top secret classification of the documents and in the in camera evidence, that disclosure would pose the threat of serious injury to the national security.” Decades later, Griswold conceded, “I have never seen any trace of a threat to the national security from the publication [of the Pentagon Papers]. Indeed, I have never seen it even suggested that there was such a threat.” Barry Siegel, National Security Push-Back, L.A. Times, June 29, 2008, at 4.

45 E.g., Edmonds v. Department of Justice, Civil Action No. 02-1448 (RBW) (D.D.C.) Memorandum Opinion, at 18 (July 6, 2004) (rejecting the test set forth in Ellsberg v. Mitchell to parse privileged and non-privileged material such that the litigation could continue); Crater v. Lucent, 423 F.3d 1260 (Fed. Cir. 2005) (upholding the decision of the trial court to decline to conduct any in camera review of over 26,000 documents, thereby upholding the government’s claim of the state secrets privilege under a mosaic theory of national security activity)

46 Chesney, supra note ___, at 1269 (arguing that such practices extend beyond any particular administration).
The administration’s warrantless wiretapping program was challenged numerous times in court, but the government’s invocation of the state secrets privilege meant that plaintiffs met with little success in pursuing lawsuits against the government regarding the program. Specifically, the government has invoked the state secrets privilege numerous times to protect records that would have allowed the plaintiffs to prove they were subject to wiretapping and thus had standing to challenge the program.

An emblematic case is that of the al-Haramain Islamic Foundation, an Islamic charity based in Saudi Arabia and operating worldwide, including the United States, which filed suit against the U.S. government for being subject to allegedly unconstitutional warrantless wiretapping of telephone conversations by the National Security Agency (NSA). Al-Haramain was in the unique position of being able to offer documented proof that it was subject to NSA wiretapping, since the government had accidentally turned over transcripts and records of the wiretapping activity to an Al-Haramain lawyer. The Bush administration sought to recover most copies of the report in the possession of Al-Haramain’s

47 E.g., ACLU v. NSA, 438 F. Supp. 2d 754 (E.D. Mich. 2006), vacated and remanded on other grounds, 493 F.3d 644, 662-664 (6th Cir. 2007), cert. denied, 128 S.Ct. 1334 (2008); see also Recent Case, Sixth Circuit Denies Standing to Challenge Terrorist Surveillance Program, 121 Harv. L. Rev. 922 (2008) (arguing that standing rules should be relaxed under such circumstances).

48 E.g., Al-Haramain Islamic Found. v. Bush, 507 F.3d 1190, 1205 (9th Cir. 2007) (“Al-Haramain cannot establish that it suffered injury in fact, a ‘concrete and particularized’ injury, because the Sealed Document, which Al-Haramain alleges proves that its members were unlawfully surveilled, is protected by the state secrets privilege.”); Hepting v. AT&T, 439 F. Supp. 2d. 974, 984 (N.D. Cal. 2006); ACLU v. NSA, 438 F. Supp. 2d 754 (E.D. Mich. 2006), vacated and remanded on other grounds, 493 F.3d 644 (6th Cir. 2007), cert. denied, 128 S.Ct. 1334 (2008) (plaintiffs’ data-mining claim barred by the state secrets privilege).


51 Leonnig & Sheridan, supra note ___.
counsel and others, but did not try to recover those copies that had been sent outside of the United States.\textsuperscript{52}

The government moved to dismiss Al-Haramain’s case based on the state secrets privilege; the motion was denied, although the presiding judge agreed to exclude the wiretapping report from the evidence available to plaintiffs.\textsuperscript{53} The Ninth Circuit reversed and remanded the case from an interlocutory appeal, holding that because the privilege surrounding the wiretapping records was “absolute,” the district court’s decision to use affidavits was unacceptable.\textsuperscript{54} Because the district court should not have considered the document in any respect, the Ninth Circuit reasoned that plaintiffs could not establish an injury in fact, and, therefore, lacked standing.\textsuperscript{55} On remand, the district court was tasked to determine whether FISA preempts the state secrets privilege such that the lawsuit could survive.\textsuperscript{56} The court concluded that FISA trumped the state secrets privilege,\textsuperscript{57} noting that the “enactment of FISA was the fruition of a period of intense public and Congressional interest in the problem of unchecked domestic surveillance by the executive branch.”\textsuperscript{58}

\begin{itemize}
\item \textsuperscript{52} See Patrick Radden Keefe, State Secrets—A Government Misstep in a Wiretapping Case, The New Yorker, Apr. 28, 2008 (describing how the government did not act to recover copies that were sent to Al-Haramain personnel in Saudi Arabia).
\item \textsuperscript{53} Keefe, \textit{supra} note ____. The judge instead ordered that the plaintiffs create affidavits based on their recollections of the privileged document. \textit{Id.}
\item \textsuperscript{54} 507 F.3d at 1204. The Ninth Circuit pointed out that the district court could have held an \textit{ex parte, in camera} review of the wiretapping records in accordance with the strict procedures of FISA, but that it did not do so. \textit{Id.}
\item \textsuperscript{55} 507 F.3d at 1205.
\item \textsuperscript{56} 507 F.3d at 1206.
\item \textsuperscript{57} In re National Security Agency Telecommunications Records Litigation, Al-Haramain Islamic Found. v. Bush, 2008 WL 2673772, at *1 (N.D.Cal.) (July 2, 2008).
\item \textsuperscript{58} \textit{Id.}, at *5. The court relied on the post-Watergate Church Committee Report on the unconstitutional domestic surveillance activities of the Nixon administration, see \textit{id.} at *6, as well as the framework for assessing presidential actions taken in defiance of congressional will, set forth in Justice Jackson’s concurrence in \textit{Youngstown Sheet and Tube Co. v. Sawyer}, 343 U.S. 579, 635, 72 S.Ct. 863, 96 L.Ed. 1153 (1952). \textit{See id.} at *7.
\end{itemize}
The court reasoned that section 1806(f) of FISA governed how sensitive government information resulting from surveillance ought to be handled by the courts, and that 1806(f) trumped the *Reynolds* framework for analyzing state secrets claims. The court went further still, holding that 1806(f) was “in effect a codification of the state secrets privilege for purposes of relevant cases under FISA, as modified to reflect Congress’s precise directive to the federal courts for the handling of materials and information with purported national security implications….the *Reynolds* protocol has no role where section 1806(f) applies." The district court’s holding kept the plaintiff’s claim alive, with Al-Haramain bearing the burden of proving surveillance apart from the wiretapping records that were inadvertently produced by the government. In its July 2008 amended complaint, Al-Haramain attempted to do so, using public statements by the Federal Bureau of Investigation that refer to the wiretapping of Al-Haramain’s telephones as part of its counterterrorism efforts.

A second motivating factor for the current push of state secrets reform is growing evidence of extreme cases of detainee mistreatment which have shocked the public: emblematic is the case of Khaled El-Masri, a German citizen who was subjected to extraordinary rendition by the U.S. government in what was later acknowledged as a case of mistaken identity.

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59 Id. at *9.
60 Id. at *9.
61 Id. at *21.
62 Evan Hill, *Islamic Charity Files New Wiretapping Complaint*, The Legal Intelligencer, July 31, 2008 [add new legal strategy by al-Haramain re: standing and classified information]
63 Other recent cases have also implicated the state secrets privilege, but were resolved on other grounds or did not garner as much attention as the El-Masri case. *See, e.g.*, *Arar v. Ashcroft*, 414 F. Supp. 2d 250 (E.D.N.Y. 2006) (dismissed on other grounds); *see also* William Fisher, *State Secrets Privilege Derails Rendition Suit*, Arab American News, July 12, 2008, at 8.
64 For a full account of Khaled El-Masri’s story of rendition, see Jane Mayer, *The Dark Side* 282-87 (2008).
In December 2003, El-Masri was taking a holiday from his hometown of Ulm, Germany, to Skopje, Macedonia. He was taken into custody by Macedonian authorities while on a bus crossing the border from Serbia.\textsuperscript{66} According to El-Masri, in January 2004, he was transported to an airport where he was beaten, stripped naked, photographed and then sodomized.\textsuperscript{67} He was then subject to “extraordinary rendition” by the CIA, who transported him to a prison in Kabul, Afghanistan.\textsuperscript{68}

El-Masri was finally released on May 28, 2004,\textsuperscript{69} after having been in captivity for approximately five months, during which he was subject to numerous harsh interrogations by the CIA, which included “threats, insults, pushing, and shoving”\textsuperscript{70} as well as force-feeding through a nasal tube.\textsuperscript{71} Upon his release, El-Masri sought out German officials who launched an investigation regarding his allegations of abduction, detention and abuse.\textsuperscript{72}

In 2005, El-Masri sued George Tenet, the former director of the Central Intelligence Agency, as well as the airlines complicit in the rendition and various other individuals.\textsuperscript{73} The government argued for dismissal of the suit based on the state secrets privilege, claiming that national security interests may be compromised if the

\textsuperscript{66} Complaint, supra note ___, at ¶ 23.
\textsuperscript{67} Complaint, supra note ___, at ¶ 28.
\textsuperscript{68} Complaint, supra note ___, at ¶ 29-35 (alleging that El-Masri was blindfolded, shackled, forced into a diaper and rendered unconscious by injections during his transport).
\textsuperscript{69} Complaint, supra note ___, at ¶ 43.
\textsuperscript{70} Complaint, supra note ___, at ¶ 40.
\textsuperscript{71} Complaint, supra note ___, at ¶ 44.
\textsuperscript{72} Complaint, supra note ___, at ¶ 57.
litigation were to continue, and that state secrets were central to El-Masri making his case against the government.\footnote{Wells, supra note ___, at 3.} This privilege claim was made despite the U.S. admission of the existence and operation of a rendition program, as well as the support for El-Masri’s factual account by German investigators and prosecutors.\footnote{Jennifer Granick, Secrecy Mustn’t Crush Rule of Law, Wired, June 21, 2006.} The federal district court agreed with the government’s claim and dismissed El-Masri’s suit at the motion to dismiss stage of the litigation, prior to the government filing an answer to El-Masri’s complaint.\footnote{See El-Masri v. Tenet, 437 F. Supp.2d 530 (E.D. Va. 2006); Wells, supra note ___, at 3. El-Masri only one of many state secrets privilege claims which led to dismissal at the pleadings stage. See, e.g., Halkin v. Helms, 598 F.2d 1 (D.C. Cir. 1978) (in which the court affirmed a partial dismissal of a suit involving domestic surveillance issues).} The federal appeals court sustained the dismissal,\footnote{See El-Masri v. United States, 479 F.3d 296 (4th Cir. 2007).} and the U.S. Supreme Court denied certiorari in 2007.\footnote{See El-Masri v. United States, 128 S.Ct. 373, 169 L.Ed.2d 258, (Oct. 9, 2007) (No. 06-1613); Linda Greenhouse, Supreme Court Refuses to Hear Torture Appeal, N.Y. Times, Oct. 10, 2007, available at http://www.nytimes.com/2007/10/10/washington/10scotus.html?ref=us (visited July 22, 2008).}

In denying certiorari, the Supreme Court essentially chose to let stand the lack of clarity surrounding the standard for determining what procedures a court should use to evaluate potentially privileged evidence, whether a court should dismiss a suit in response to a valid privilege claim, and whether dismissal can occur prior to evidentiary discovery or even the filing of an answer to the complaint.\footnote{Wells, supra note ___, at 3.}

The dismissal of \textit{El-Masri} and the subsequent denial of certiorari made clear that any clarification of the state secrets privilege would have stem from Congress.\footnote{It is clearly not in the interest of the executive branch to initiate any tinkering with the state secrets privilege, since the current application tends to grant most government requests for dismissal or non-discovery. See Editorial, Secrets and Rights, N.Y. Times, Feb. 2, 2008, at A28 (noting that the proposed Congressional measures were necessary given the courts’ reflexive dismissal of cases involving national security issues).} Critics of the current use and
application of the state secrets privilege cite numerous areas that require clarification: when the government can invoke the privilege, and what can be protected from disclosure; when it is appropriate to grant a motion to dismiss based on a state secrets claim at the initial pleadings stage; the appropriate relief for a valid claim of the privilege; and how deeply the court must examine the government’s claim.

More fundamentally, the petition for certiorari by El-Masri reflects broader concerns that the Reynolds framework should be reevaluated in light of serious constitutional issues raised in current cases that were not present in Reynolds. Additionally, critics have noted that the nature of national security concerns has changed significantly since the end of the Cold War, and the courts’ ability to adjudicate cases while protecting sensitive information has improved dramatically in the decades since Reynolds.

The certiorari petition asserted that it was time for the Court to revisit the Reynolds standard and the state secrets privilege generally, arguing that since Reynolds was decided, “the privilege has become unmoored from its evidentiary origins” and now provides a type of blanket immunity for bad actions by the government.

Indeed, the Bush administration invoked the state secrets privilege with greater frequency, in cases of greater national significance, and sought broader immunity for alleged bad acts by the government, than in previous administrations. It also extended
the ability to classify documents as “secret” to additional administrative agencies.\textsuperscript{88} These claims of state secrets have, as El-Masri argued, been raised frequently at the initial pleadings stage, allowing the government to seek dismissal prior to discovery.\textsuperscript{89} Further, courts often have not examined the documents over which the privilege has been claimed, relying solely on government affidavits to determine that the privilege applies and that the suit must be dismissed prior to the commencement of discovery.\textsuperscript{90} Given the fact that litigation that touches on issue of national security is likely going to be a constant

\textsuperscript{88} See Weaver, supra note ___, at 9 (noting that the ability to classify documents as “secret,” and, therefore, potentially shield them from disclosure in litigation, to the department of Health and Human Services, the Environmental Protection Agency, the Department of Agriculture, and the Office of Science and Technology Policy).

\textsuperscript{89} See Hepting v. AT&T, Corp., 439 F. Supp. 2d 974 (N.D. Cal. 2006), appeal docketed, No. 06-17137 (9th Cir. Nov. 9, 2006); Al-Haramain Islamic Found., Inc. v. Bush, 451 F. Supp. 2d 1215 (D. Or. 2006); ACLU v. NSA, 438 F. Supp. 2d 754 (E.D. Mich. 2006); Terkel v. AT&T Corp., 441 F. Supp. 2d 899 (N.D. Ill. 2006); Edmonds v. U.S. Dep’t of Justice, 323 F.Supp. 2d 65 (D.D.C. 2004), cert. denied, 74 USLW 3108 (U.S. Nov. 28, 2005) (No. 05-190) (invoking the privilege to terminate a whistleblower suit by an FBI translator who was retaliated against); see also William F. Jasper, Shooting the Messenger, New American, July 7, 2008, at 20 (detailing the level of retaliation against Sibel Edmonds, and her inability to seek recourse in the courts).

\textsuperscript{90} Petition for certiorari, supra note ___, at 14.
for the foreseeable future, re-assessing *Reynolds* in light of modern standards is necessary.  

C. Proposed Reforms

The 2008 and 2009 proposed reforms are the first sustained attempt by Congress to address the concerns of lawmakers, scholars and activists to allow courts some flexibility in their evaluation and application of the privilege while protecting sensitive government information.  

Both the Senate and House bills created a uniform set of procedures for federal judges to employ when the government asserts the privilege, modeled in large part after the Classified Information Procedures Act, a 1980 law which established procedures for the use of classified information in criminal trials.

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91 It has been clear for decades that the state secrets privilege needs to be re-assessed and clarified for courts to apply a consistent and clear standard. *See* 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).

92 A number of courts have held that Congress can preempt or modify the application of the state secrets privilege through statute. *See* Halpern v. United States, 258 F.2d 36 (2d Cir. 1958) (noting that the Invention Secrecy Act—not the common law state secrets privilege—should guide the court’s decision-making regarding sensitive evidence); *In re National Security Agency Telecommunications Records Litig.*, 2008 WL 2673772 (N.D. Cal., July 2, 2008) (noting that the Foreign Intelligence Surveillance Act has primacy over the state secrets privilege in setting forth the parameters of how evidence should be treated during litigation); *see also* Eric Lichtblau, Judge Rejects Bush’s View on Wiretaps, N.Y. Times, July 3, 2008 at A1 (noting FISA’s limitations on executive branch activities).

93 Pub. L. 96-456 (1980). The Bush administration has pointed out that analogizing the use of the state secrets privilege to the application of the CIPA is inapposite, since the end result of nondisclosure of government held evidence under CIPA is that the government would need to drop its prosecution of a criminal case; in a state secrets situation, the proposed reforms would mean that government nondisclosure after a court order would lead to an adverse inference which increases the likelihood of government liability to private litigants. *See* Mukasey Letter, *supra* note ___, at ___.
Under the proposed legislation, courts would have the ability to conduct hearings on the documents claimed to be privileged in camera, ex parte or through the participation of attorneys and legal experts with appropriate security clearances to review the materials. The bills also require the government to produce each piece of evidence it claims is protected for in camera review, along with a signed affidavit from the head of the agency in possession of the evidence. The Senate bill also requires the government to attempt to produce a non-privileged substitute—such as a redaction or summary—for any piece of evidence for which the privilege is upheld by the court.

These proposed reforms mark a stark contrast to the current situation in which the government’s common practice is to rely solely on affidavits to assert the privilege and move for dismissal of a suit. Judges would have been prevented from dismissing cases based on the privilege before plaintiffs have had a chance to engage in evidentiary discovery, and the level of deference to be accorded to the executive branch would have changed from the current standard of court giving the “utmost deference” to

94 S. 417 (2009). The bill empowers the judiciary to implement procedures to ensure that a sufficient number of attorneys with high-level security clearances are available to assist with such cases.
95 S. 417 at §4052(b)(1) (providing for in camera hearings except in when the hearing relates solely to a question of law). The court can choose to review only a sampling of the documents in question, if the review of every document would be prohibitively time-consuming.
96 S. 417.
97 See Oliphant, supra note ___. S. 417 requires that the government also provide an affidavit to support a claim of state secrets, and that an unclassified version of the affidavit must be made public. S. 417 at §4053(d).
98 S. 417 at §4055 (“After reviewing all available evidence, privileged and non-privileged, a Federal court may dismiss a claim or counterclaim on the basis of the state secrets privilege”).
99 “Utmost deference” was also the standard accorded to executive claims of privilege in United States v. Nixon. 418 U.S. 683, 684 (1974).
administration claims to one in which judges give only “substantial weight” to such claims.  

D. Critiques and Concerns Over Reforming the Privilege

The 2008 proposed reforms were met with immediate and strong opposition from the Bush administration. In a March 31, 2008 letter to the Senate Judiciary Committee, then-Attorney General Michael Mukasey offered numerous critiques, including that the state secrets privilege is constitutionally rooted, and not solely a common law evidentiary privilege; the courts are not the appropriate decision makers regarding national security matters; that other aspects of S. 2533, including reporting requirements to Congress, are constitutionally suspect; and the proposed reforms would compromise the state secrets privilege to the detriment of national security.

First, the Bush administration offered the Article II-based argument that congressional regulation of the privilege is overreaching because the state secrets privilege is not a purely evidentiary privilege for which the parameters can be set by Congress. Instead, the Bush administration and other critics

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100 See Senate Judiciary Committee amendments to S. 2533. Finally, the Attorney General would have been obligated to report to Congress within 30 days on any case in which the state secrets privilege was invoked, and any member of the House and Senate Intelligence and Judiciary Committees to request and examine any piece of evidence deemed protected by a court.


102 Mukasey letter, supra note ___, at 2-3.

103 Mukasey letter, supra note ___, at 3-4.

104 Mukasey letter, supra note ___, at 4-5.

105 Mukasey letter, supra note ___, at 5-6. The Mukasey letter also detailed four other concerns: that the state secrets privilege is a well-settled doctrine, id. at 1, the Reynolds standard was appropriate for evaluating a claim of privilege, id. at 2, the proposed reforms could affect pending legislation and the proposed amendments lacked clarity as to classification procedures. Id. at 7.

106 See, e.g., El-Masri, 437 F. Supp. 2d at 535, 537 (asserting that the “privilege derived from the President's constitutional authority over the conduct of this country's diplomatic and military affairs”); Memorandum in Support of the United States’ Assertion of State Secrets Privilege at 3-4, Arar v. Ashcroft, No. 04-CV-240-DGT-VVP (E.D.N.Y. Aug. 11, 2005); Defendants’ Motion to (…continued)
argued that the state secrets privilege is grounded in the President’s inherent executive power, a position articulated by the Supreme Court in the dicta of United States v. Nixon, and mentioned in passing in a footnote in Reynolds.

Since Reynolds, most courts have construed the state secrets privilege simply as a common law evidentiary privilege, created and enforced to protect information when disclosure would be inimical to national security interests. In 2005, in Tenet v. Doe, the Supreme Court clarified that the state secrets privilege ought to be viewed as purely evidentiary in nature.

(continued…)

Dismiss or, in the Alternative, for Summary Judgment; and Defendants’ Motion to Stay Consideration of Plaintiffs’ Motion for Summary Judgment, American Civil Liberties Union v. National Sec. Agency, 438 F.Supp.2d 754 (E.D. Mich. 2006) at 10 (arguing that the “privilege derives from the President’s Article II powers to conduct foreign affairs and provide for the national defense”). See also Robert M. Chesney, State Secrets and the Limits of National Security Litigation, 75 Geo. Wash. L. Rev. 1249, 1309 (2007) (asserting that the state secrets privilege is best conceived of as an Article II privilege with an overlay of evidentiary issues, the latter of which can be regulated by Congress).


109 Reynolds, 345 U.S. at ___.

110 In re United States, 872 F.2d 472, 474 (D.C.Cir.1989); Al- Haramain Islamic Foundation v. Bush, 507 F.3d at 1196 (“The state secrets privilege is a common law evidentiary privilege that permits the government to bar the disclosure of information if ‘there is a reasonable danger’ that disclosure will ‘expose military matters which, in the interest of national security, should not be divulged.’” (citing Reynolds, 345 U.S. at 10); In re National Security Agency Telecommunications Records Litigation, Al-Haramain Islamic Found. v. Bush, 2008 WL 2673772, at *9 (N.D. Cal.) (July 2, 2008); Hepting v. AT & T Corp., 439 F. Supp. 2d 974, 980-85 (N.D. Cal. 2006).


112 Other supporters of the 2008 proposed reforms argued that whether the privilege has some constitutional roots is irrelevant, since the proposed reforms seek to impose the cost of an adverse inference against the government if it does (…continued)
Second, the Bush administration argued that the state secrets privilege is best exercised by the executive branch, which is owed a high level of deference on national security matters.\footnote{See \textit{United States v. Nixon}, 418 U.S. at 710 (reasoning that courts owe the “utmost deference” to executive branch requests for privilege).} For example, the government, in asking the Supreme Court not to grant El-Masri’s petition for certiorari, cited \textit{United States v. Nixon} for the proposition that “[s]uch deference protects the Executive’s Article II responsibility to safeguard national security information and accounts for the fact that the Executive Branch is in a far better position than the courts to evaluate the national security and diplomatic consequences of releasing sensitive information.”\footnote{\cite{gov:brief; US v. Nixon}}

This argument relied on the premise that judges cannot adequately evaluate some issues that relate to national security matters.\footnote{See \textit{Chesney}, supra note \ldots.} The district court in \textit{El-Masri} emphasized this purported judicial deficiency, quoting from the 1948 case of \textit{C. & S. Air Lines v. Waterman S.S. Corp.},\footnote{333 U.S. 103, 111 (1948).} “the President…has available intelligence services whose reports are not and ought not to be published to the world. It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret.”\footnote{\textit{El-Masri}, 437 F. Supp. 2d at 536, n. 7.}
This claim—which if followed to its logical conclusion would preclude judicial oversight of almost all national security matters—is questionable, since federal courts are regularly tasked with dealing with sensitive information related to national security issues. Further, the ability of the courts to deal with sophisticated and sensitive matters of national importance has increased dramatically since the Reynolds decision. Additionally, the status quo reflects little or no judicial check on executive branch overreaching; the proposed reforms attempt to rectify that by shedding sunlight on executive branch decision making that would not exist otherwise. Although involved executive branch officials would have a better and more nuanced understanding of national security issues than federal judges, the conclusion that judges are thus incompetent to play any significant role in the application of an evidentiary privilege—even with the protections of in camera review—does not follow.

Third, the Bush administration strongly objected to the proposed requirement that the Attorney General report to Congress on invocations of the state secret privilege and provide copies of privileged documents to members of Congress upon request. Any President who subscribes to a robust view of a unitary executive theory—particularly in light of the claim that the state secrets privilege has an Article II core—may decide to refuse to comply with the legislated state secrets framework based on the theory of constitutional avoidance.

119 See Testimony of Judge Patricia Wald before the House Judiciary Subcommittee on the Constitution, Civil Rights and Civil Liberties (Jan. 30, 2008).

120 Various developments have contributed to this trend, including the 1958 amendments to the Housekeeping Statute [cite], the 1974 amendments to the Freedom of Information Act, the 1978 creation of the Foreign Intelligence Services Act court, and the 1980 passage of CIPA. See Fisher, supra note ___, at 124-64; Constitution Project, supra note ___, at 5.

121 See Mukasey letter, supra note ___, at 4-5.


123 See Setty, supra note ____.

124 Constitutional avoidance commonly refers to as been used to mean that the President can “avoid” a constitutional dispute by asserting his own view of his constitutional obligations any time the actions of another branch make an incursion onto the constitutional right of the executive to exert its decision—(...continued)
to mandate the Attorney General’s reporting to Congress on information related to national security, the President may choose to “avoid” a potential constitutional question by refusing to enforce the legislation mandating the sharing of information. However, because the judiciary has a central role in evaluating and applying the state secrets privilege, the use of avoidance by the executive branch may be limited to some extent.

Fourth, the administration raised the concern that the proposed reforms, if enacted, would lead to the disclosure of more state (continued…)

making primacy in certain areas, such as in the conduct of war. See Morrison, supra note __, at 1218-19 (critiquing the OLC’s use of avoidance to assert more presidential power than is granted under law). Congress has attempted to address the question of constitutional avoidance through 2002 appropriations legislation that included a provision mandating notification to Congress whenever the executive branch chooses not to enforce a law as written. See The 21st Century Department of Justice Appropriations Authorization Act, § 202, Pub. L. No. 107-273, 28 U.S.C. § 530(D) (2002). Unfortunately, the administration appears to have engaged in “meta-avoidance” by refusing to comply with the congressional notification requirement in the Act. See Presidential Signing Statement for 21st Century Department of Justice Appropriations Authorization Act, 38 Weekly Comp. Pres. Doc. 1971, H.R. 2215 (Nov. 2, 2002) (noting that section 530D “purports to impose on the executive branch substantial obligations for reporting to the Congress activities of the Department of Justice involving challenges to or non-enforcement of law that conflicts with the Constitution. The executive branch shall construe section 530(D)...in a manner consistent with the constitutional authorities of the President to supervise the unitary executive branch...”).

125 Morrison, supra note __, at 1250-58. Members of Congress, acknowledging the ineffectiveness of Congressional oversight in the face of the heightened use of executive privilege and constitutional avoidance, have voiced the belief that the Courts are the last safeguards of separation of powers. Oversight Hearing Transcript at 5, 13-14 (Specter, citing Rasul). Sen. Specter has objected to this meta-use of constitutional avoidance, noting that even if enforcement of a statute is “avoided” by the administration, that avoidance needs to be reported to the appropriate committee in the Senate and House of Representatives. Oversight Hearing Transcript, supra note __, at 12.

126 It should be noted that there is no layer of judicial oversight for the provision of S. 2533 which requires the Attorney General to report to Congress and provide documents for inspection which were withheld under the privilege. Thus, an administration intent on using the avoidance doctrine might do so in the context of this congressional reporting requirement.
secrets and compromise national security as a result. \(^{127}\) Clearly, more information would likely be revealed in litigation if the proposed reforms were enacted: S. 417 elevates the threshold for nondisclosure from “a reasonable danger” that disclosure could harm national security—the standard from *Reynolds*—to the higher standard that disclosure is “reasonable likely to cause significant harm” to national security. \(^{128}\) A higher rate of disclosure would be almost inevitable with the proposed standard, particularly given that the courts, not the executive branch, would make the final determination as to the level of potential harm caused by disclosure.

However, it is unclear whether a higher rate of disclosure would jeopardize U.S. security interests. Although the Bush administration asserted that disclosing information regarding administration activities in the war on terror in response to oversight attempts would compromise national security interests, \(^{129}\) it offered no evidence supporting such a claim. \(^{130}\)

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\(^{127}\) The court in *El-Masri* acknowledged the potential danger to national security in disclosing state secrets during litigation. 437 F. Supp. 2d at 537 (“[A]ny admission of denial of the allegations by defendants in this case would reveal the means and methods employed pursuant to this clandestine [wiretapping] program and such a revelation would present a grave risk of injury to national security”).


\(^{129}\) See Setty, *supra* note __, at 39–40; Prepared Statement of Hon. Alberto R. Gonzales, Attorney General of the United States, Feb. 6, 2006, available at http://www.fas.org/irp/congress/2006_hr/020606gonzales.html (visited March 3, 2008); Kitrosser, *supra* note __, at 1056 (“the administration has offered no explanation of the purported dangers of revealing the program’s very existence beyond the vague assertion that, while terrorists surely already know that the United States can surveil their conversation, knowing about the program would remind them of this fact and might lead them to infer that surveillance is broader than they had assumed”); Ackerman, *supra* note __, at 478–79 (arguing that the rhetoric surrounding the war on terror encourages a public and congressional overreaction of ceding powers to the President). *See also* Warrick & Eggen, *supra* note __ (offering a second reason for the desire for secrecy: to avoid public and international censure over the use of the harsh interrogation techniques. When the U.S. interrogation program became known widely in late 2006, the uproar from Congress and the public apparently prompted the administration to modify its program).

Further, although then-Attorney General Mukasey framed the reforms as creating a “Hobson’s Choice of either disclosing classified activities or losing cases,”\textsuperscript{131} this overstates the effect of overhauling the \textit{Reynolds} standard. The proposed legislation would not have mandated government liability if relevant evidence were not disclosed to the court, nor would it have required the government to turn over the evidence to a plaintiff after a court determination that the evidence is not privileged. The actual detriment to the government would have been a finding of contempt and an adverse inference against the government’s case.

The Bush administration wanted to see a continuation of the status quo, and believed that the deferential \textit{Reynolds} standard was preferable to creating a stronger judicial oversight mechanism. To date, the common application of \textit{Reynolds} is what still governs, and it is unclear whether the Obama administration and a Democratic Congress will pass legislation to address the process and rule of law problems that \textit{Reynolds} has engendered. To evaluate whether \textit{Reynolds} and its progeny offer the appropriate standard to apply,\textsuperscript{132} however, it is useful to look back at how the U.S. state secrets privilege evolved to its current state.

II. THE HISTORY AND EVOLUTION OF THE U.S. STATE SECRETS PRIVILEGE

There is little doubt that the U.S. version of the state secrets privilege arises from international sources but has evolved independently, particularly since the \textit{Reynolds} decision in 1953. Both the English and Scottish origins of the U.S. privilege, as well as the development of the U.S. state secrets doctrine, provide context for evaluating the proposed domestic reforms to the privilege.

A. \textit{The U.K. Origins of the U.S. State Secrets Privilege}

Although precedent from England was not the only legal basis for the \textit{Reynolds} decision, it played an instrumental role for the Supreme Court, which had little domestic doctrine to rely upon. However, what the \textit{Reynolds} court viewed as simply English

\textsuperscript{131} Mukasey letter, \textit{supra} note ___, at 6.
\textsuperscript{132} Mukasey letter, \textit{supra} note ___, at 1-2.
precedent actually represented two distinct and, to some extent, contrary legal precedents from England and Scotland.

1. England

The first indication that crown privilege extended to protect the government against disclosure of state secrets can be found during the realm of Charles I of England. The heart of the privilege is to protect the public interest by keeping sensitive information out of public purview. In Charles I’s time, the privilege was used to prevent courts from gaining jurisdiction over the habeas claims of prisoners unless the Crown agreed to show cause for the detention. This was, even at the time, a controversial proposition, since habeas rights had existed since the time of the Magna Carta. Even at the time, commentators argued that the crown was abusing its privilege and that the rule of law and government accountability were at grave risk.

The Crown’s position on habeas rights was overturned by the Petition of Right of 1628, which forbade Charles I from divesting the courts of jurisdiction over matters of arrest and detention. However, the notion of a state secrets privilege over security-related information was established and uncontested by Parliament or the courts in future years.


133 Weaver, supra note ___, at 13.
134 Weaver, supra note ___, at 14-15.
135 Weaver, supra note ___, at 17.
136 Weaver, supra note ___, at 19 (citing Paragraph 39 of the Magna Carta).
137 Weaver, supra note ___, at 22.
138 Weaver, supra note ___, at 23.
139 Weaver, supra note ___, at 23-26 (citing Trial of the Seven Bishops, 12 How. St. Tr. 183, 309-11 (1688), in which the court refused to require a witness to testify as to the proceedings of a Privy Council meeting; Layer’s Case, 16 How. St. Tr. 94, 223-24 (1722), in which the court denied a witness’s request to have Privy Council proceedings revealed in court; Bishop Atterbury’s Case, 16 How. St. Tr. 323, 495 (1723), in which the House of Lords precluded testimony regarding encrypted communications; The Trial of Maha Rajah Nundocomar, 20 How. St. Tr. 923, 1057 (1775), in which the court denied the claim of privilege over Privy Council records).
the privilege remained murky even through the 1800s: while some judges believed that a court could invoke the privilege *sua sponte* even absent a government claim of privilege, other questioned the erosion of individual rights and the rule of law in the face of the government’s ability to hide relevant and potentially damaging information.

Two English decisions—one in the 1860s and the other in the 1940s—were decisive in clarifying the state secrets privilege in England and laying the groundwork for the parameters of the U.S. state secrets privilege as laid out in *Reynolds*. In the 1860 case of *Beatson v. Skene*, the court found that “if the production of a State paper would be injurious to the public service, the general public interest must be considered paramount to the individual interest of a suitor in a court of justice.” *Beatson* further broadened the power of the government by stating that the judiciary should defer to the head of the government department with custody of the paper to determine whether to disclose the document.

The doctrine of the state secrets privilege was not substantially revisited until the 1942 case of *Duncan v. Cammel Laird*, a key case cited to support an expansive reading of the privilege by the *Reynolds* court. In *Cammel Laird*, the House of Lords followed

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141 *E.g., Anderson v. Hamilton*, 2 Brod. & B. 156 (1818) (in a suit for false imprisonment, Lord Ellenborough denied the plaintiff’s request to compel production of correspondence between government officials, even absent a government objection to the production, noting that “the breach of the privilege given by the law to such communications would be highly dangerous to the interests of the state”); *see also* Weaver, supra note ____, at 28; Chesney, supra note ____, at 1275-76.

142 *Gugy v. Maguire*, 13 Low. Can. 33, 38 (1863) (in which Judge Mondelet stated, “I cannot, I ought not, for a moment, as a judge living and administering justice under constitutional institutions, admit such a monstrous doctrine...A doctrine which reduces the judge on the Bench to an automaton, who...will bend at the bidding of any reckless politician...If that doctrine be law...it would be appalling. It would be such that no one would feel himself secure.”).

143 5 H. & N. 838 (1860).

144 5 H. & N. at 853.

145 5 H. & N. at 853 (noting that if the head of a department “states that in his opinion the production of the document would be injurious to the public service, we think the Judge ought not to compel the production of it”).

the reasoning of Beatson to clarify the English standard for public interest immunity. The facts of Cammel Laird are remarkably similar to those of Reynolds: a British submarine sank in 1939 during sea trials, which resulted in the death of 99 people. The families of the sailors who had been killed claimed damages from the builders, Cammel Laird.

The House of Lords upheld an affidavit issued by the British Admiralty claiming public interest immunity precluded disclosure of the plans of the submarine, and affirmed the rule of Beatson that the courts should take an affidavit claiming public interest immunity at face value: “Those who are responsible for the national security must be the sole judges of what the national security requires.” The Lords further held that if a government officer offers a good faith affidavit as to the need for nondisclosure, then “the court should not require to see the document.”

In reasoning through the secrecy dilemma, the Lords first attempted to determine whether the question of the appropriateness of in camera review of the disputed information was a matter of first impression. Counsel for the government said that it was not, relying on the Scottish case of Earl v. Vass for the proposition that courts need not conduct an independent review of the materials. Specifically, the Lords agreed with the Vass court’s reasoning that the privilege was absolute when invoked by the government and that government’s good faith determination of nondisclosure was sufficient. The Cammel Laird court went on to note that such deference to the government would result in an information imbalance between the Crown and other litigants, but

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148 [1942] A.C. at 626-27. The court noted that the First Lord of the Admiralty offered a sworn affidavit that he and his technical advisers examined the documents being requested and determined for themselves that disclosure would be injurious to the public interest. Id.
149 [1942] A.C. at 641 (internal quotations omitted).
151 (1822) 1 Shaw’s App. 229.
that such an imbalance was necessary to preserve the public interest.\footnote{153}{[1942] A.C. at 633.}

The \textit{Cammel Laird} court also looked at \textit{Admiralty Commissioners v. Aberdeen Steam Trawling},\footnote{154}{Admiralty Commissioners v. Aberdeen Steam Trawling and Fishing Co., Ld., 1909 S.C. 335.} in which the Inner House of the Court of Session “insisted that the view of the government department was final.”\footnote{155}{[1942] A.C. at 639-40.} The \textit{Cammel Laird} court also relied upon the reasoning in \textit{Aberdeen Steam} to support the conclusion that the government was better suited to make the final determination of privilege because a court may find certain information “innocuous,” whereas government officials who properly understand the context of the information would know better\footnote{156}{[1942] A.C. at 640-41.}—one of the same arguments offered by the Bush administration in opposition to the Senate’s current proposed reforms.\footnote{157}{\textit{See} Mukasey letter, \textit{supra} note \_\_\_.}

The appellants argued that the Lords should undertake an \textit{in camera} review of the documents in question prior to making a final determination as to whether the public interest immunity applied, to make sure that an impartial party—the judges—could appropriately balance the need to maintain state security against the possible injustice of nondisclosure suffered by an individual litigant.\footnote{158}{[1942] A.C. at 627-28.} The appellants further pointed out the inherent conflict of interest in asking government officials to make their own determination as to whether a document ought to be disclosed.\footnote{159}{[1942] A.C. at 628.} The Lords found neither argument persuasive,\footnote{160}{[1942] A.C. at 636 (noting the need for a broad public interest immunity to encourage unhindered discussion among government officials), 637-38.} ultimately holding that “[t]he practice in Scotland, as in England, may have varied, but the approved practice in both countries is to treat a ministerial objection taken in proper form as conclusive.”\footnote{161}{[1942] A.C. at 641.}
Critics have decried the result of *Cammel Laird* on two fronts—
first, that the decision cemented the English rule of giving “carte
blanche to crown privilege;”¹⁶² and second, that *Cammel Laird*’s
rationale was faulty because it erroneously relied on the Scottish
case law¹⁶³ to defend a broad, deferential state secrets privilege.¹⁶⁴
If *Cammel Laird* was erroneously decided, then—some argue—
the U.S. Supreme Court’s reliance on English law in *Reynolds*
becomes less well-founded.¹⁶⁵

2. **Scotland**

Although the court in *Cammel Laird* relied on *Vass* and *Aberdeen
Steam*, Scottish law has always had a considerably narrower view
of the state secret privilege than England. In Scotland, the privilege
was retained as a limited crown privilege, rather than the broad
public interest exception that is embodied in English law.¹⁶⁶

In fact, the application of the state secrets privilege in Scotland
differed greatly from England since at least the eighteenth century.
The Scottish courts consistently used a balancing approach
between the need to maintain national security and the need for
democratic accountability and individual rights. That balancing
test yielded a much greater diversity in results than the deferential
English standard. For example, in the 1727 case of *Stevens v.
Dundas*, the court compelled production of documents over the
government’s objections.¹⁶⁷ In the 1818 case of *Leven v. Young*,
the court affirmed that the judiciary—not the government
ministers—have the right to make an independent determination as
to whether the privilege should allow for nondisclosure of relevant
information.¹⁶⁸ On the other hand, when applying this balancing
standard on a case-by-case basis, Scottish courts stated that the

¹⁶² Robert Stevens, *The English Judges: Their Role in Changing Constitution* 27
(Hart 2005).
¹⁶⁴ Weaver, *supra* note ___, at 31-32.
¹⁶⁵ Weaver, *supra* note ___, at 32.
¹⁶⁷ *See* 19 W.M. Morison, *Decisions of the Court of Sessions* 7905 (1804)
discussing the *Stevens* case); *see also* Weaver, *supra* note ___, at 35.
¹⁶⁸ 1 Murray 350, 370 (1818).
party seeking sensitive information was required to show a
significant level of necessity for the court to order disclosure.\textsuperscript{169}

Both \textit{Vass} and \textit{Aberdeen Steam} included language that supported a
significant deference toward the executive in determining when the
privilege should apply. However, it should have been clear to the
House of Lords in \textit{Cammel Laird} that Scottish law on the
application of the privilege differed greatly from English law;
nonetheless, the English court conflated the English and Scottish
standards in \textit{Cammel Laird}, arguably creating the faulty standard
which set the stage for \textit{Reynolds}.

\section*{B. History of the U.S. State Secrets Privilege}

Prior to \textit{Reynolds}, U.S. jurisprudence on the state secrets privilege
was limited and vague, and failed to set forth a standardized
document by which privilege claims ought to be evaluated. Some
scholars argue that the state secrets privilege simply did not exist
in U.S. jurisprudence prior to \textit{Reynolds},\textsuperscript{170} but some evidence does
exist that courts accepted the general notion of executive privilege,
albeit in the specific context of an informer’s privilege\textsuperscript{171} and
deliberative privilege,\textsuperscript{172} not a state secrets privilege. As early as
\textit{Marbury v. Madison}, the Court mentions the existence of
presidential prerogatives not delineated in the Constitution,\textsuperscript{173} but
does not clarify the nature or extent of those prerogatives. In
accepting a presidential prerogative as a natural derivation of the
crown privilege, the Court did not acknowledge the significantly
different nature of the crown or the judiciary in England; unlike
U.S. judges, English judges were not independent from Parliament
after being appointed.\textsuperscript{174} Ironically, \textit{Marbury} is best known for
formalizing the U.S. doctrine of judicial review, but the decision
operated under the assumption that there were certain executive
privileges that may be beyond the purview of the judiciary.

\begin{footnotes}
\footnotetext[169]{Weaver, \textit{supra} note \text{___}, at 37.}
\footnotetext[170]{Weaver, \textit{supra} note \text{___}, at 42.}
\footnotetext[171]{Chesney, \textit{supra} note \text{___}, at 1280.}
\footnotetext[172]{Chesney, \textit{supra} note \text{___}, at 1274.}
\footnotetext[173]{5 U.S. (1 Cranch) 137, 144, 169-70 (1803).}
\footnotetext[174]{Weaver, \textit{supra} note \text{___}, at 40.}
\end{footnotes}
Soon after *Marbury*, the Court in *United States v. Burr* hinted at the questions surrounding the government’s desire to withhold documents during litigation, and noted that the government right to refuse disclosure did not turn on whether revealing the document would “endanger the public safety.”\(^\text{175}\) However, the question of government nondisclosure did not actually arise in *Burr*.\(^\text{176}\) The Jefferson administration did not attempt to withhold any documents from production to the court,\(^\text{177}\) and the court stated that “it need only be said that the question [of state secrets] does not occur at this time.”\(^\text{178}\) Almost 20 years later, an influential treatise on evidentiary law mentions the existence of a privilege based on public policy, noting that some evidence “is excluded [because] disclosure might be prejudicial to the community.”\(^\text{179}\)

The nature of a state secrets privilege remained relatively static until 1875 in the Supreme Court decision of *Totten v. United States*.\(^\text{180}\) The plaintiff in *Totten* brought suit to enforce an alleged government contract for espionage during the Civil War;\(^\text{181}\) the Supreme Court held that it was inappropriate for the lower court to hear the case in the first place, since “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


\(^{176}\) Some scholars have argued that the mention in *Burr* of the government’s right to nondisclosure of evidence hints at the court’s belief that public safety ought to be taken into account when making determinations of whether evidentiary disclosure ought to be ordered. See Chesney, *supra* note ___, at 1272-73.

\(^{177}\) Weaver, *supra* note ___, at 45 (citing 11 The Writings of Thomas Jefferson 241 (Thomas Jefferson Memorial Association of the United States, 1904)).

\(^{178}\) *Burr*, 25 Fed. Cas. at 37 (Chief Justice Marshall also offered the following on a potential presidential privilege regarding evidentiary disclosure obligations: “What ought to be done under such circumstances [s] a delicate question, the discussion of which, it is hoped, will never be rendered necessary in this country”); see Louis Fisher, *In the Name of National Security: Unchecked Presidential Power and the Reynolds Case* 212-20 (2006).


\(^{180}\) 92 U.S. 105 (1875).

\(^{181}\) 92 U.S. 105.
itself regards as confidential, and respecting which it will not allow the confidence to be violated.” 182 Totten embodied the idea that some claims against the government are simply not justiciable based on the nature of the claim being made and the need for government secrecy. 183

However, the relevance of Totten in terms of the state secrets privilege is still open to debate. Although the Reynolds Court cited to Totten as evidence that an evidentiary privilege against revealing state secrets existed, 184 the Supreme Court stated unequivocally in 2005 that Totten does not involve the state secrets privilege. 185 The Court in Tenet found that Totten dealt with baseline questions of justiciability, and the state secrets privilege as articulated in Reynolds required a balancing test for the admissibility of evidence, which may or may not necessitate dismissal of a case. 186

Even setting Totten aside as distinct from the state secrets privilege, 187 the application of a national security-related privilege is found in several cases in the early twentieth century. 188 Other

182 Totten, 92 U.S. at 107.
184 Reynolds, 345 U.S. at 6-7.
186 See Tenet, 544 U.S. at 8-11. The Court in Tenet noted that in Reynolds, Totten was distinguished as having been “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.” Id. at 9. The Court further distinguished Reynolds from Totten, noting that “[t]he state secrets privilege and the more frequent use of in camera judicial proceedings simply cannot provide the absolute protection we found necessary in enunciating the Totten rule.” Id. at 10.
187 But see Chesney, supra note ___, at 1278 (arguing that Totten is properly viewed as part of the spectrum of possible determinations after a government claim of state secrets privilege).
188 E.g., Firth Sterling Steel Co. v. Bethlehem Steel Co., 199 F. 353 (E.D. Pa. 1912) (citing Totten in the decision to dismiss a suit involving the designs for armor-piercing projectiles); Pollen v. United States, 85 Ct. Cl. 673 (Ct. Cl. 1937) (dismissing a suit involving gun designs); Pollen v. Ford Instrument Co. 26 F. (…continued)
national-security cases involved the invocation of a state secrets privilege in the criminal context. For example, in *United States v. Haugen*, a district court acquitted a defendant charged with forgery while working under a military contract, based largely on the fact that the contract in question could not be compelled for production by the government. Although each of these cases dealt with the question of how to handle state secrets in the litigation context, they did so without a judicial or legislative standard or unifying doctrine in place.

After World War II, the number of lawsuits involving a question of state secrets increased significantly, largely due to the enactment of the Federal Tort Claims Act, which permitted individuals to sue the government for allegedly tortuous conduct. This development set the stage for the Supreme Court to establish a standard for the state secrets privilege in the seminal case of *United States v. Reynolds*.

The early 1970s saw an increase in the number of lawsuits in which the government invoked the state secrets privilege. This trend was fueled by several factors. In 1971 the Supreme Court held in *Bivens* that private litigants could seek compensation for the government’s constitutional violations, which opened the door for numerous types of lawsuits against the government. Further, the Watergate scandal broke and propelled a massive push for government accountability, including the fortification of the Freedom of Information Act, the establishment of additional

(continued…)

Supp. 583 (E.D.N.Y. 1939) (citing *Totten* in the decision to deny a discovery request).

189 58 F. Supp. 436 (E.D. Wash. 1944), aff’d, 153 F.2d 850 (9th Cir. 1946).

190 *Haugen*, 58 F. Supp. at 438.


192 345 U.S. 1 (1953).

193 *See* Chesney, *supra note ___* at 1292-93; *see also* *Pan Am World Airways v. Aetna Cas. & Sur. Co.*, 368 F. Supp. 1098 (S.D.N.Y. 1973);


congressional oversight mechanisms and the passage of the Foreign Intelligence Services Act.\textsuperscript{196}

As oversight and lawsuits increased, the state secrets privilege offered a mechanism for the executive branch to both protect sensitive national security information and avoid higher levels of transparency and accountability.\textsuperscript{197} The problem faced by courts has been determining which of the two administrative motivations was at play in a given situation, and to navigate the interbranch tension inherent in a confrontation with an executive branch assertion of power. The result has often been that courts decline to get involved in the process of weighing evidence altogether: in fact, since 1990 judges have conducted an \textit{in camera} review of documents over which the privilege has been claimed in only about 20\% of state secrets privilege cases.\textsuperscript{198}

In the post-September 11, 2001 era, the question of proper invocation of the state secrets privilege has resurfaced, particularly in light of controversial programs such as warrantless surveillance and extraordinary rendition. Some of the state secrets cases in the post-September 11 era have involved government attempts to prevent the disclosure of technical information related to military issues,\textsuperscript{199} somewhat akin to the situation in \textit{Reynolds}. Other cases

\textsuperscript{199} \textit{E.g.}, \textit{Crater Corp. v. Lucent Tech., Inc.}, 423 F.3d 1260 (Fed. Cir. 2005); \textit{McDonnell Douglas Corp. v. United States}, 323 F.3d 1006 (Fed. Cir. 2003) (upholding the claim of state secrets privilege); \textit{DTM Research, LLC v. AT&T Corp.}, 245 F.3d 327 (4\textsuperscript{th} Cir. 2001) (upholding claim of state secrets privilege and quashing a subpoena for government’s information on data mining); \textit{United States ex rel. Schwartz v. TRW, Inc.}, 211 F.R.D. 388 (C.D. Cal. 2002) (holding (…continued)
involve government contracting and business management issues, or internal policies and procedures arguably related to national security. Finally, in cases like *El-Masri* and *Al-Haramain*, the privilege was invoked to terminate litigation that involved allegations of gross violations of individual civil and human rights.

III. COMPARATIVE PERSPECTIVES ON THE STATE SECRETS PRIVILEGE

In establishing the U.S. doctrine of the state secrets privilege, the *Reynolds* court relied significantly on the English precedent of *Cammel Laird*—and inherent in that decision, an arguably incorrect reading of Scottish law as well. This Part evaluates how the Scottish and English versions of the state secrets privilege, known as public interest immunity, have evolved since the decision in *Reynolds*. This analysis provides context for evaluating the evolution of the U.S. doctrine since the 1950s, as well as the recent domestic reform efforts. This section also examines how countries facing significant national security challenges that rely

(continued…)

that the government had not met the technical requirements of the *Reynolds* standard).

200 *E.g., Sterling v. Tenet*, 416 F.3d 338 (4th Cir. 2005) (upholding claim of privilege to dismiss a Title VII complaint related to employment discrimination); *Monarch Assoc. v. United States*, 244 F.3d 1356 (Fed. Cir. 2001) (upholding claim of privilege to dismiss a complaint related to fraudulent contracting). *See also Tenet v. Doe*, 554 U.S. 1 (2005) (dismissing the complaint based on the precedent of *Totten*, not on the state secrets privilege *per se*).

heavily on UK precedent—such as Israel and India—deal with questions of state secrets during litigation.

A. Scotland

In the years after Reynolds was decided, courts clarified that Vass—albeit misread by the English court in Duncan v. Cammel Laird—does not support a broader right by the Scottish government to invoke the state secrets privilege with little or no review by the courts. The 1956 case of Glasgow v. Central Land Board noted that for Scotland to follow the English rule “would be to go far along the roads towards subordinating the Courts of Justice to the policy of the Executive, and to regulating the extent to which justice could be done by the limits within which that policy would permit it to be done. This has never been the law of Scotland.”

Glasgow was the first case after Cammel Laird and Reynolds were decided to clarify the differences between Scottish and English law. In Glasgow, the Law Lords specifically acknowledged that the rationale of Cammel Laird did not apply to Scottish cases, as “an inherent power in the Court of Scotland provides an ultimate safeguard of justice in that country which is denied to a litigant in England,” and noted that should the Lords have to judge a Scottish appeal regarding the public interest privilege, they would “be jealous to preserve [the Scottish rights].”

This distinction between the Scottish and English approaches was revisited in Conway v. Rimmer in 1968. The Lords articulated the Scottish standard, that “[i]f, on balance, considering the likely importance of the document in the case before it, the court considers that it should probably be produced, it should generally examine the document before ordering the production.” The court ultimately decided, despite the government’s affidavit to the contrary, that any harm from disclosure was minimal, and that the

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202 E.g., Conway Appellant v. Rimmer and Another Respondents, 1967 H.L. 910.
205 Glasgow, 1956 S.C. (H.L.) at 11.
documents in question should be produced as they were vital to the litigation.\textsuperscript{208}

The Court did, however, set forth guidelines defining when greater deference was due to the executive, applicable to documents concerning the national defense, documents “of a political nature, such as high state papers” and departmental papers which involve issues of public interest.\textsuperscript{209} On the other side of the balancing test, Crown litigation related to accidents involving government employees and on government premises are areas in which “Crown privilege ought not to be claimed…and we propose not to do so in the future."\textsuperscript{210} In creating a more detailed approach to the balancing test, the court openly acknowledged that “[i]mmunity from unauthorized disclosure and from accountability are two sides of the same coin,”\textsuperscript{211} which informs the Court’s careful and narrow approach to applying the privilege.

The \textit{Conway} court also specifically undertook a dissection of the \textit{Cammel Laird} opinion that conflated the English and Scottish standards, concluding that the \textit{Cammel Laird} court’s determination to uphold the claim of public interest privilege was correct, but that the muddling of the Scottish standard was not.\textsuperscript{212} The Lords ultimately concluded that:

“it is worth remembering that the conclusion [in \textit{Cammel Laird}] was reached under a misapprehension as to the corresponding law of Scotland. The Scottish cases show that although seldom exercised, the residual power of the court to inspect and if necessary order production of documents is claimed. By a misapprehension, however, in Duncan’s case the protection in Crown privilege cases in both countries was held to be absolute. This misapprehension no longer prevails since the decision of

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\textsuperscript{208} [1968] A.C. at 911, 998. The court noted that there is no case in which the executive becomes the final arbiter of the privilege, since that right is reserved solely for the court. \textit{Id.} at 918. The court also reaffirmed its right to examine documents \textit{in camera} in order to make its privilege determination. \textit{Id.}
\textsuperscript{209} [1968] A.C. at 920, 937.
\textsuperscript{210} [1968] A.C. at 923.
\textsuperscript{211} [1968] A.C. at 924.
\textsuperscript{212} [1968] A.C. at 938.
this House in Glasgow Corporation v. Central Land Board.” 213

The Scottish balancing test enunciated in Conway continues to be used by courts today and has not been reformed significantly since.

B. England

In the years since Cammel Laird was decided, English courts have continued to afford high levels of deference to government officials claiming the public interest immunity, and remained reluctant to conduct in camera inspections of the documents in dispute. This deference toward the government has at times troubled the English courts, as graphically illustrated in the February 2009 decision in the case of Binyam Mohamed, discussed below.

One example of such deference toward government claims for a public interest immunity certificate is the 1983 case of Air Canada v. Secretary of State for Trade, 214 airlines sued the English government over increased airline taxes at Heathrow Airport. During the litigation, plaintiffs sought government documents outlining the reasoning behind the tax increase. 215 The lower court decided to examine the documents in camera, which led to an interlocutory appeal by the government. 216 The Lords reversed the decision of the lower court as to in camera review, stating that when a government official has proffered a good faith affidavit as to the need for the public interest immunity to apply, the court should give absolute deference. 217

The English courts continue to grant extremely broad deference to executive decision-making—certainly as broad as had been afforded in Cammel Laird and that applied by U.S. courts. English courts often address the invocation of the privilege after initial pleadings have been filed; courts have the option of examining the documents in camera but rarely do so. More commonly, courts uphold a public interest immunity certificate (akin to U.S. courts

217 [1983] 2 A.C. at ___.

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upholding the claim of privilege) with regard to the evidence in question and allow the plaintiff to continue its case if possible without the benefit of the evidence in question.

However, the ongoing UK case of Binyam Mohamed highlights the complexities of such deference to the executive branch, and how political and foreign policy considerations can take precedence over the desire for government accountability for alleged human rights abuses.

Binyam Mohamed is a British resident who traveled to Afghanistan in 2001. According to Mohamed, he traveled to escape a lifestyle that led to drug addiction in England. According to U.S. authorities, Mohamed trained with the Taliban in Afghanistan to prepare for an attack within the United States. Mohamed was arrested in Pakistan in 2002 as he attempted to return to the UK; he claims that he was then detained and tortured in Pakistan, and then transported to Morocco, where he was held incommunicado and tortured for an additional 18 months. Mohamed alleges that he was then held in Afghanistan for some time, and was ultimately transferred to the U.S. detention center at Guantanamo Bay, Cuba, where he was held from September 2004 until February 2009.

Mohamed and others alleging they were subjected to extraordinary rendition by the United States filed suit in 2007 against the company that operated the airplanes which transported the detainees to various detention centers around the world. In May 2008, the U.S. charged Mohamed under the Military Commissions Act with conspiracy to commit terrorism, relying on his

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219 Id. Mohamed alleges that he was beaten, scalded and cut with a scalpel by his captors. See id.
220 Id.
224 This proceeding was later dropped, as the convening judge determined the prosecution could not proceed without the use of evidence obtained through (…continued)
confessions, which Mohamed alleged were given under the threat of torture. Mohamed’s attorneys began proceedings in English courts seeking release of evidence that the U.S. had compiled against Mohamed.

In August 2008, a court ruled in Mohamed’s favor, concluding that Mohamed’s allegations of torture were substantiated and Mohamed had a right to such evidence that supported his claim. As part of its ruling, the court summarized evidence gleaned from U.S. intelligence sources, but redacted that summary after the Foreign Secretary issued a public interest immunity certificate claiming that state secrets were at issue in Mohamed’s suit.

The Divisional Court of the Queen’s Bench Division then reconsidered whether the public interest immunity certificate issued by the Foreign Secretary was compelling such that the previously redacted summary with evidence of Mohamed’s treatment could not be given to Mohamed’s attorneys. The

(continued…)


225 Mohamed v. Secretary of State, [2008] EWHC 2048 (Admin), at ¶¶ 38-42.


228 The court noted that the information in question was “seven very short paragraphs amounting to about 25 lines” of text which summarized reports by the United States Government to British intelligence services on the treatment of Mohamed during his detention in Pakistan. See Binyam Mohamed v. Secretary (…continued)
public interest immunity certificate asserted that the summary report must remain undisclosed because if it were disclosed to Mohamed’s attorneys, the U.S government had threatened to re-evaluate its intelligence sharing relationship with the U.K. and possibly withhold vital national security information from the U.K.

The court laid out the test for balancing the public interest in national security and the public interest in “open justice, the rule of law and democratic accountability.” The test involved balancing the public interest in disclosure of the information and the possibility of serious harm to a public interest such as national security if disclosure is made, and determining whether national security interests can be protected by means other than nondisclosure.

The court took pains to detail all of the reasons that disclosure was desirable, including upholding the rule of law, conforming with international and supranational standards, ensuring that allegations of serious criminality are not dismissed inappropriately, maintaining accountability over the executive branch of government, and protecting the public and media interest in disclosure of government activities. The court also appeared shocked that the United States government was apparently interfering in a matter of government accountability in another country.

(continued…)

229 2009 EWHC 152 (Admin), at ¶62.
230 2009 EWHC 152, at ¶18 (noting that this case revolved around a question of the rule of law, not around the rights of an individual litigant).
231 2009 EWHC 152, at ¶34 (citing R v. H, 2004 2 A.C. 134, at ¶38(3)).
232 2009 EWHC 152, at ¶¶18, 19.
233 2009 EWHC 152, at ¶¶20, 21, 26, 101-105.
234 2009 EWHC 152, at ¶25(iv), (ix).
235 2009 EWHC 152, at ¶32.
236 2009 EWHC 152, at ¶37 (noting that “where there is no publicity there is no justice….There is no greater danger of usurpation than that which proceeds little by little, under cover of rules of procedure, and at the instance of judges themselves”).
237 2009 EWHC 152, at ¶¶67-72. The court noted that:
(…continued)
However, in applying the test, the court relied heavily on its longstanding precedent of offering deference to the executive branch in matters of national security.\textsuperscript{238} The court found that the Foreign Secretary acted in good faith in issuing the public interest immunity certificate;\textsuperscript{239} that an opportunity for government accountability may still exist with ongoing investigations within the U.K. into Mohamed’s allegations;\textsuperscript{240} and that the position of the U.S. government had not changed with the change of presidential administrations.\textsuperscript{241} Ultimately, the court decided that there was no basis on which it could question the Foreign Secretary’s issuance of the public interest immunity certificate.\textsuperscript{242}

The \textit{Binyam Mohamed} decision reflects both the strength of English precedent that mandates a high level of deference to the government in matters related to public interest immunity, and the

\textbf{(continued…)}

“in light of the long history of the common law and democracy which we share with the United States, it was, in our view difficult to conceive that a democratically elected and accountable government could possibly have had a rational objection to placing into the public domain such a summary of what its own officials reported as to how a detainee was treated by them and which made no disclosure of sensitive intelligence matters. Indeed we did not consider that a democracy governed by the rule of law would expect a court in another democracy to suppress a summary of the evidence…where the evidence was relevant to allegations of torture, cruel, inhuman or degrading treatment, politically embarrassing though it might be.”

\textit{Id.} at ¶69.

\textsuperscript{238} [2009] EWHC 152, at ¶¶63-67. However, the court noted that such deference needed to be limited to instances of genuine national security, and not cases in which “it appears that while disclosure of the material may cause embarrassment or arouse criticism, it will not damage any security or intelligence interest.” \textit{Id.} at ¶66.

\textsuperscript{239} [2009] EWHC 152, at ¶¶62-63, 76-79 (noting that the Foreign Secretary perceived the U.S. threat to be real, and that if the threat were carried out, that U.K. national security interests would be seriously prejudiced). \textit{See Ministers Face Torture Pressure}, bbcnews.com, Feb. 4, 2009, available at http://news.bbc.co.uk/2/hi/uk_news/politics/7870049.stm (visited Feb. 6, 2009) (noting that Foreign Secretary David Milibrand denied that the U.S. made a threat; Milibrand instead stated that the U.S.-U.K. security relationship was based on trust and the trust depended on intelligence remaining confidential).

\textsuperscript{240} [2009] EWHC 152, at ¶¶102, 104, 105.

\textsuperscript{241} [2009] EWHC 152, at ¶78.

\textsuperscript{242} [2009] EWHC 152, at ¶79.
difficulties that courts may have in applying that deferential standard when doing so implicates the rule of law, individual rights and government accountability in matters of serious allegations of human rights abuses.

The Mohamed opinion also reflects the fact that although the English and U.S standards on state secrets are in some ways very similar, the recent expansion of the use of the state secrets privilege by the Bush administration—and supported by the Obama administration—reflect a significantly broader privilege being invoked and granted in the United States. While the U.S. is continuing on a trajectory of demanding broad grants of immunity for bad acts and high levels of secrecy in the litigation context, peer nations are attempting to limit their application of similar privileges but are being hamstrung by the U.S. government.

C. Israel

Israel does not apply a standardized doctrine comparable to the U.S. state secrets privilege or the Scottish and English public interest immunity. Instead, the analysis of a state secrets-type claim turns on two questions: whether the case is justiciable, and then, assuming the case survives that analysis, how to evaluate potentially sensitive evidence that relates to national security matters.

Unlike the non-justiciability doctrine of Totten, in Israel almost any complaint against the executive branch and its actions is considered justiciable.243 The Israeli Supreme Court dismantled various doctrinal barriers to judicial review, such as standing and justiciability, in the 1990s in order to facilitate more private actions.244 Even with an extremely broad grant of standing—particularly by U.S. standards—Israeli courts undertake a balancing analysis to determine whether national security-related

244 Stephen J. Schulhofer, Checks and Balances in Wartime: American, British and Israeli Experiences, 102 Mich. L. Rev. 1906, 1923 (2004). Schulhofer also notes that Israeli government and military leaders seem to accept the judicial safeguards that have been put into place to modify the conduct of the administration. Id. at 1931.
litigation ought to continue or be dismissed as non-justiciable.\footnote{This is particularly remarkable given the difficult national security situation Israel faces.\footnote{In this regard, the justiciability analysis of Israeli courts can be likened to \textit{Totten} and other state secrets privilege cases which have been dismissed at the pleadings stage, \textit{e.g.}, \textit{El-Masri}, based on the supposed centrality of the protected material to the claims brought in the lawsuit.}}

In \textit{Public Committee Against Torture in Israel v. Government of Israel},\footnote{\textit{See, e.g.}, H.C.J. 769/02 (2005), at ¶¶ 10, 16, 47; H.C. 5100/94, \textit{Public Comm. Against Torture in Isr. v. Government of Israel}, 53(4) P.D. 817, at ¶ 1 (1999) (“The State of Israel has been engaged in an unceasing struggle for both its very existence and security, from the day of its founding”); Stephen J. Schulhofer, \textit{Checks and Balances in Wartime: American, British and Israeli Experiences}, 102 Mich. L. Rev. 1906, 1919 (2004).} the central issue was whether preventative strikes undertaken by the Israeli military in response to alleged terrorist attacks were illegal.\footnote{H.C.J. 769/02 (2005).} Plaintiffs challenged the practices of the military based on the loss of civilian life in the strikes and Israel’s obligations under international treaties and international customary law.\footnote{H.C.J. 769/02, at ¶¶ 1-2.} However, before reaching a conclusion as to the merits of the case, the court considered a challenge by the Government that the suit was not justiciable, based largely on national security grounds.\footnote{H.C.J. 769/02, at ¶ 9 (the government, in arguing against justiciability, cited Israeli High Court of Justice precedent, H.C.J. 5872/01 (Jan. 29, 2002), for the proposition that “the choice of means of war employed by [the government] in order to prevent murderous terrorist attacks before they happen, is not among the subjects in which this Court will see fit to intervene”). In this respect, the \textit{Public Committee Against Torture} case is analogous to the question faced by the U.S. Supreme Court in \textit{Totten}. Although the U.S. Supreme Court in \textit{Tenet} specified that \textit{Totten} was not strictly a state secrets case, the analysis of the justiciability element—given the recent trend in the U.S. of claiming the state secrets privilege at the pleadings stage and dismissing suits accordingly, \textit{see, e.g.}, \textit{El-Masri}—is relevant as part of a larger analysis of state invocation of national security to curtail litigation.}

The Israeli Supreme Court considered the broad Israeli justiciability doctrine, and assessed both the government’s claim of normative non-justiciability—where a court could find it cannot try
a case because it lacks any relevant legal standard to apply—and institutional non-justiciability—where a court has a relevant legal standard to apply, but chooses not to try the case due to structural factors, such as confronting an issue solely within the purview of a different branch of government.

In *Public Committee Against Torture*, the court rejected the notion of normative non-justiciability, but applied a four-pronged standard to analyze the question of institutional justiciability: (1) a case which involves the impingement of human rights is always justiciable; (2) a case in which the central issue is one of political or military policy and not a legal dispute is not justiciable under the institutional justiciability doctrine; (3) an issue that has already been decided by international courts and tribunals to which Israel is a signatory must be justiciable in Israel’s domestic courts as well; and (4) judicial review is most appropriate in an *ex post* situation, where the court is evaluating particular applications of a government policy, rather than the policy itself.

If the first and second prongs of the institutional justiciability analysis come into conflict in a particular situation, courts must undertake a proportionality analysis. Applying these criteria to the situation at hand, the Court found that the claims were deeply entwined with alleged human rights violations; that the suit did not implicate political or military policies *per se*, since the suit did not question the practice of targeted strikes generally, so much as the effect of the specific military strikes on individual civilians;

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251 H.C.J. 769/02, at ¶ 48.
252 H.C.J. 769/02, at ¶ 49.
255 H.C.J. 769/02, at ¶ 53.
256 H.C.J. 769/02, at ¶ 54.
257 H.C.J. 769/02, at ¶ 58 (“Between these two ends of the spectrum, there are intermediate situations. Each of them requires a meticulous examination of the character of the decision. To the extent that it has a legal aspect, it approaches the one end of the spectrum. To the extent that it has a professional military aspect, it approaches the other end of the spectrum”).
258 H.C.J. 769/02, at ¶¶ 1-3.
259 H.C.J. 769/02, at ¶¶ 8, 51.
that international courts and tribunals had already opined on this issue;\footnote{H.C.J. 769/02, at ¶¶ 19-46, 56 (discussing the application of international customary law).} and that this was the type of \textit{ex post} situation which was most appropriate for judicial review, despite the sensitive nature of the claims.\footnote{The institutional non-justiciability argument has been successful in other cases. \textit{See Bargil v. State of Israel}, H.C.J. ____ (Aug. 25, 1993) (finding executive branch policies governing Israeli settlements to be non-justiciable).}

Following the court’s rejection of the government’s claim of non-justiciability,\footnote{H.C.J. 769/01, at ¶ 63. The court did not mention, however, how it would deal with evidentiary issues involving national security secrets that may arise as an individual instance of a targeted killing was litigated.} the court determined that targeted killings are not, \textit{per se}, illegal under customary international law, and must be evaluated on a case-by-case basis.\footnote{\textit{See}, e.g., \textit{Schmitz v. The Chief Military Censor}, H.C.J. 680/88 (Jan. 10, 1989). This case also reflects how many of the state secrets cases in Israel relate to alleged violations of the Official Secrets Act. \textit{See id.} at ¶¶ 3-7.} The Israeli Supreme Court has consistently found that executive branch national security policy is judicially reviewable, rejecting the idea that only the executive branch can adequately evaluate a national security-related issue,\footnote{\textit{See Mukasey Letter, supra note __.}} and expressing none of the concern voiced by the Bush administration over judicial involvement in the decision to disclose security-related documents.\footnote{\textit{See Mukasey Letter, supra note __.}}

Indeed, the Israeli courts have consistently been involved in weighing national security interests against human rights concerns, and have developed a sophisticated analysis to do so. In \textit{Adalah Legal Centre for Arab Minority Rights in Israel v. Minister of the Interior}, Justice Procaccia explained the balancing act that Israeli courts undertake:

\begin{quote}
"The ‘security need’ argument made by the state has no magical power such that once raised it must be accepted without inquiry and investigation….Admittedly, as a rule, the court is cautious in examining the security considerations of the authorities and does not intervene in them lightly. Notwithstanding, where the implementation
of a security policy involves a violation of human rights, the court should examine the reasonableness of the considerations of the authorities and the proportionality of the measures that they wish to implement.  

Additionally, Israeli courts do not hesitate to use *in camera* review to assess whether a purported national security risk is real. For example, in *Vanunu v. Head of the Home Front Command*, a case involving a violation of the Official Secrets Act, the court undertook extensive *in camera* review without the presence of parties or counsel in order to determine whether the information in question, if disclosed, posed a risk to national security. The Court ultimately agreed with the government’s position that the information needed to remain undisclosed. Likewise, in *Adala*, the Court found no issue with the trial court reviewing privileged material *ex parte* in order to determine whether the government’s claim of military necessity in connection with contested national security policies was supportable.

It is noteworthy that *in camera* and *ex parte* review of materials in any of these Israeli cases is neither unusual nor subject to objection by either party. These decisions represent an engagement by the Israeli judiciary in the various national security operations utilized by Israel’s military and demonstrate the importance accorded to rule of law issues in the court’s analysis.

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266 H.C.J. 7052/03, opinion of Justice A. Procaccia, at ¶ 10 (citing *Ajuri v. IDF Commander in the West Bank* [1], at pp. 375-76; H.C.J. 9070/00 *Livnat v. Chairman of Constitution, Law and Justice Committee* [153], at p. 810).

267 H.C.J. 5211/04 (July 11, 2004).

268 H.C.J. 5211/04.

269 H.C.J. 7052/03, opinion of Justice A. Procaccia, at ¶¶ 10-12 (explaining the two-step balancing test undertaken to determine military necessity).

270 See also Hallett, supra note ___; H.C. 5100/94, *Public Comm. Against Torture in Isr. v. Government of Israel*, 53(4) P.D. 817, ¶¶ 38-40 (1999) (finding that the Israeli military’s use of physical interrogation techniques on Palestinian detainees was not legally protected activity). The court struggled with several national priorities: “[w]e are aware that this decision does not ease dealing with that harsh reality [of Israel’s security issues]. This is the destiny of democracy, as not all means are acceptable to it, and not all practices employed by its enemies are open before it. Although a democracy must often fight with one hand tied behind its back, it nonetheless has the upper hand. Preserving the Rule of Law and recognition of an individual’s liberty constitutes an important (…continued)
D. India

India, like Israel, does not operate under a standardized state secrets doctrine. However, India’s approach to requests for document disclosure and the need for secrecy is markedly different from that of Israel. Indian courts afford an extremely high level of deference to executive branch claims of the need for confidentiality and secrecy, and although courts undertake a balancing test to determine whether the public interest or individual rights at stake should override executive secrecy, the claim for secrecy consistently prevails.\(^{272}\)

Deference to executive branch decision-making is deep-rooted, despite the passage of freedom of information statutes\(^{273}\) and acknowledgement by the Indian Supreme Court that freedom of information is a positive right recognized in Article 19 of the Indian Constitution.\(^{274}\)

\(^{271}\) See, e.g., H.C. 5100/94, Public Comm. Against Torture in Isr. v. Government of Israel, 53(4) P.D. 817, ¶¶ 38-40 (1999). The court struggled with several national priorities: “[w]e are aware that this decision does not ease dealing with that harsh reality [of Israel’s security issues]. This is the destiny of democracy, as not all means are acceptable to it, and not all practices employed by its enemies are open before it. Although a democracy must often fight with one hand tied behind its back, it nonetheless has the upper hand. Preserving the Rule of Law and recognition of an individual’s liberty constitutes an important component in its understanding of security.” Id. at ¶ 39.

\(^{272}\) E.g., People’s Union for Civil Liberties & Anr. v. Union of India & Ors., Civil Appeal No. 4294 (1998), decided Jan. 6, 2004 (Chief Justice V.N. Khare & Justice S.B. Sinha).

\(^{273}\) E.g., Freedom of Information Bill (2000); see Richard N. Winfield & Sherrell Evans, Not Good Enough: India’s Freedom of Information Bill Has Great Potential to Overhaul the Ills of Secrecy and Inaccessibility But There Are Inadequacies that Need to be Addressed, 11 No. 1 Hum. Rts. Brief 24, 25 (Fall 2003).

\(^{274}\) S.P. Gupta v. President of India [1982] AIR SC 149 ("The concept of an open Government is the direct emanation from the right to know which seems implicit in the right of free speech and expression guaranteed under Article 19 (1)(a). Therefore, disclosures of information in regard to the functioning of (...continued)
This deference in the litigation context is consistent with India’s history of granting the executive branch sole power to determine whether to disclose information in any number of contexts, and applying strict and often harsh enforcement of its Official Secrets Act.275

In 2004, the Indian Supreme Court decided the key secrecy case of People’s Union for Civil Liberties v. Union of India,276 in which the Court evaluated whether a government report on a nationwide nuclear reactor program277 must be disclosed in response to a request by various citizens’ rights groups alleging concerns about

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Government must be the rule, and secrecy an exception justified only where the strictest requirements of public interest so demands.”).


One of the most prominent examples of an OSA-related arrest and detention is the case of Iftikar Gilani, a Kashmiri journalist detained by the Indian government for seven months in 2002 and 2003 for an alleged violation of the Official Secrets Act. See A. Deepa, Presumed Guilty, Secretly, India Together, July 14, 2005, available at http://www.indiatogether.org/2005/jul/rvw-gilani.htm (visited Aug. 2, 2008). Gilani was arrested and charged with sedition under Sections 3 and 9 of the Official Secrets Act for possessing a document that was generated in Pakistan and was publicly available India—clearly not an official secret of the Indian government—and was imprisoned under harrowing conditions. Gilani was never tried in court, and was released after contradictions in the government’s case were made public. See Iftikar Gilani, My Days in Prison (Penguin 2005).

276 People’s Union for Civil Liberties & Anr. v. Union of India & Ors., Civil Appeal No. 4294 (1998), decided Jan. 6, 2004 (Chief Justice V.N. Khare & Justice S.B. Sinha).

277 The specific report in question was a November 1995 report by the Atomic Energy Regulatory Board (AERB) documenting safety defects and weaknesses in the nuclear reactor system. See People’s Union for Civil Liberties, Writ Proceedings section.
the safety of the reactors, and over the objection of the government. The Atomic Energy Act, 1962 governed the submission and maintenance of the report, and contained specific provisions for the government to withhold such reports from public dissemination due to a concern that disclosure “would cause irreparable injury to the interest of the State [and] also would be prejudicial to the national security.”

In this regard, the government’s argument in favor of secrecy was bolstered by the statutory language authorizing nondisclosure. The citizens’ rights groups offered extensive evidence that details of the report—and specific discussion of the safety concerns therein—had been made public years before through press releases and media interviews. Petitioners further argued that the public interest of the citizenry to understand the potential safety risks of the nationwide nuclear reactor program outweighed the purported threat to national security that would arise from disclosure.

The court acknowledged the fundamental right to information as set forth in Article 19(1) India’s constitution. The Court also noted that the general rule of disclosure is necessary to “ensure the continued participation of the people in the democratic process” and that “[s]unlight is the best disinfectant” against government overreaching.

However, the Court reasoned, the Constitution’s protection for the right to information was limited: “unlike Constitutions of some other developed countries, however, no fundamental right in India is absolute in nature. Reasonable restrictions can be imposed on such fundamental rights.” The court noted that Article 19(2) of

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278 See People’s Union for Civil Liberties, Writ Proceedings section.
279 See People’s Union for Civil Liberties, Vires of Section 18 of the Act section (noting that Parliament had sanctioned the designation of documents as secret according to the criteria of Section 18 of the Atomic Energy Act, 1962).
280 See People’s Union for Civil Liberties, Writ Proceedings section.
281 See People’s Union for Civil Liberties, Writ Proceedings section.
282 Ind. Const. Article 19(1). See People’s Union for Civil Liberties, High Court Judgment section.
283 See People’s Union for Civil Liberties, Right of Information section.
the Constitution gave the government the privilege of withholding information in the public interest, and reasoned that secrecy was sometimes necessary because “[i]f every action taken by the political or executive functionary is transformed into a public controversy and made subject to an inquiry to soothe popular sentiments, it will undoubtedly have a chilling effect on the independence of the decision-maker.”285

The Court also examined India’s Evidence Act, which set forth the standard for evidentiary privilege.286 Section 123 of the Evidence Act provides an extremely deferential standard for government documents: “No one shall be permitted to give any evidence derived from unpublished official records relating to any affairs of State, except with the permission of the officer at the head of the department concerned, who shall give or withhold such permission as he thinks fit.”287 If a lawsuit is brought in which disclosure of a previously undisclosed document is sought, Section 162 of the Evidence Act allows the court to inspect the document, “unless it refers to matters of State.”288 The Court found this standard to be consistent with the English cases on public interest immunity.289

The Attorney General volunteered to submit the A.E.R.B. Report to the Court for an in camera review, but the Court declined, stating that there were no grounds to examine the report itself.290 Instead, the government proffered affidavits attesting to the need to maintain secrecy for national security reasons, and to the fact that the Atomic Energy Act, 1962 made specific provisions allowing


285 See People’s Union for Civil Liberties, Right of Information section.
286 See People’s Union for Civil Liberties, Criteria for Determining the Question of Privilege section.
287 Section 123 of the Evidence Act (Evidence as to Affairs of State).
288 Section 162 of the Evidence Act.
289 See People’s Union for Civil Liberties, Criteria for Determining the Question of Privilege section (citing Raj Narain [full cite], which held that “the foundation of the law behind Sections 123 and 162 of the Evidence Act is the same as in English Law. It is that injury to public interest is the reason for the exclusion from disclosure of documents whose contents if disclosed would injure public and national interest”).
290 See People’s Union for Civil Liberties, Conclusion.
the government to object to disclosure. The Court relied on the government affidavits regarding potential threats to national security to support its decision to deny the petitioner’s claim. The holding of the case affirmed the strong protection for the government’s unilateral decision to withhold information in the litigation context, should questions of international relations, national security or other deliberative information be at issue. This protection remains robust despite language from the courts that suggests that disclosure, not government secrecy, ought to be the norm.

The Court decided People’s Union for Civil Liberties in 2004, and one year later the Right to Information Act, 2005 (“RTI”) was enacted by the Indian parliament. The RTI was breakthrough legislation in terms of attempting to shed light on governmental practices. The passage of the RTI occurred after sustained efforts by various groups to incorporate strong and enforceable FOIA-type provisions into Indian law.

However, the changes envisioned in the passage the RTI have not yet materialized. First, the backlog in the processing of RTI claims since 2005 appears to have immediately overwhelmed state and national information officers charged with responding to RTI requests, bringing the RTI request process to a near standstill.

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291 See People’s Union for Civil Liberties, Writ Proceedings section.
292 See People’s Union for Civil Liberties, A.E.R.B. Report section, Conclusion (in which the Court noted that the Attorney General had offered to submit the A.E.R.B. Report to the Court for an in camera review, but that the Court saw no need to examine the report itself).
293 Although petitioners claimed that the 1995 report did not implicate matters of national security, the Court disagreed on the grounds that nuclear material was inherently volatile. See People’s Union for Civil Liberties, High Court Judgment section.
294 E.g., D.K. Basu v. State of West Bengal (1997) 1 SCC 216 (“transparency of action and accountability perhaps are the two safeguards which this court must insist upon”).
295 The RTI replaced the Freedom of Information Act, 2002, which was perceived to be too weak in mandating government disclosure. See RTI, ¶ 31.
296 See Anita Aikara, Information Delayed is Information Denied, dna-india.com, Sept. 7, 2008, available at www.dnaindia.com/dnaprint.asp?newsid=1188257 (visited Sept. 25, 2008) (noting that over 15,000 RTI cases were waiting to be processed at the State Information Commission level in one state, Maharashtra); RTI Activists Ask for Fast Case Disposal, dna-india.com, Aug. 23, 2008, (…continued)
These delays are compounded with the backlog of years and sometimes decades in the actual litigation of a suit, making it difficult to assess the full impact of the RTI in terms of genuine changes to the Indian judiciary’s approach to sensitive government information.

Second, the RTI loophole for excluding disclosure of national security policy is extremely broad and may be used by the executive branch to revert to the usual posture of avoiding disclosure of information which has only an attenuated connection to national security issues. From the few RTI claims that have been adjudicated within the information commission system, it appears that information commissioners are viewing the national security exception to RTI as a broad mandate for nondisclosure.

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available at www.dnaindia.com/dnaprint.asp?newsid=1185178 (visited Sept. 25, 2008) (noting that the estimated time for an RTI claim to be processed in Maharashtra was 18 to 24 months).


Historically, Indian courts have granted the utmost deference to the executive branch as to when national security policy should be disclosed. E.g., State of Uttar Pradesh v. Raj Narain, AIR 1975 SC 865 (carving out national security as the area in which the Prime Minister can unilaterally decide what information to disclose).

In one case, the Central Information Commission upheld the denial of an RTI request for information by environmental activists regarding the cost of processing nuclear fuel at a nuclear reactor then under construction. The Commission reasoned that nuclear material reprocessing was a component of the recent India-U.S. nuclear agreement, and therefore was central to the strategic and scientific interests of India. Although the costs associated with processing were not necessarily sensitive information, the Commission found that the “ disclosure of this information can have unforeseen ramifications because of the sensitivity in the nature of the project on which the information is sought.” Central Information Commission, Appeal No. CIC/WB/A/2006/00878, dated 29-11-2006, decided Sept. 10, 2007, available at http://cic.gov.in/CIC-Orders/Decision_10092007_08.pdf, at 5 (visited Dec. 16, 2008).

In another case, a state information commission relied on the national security exception to refuse an RTI claim seeking a memorandum of understanding between the government and Dow Chemical Corporation to build a research and (…continued)
IV. VIEWING U.S. REFORM EFFORTS WITHIN A COMPARATIVE CONTEXT

Although the current U.S. use and application of the state secrets privilege is roughly analogous to that of England, the Mohamed case suggests that England’s current application of the privilege may be more narrow than that of the United States, and that the English court in Mohamed was forced to expand the scope of its own public interest immunity because of the threat of national security repercussions from the United States. The transnational implications of U.S. pressure regarding the state secrets privilege may be that even if other nations’ courts use a narrower standard for the privilege, those standards may be undermined if the U.S. government uses its considerable clout to pressure governments to claim state secrets in cases where U.S. government actions are implicated.

U.S. courts are also less deferential to the executive branch than India, but much more so than Scotland and Israel. The proposed congressional reforms offer some positive steps to establish procedural safeguards that strike an appropriate balance between national security interests and the rule of law, government accountability and individual liberty. However, Congress should consider going further in addressing the need for litigation to compensate those who have suffered gross constitutional and human rights violations at the hands of the government.

A. Future Reform Efforts Should Consider Explicitly Accounting for Alleged Human Rights Abuses

If the legislative reforms are adopted, the United States’ application of the state secrets privilege would align with the Scottish courts’ treatment of public interest immunity. However, the reforms proffered in the U.S. fall short of the Israeli standard of justiciability in national security matters—whereas the Israeli standard explicitly requires consideration of allegations of human

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rights abuses, the proposed safeguards in the United States do not.\textsuperscript{300}

Of course, the Israeli test for justiciability is not directly analogous to the United States doctrine regarding the state secrets privilege. However, reforms in the United States should require courts to consider potential human rights abuses in determining whether a lawsuit should go forward, particularly with regard to whether a case ought to be ultimately dismissed.\textsuperscript{301} Although the nature of the allegations should not be determinative as to whether litigation should proceed, it would be appropriate for U.S. judges—like their Israeli counterparts—to undertake a balancing test which accounts for the nature of the claim when deciding whether a case ought to go forward at the discovery stage. After all, the cases of El-Masri, Al-Haramain and Mohamed, and the violations of human rights and constitutional safeguards that they represent are at the heart of the impetus for reforming the privilege.

\textbf{B. Congressional Reforms Should Encompass Both the State Secrets Privilege and Justiciability}

Congress should consider proposing reforms that encompass both the evidentiary issues of the state secrets privilege and the justiciability questions surrounding \textit{Totten} and its progeny. Although the Supreme Court clarified in \textit{Tenet v. Doe}\textsuperscript{302} that questions of justiciability should be considered independently of the state secrets privilege, courts have struggled with this distinction.\textsuperscript{303} It would be appropriate and useful for Congress to assist in the clarification between the state secrets privilege and \textit{Totten}’s standard of dismissal based on the subject matter of the litigation.

Such clarification should be undertaken simultaneously with state secrets reform because it would close a potential avenue for the executive branch to avoid disclosure of evidence. The post-Watergate era saw a spike in invocations of the state secret

\textsuperscript{300} See S. 2533, H.R. 5607.
\textsuperscript{301} Under S. 2533, such a dismissal could not occur until the discovery phase has at least begun.
\textsuperscript{302} \textit{Tenet v. Doe}, 544 U.S. 1, 10-11 (2005).
\textsuperscript{303} \textit{Tenet v. Doe}, 544 U.S. 1, 11 (2005).
privilege precisely because reform efforts had opened avenues for individual litigants to seek redress and information from the government.\textsuperscript{304} A partial reform effort which addresses the state secrets privilege but not the question of justiciability may inadvertently provide an incentive to the executive branch to attempt to dismiss cases based on \textit{Totten}'s non-justiciability standard. Congressional reform efforts should include a justiciability assessment like that undertaken by Israeli courts, in which U.S. courts could use the standard articulated by the Supreme Court in \textit{Tenet}, but with an included factor of accounting for allegations of human rights abuses. Such a measure would preclude subsequent abuse of the \textit{Totten} standard as an alternative means for the executive branch to avoid liability or disclosure of allegedly sensitive information.

\textbf{C. Reforming the Privilege Should Remain a Priority}

The national security programs created or enhanced since 2001 as a part of the war on terror have come under a great deal of scrutiny, but very few concrete oversight measures have taken hold for a number of reasons.

Legislative inertia and a high level of deference to executive branch decision-making have hobbled many avenues for genuine legislative oversight or any kind of substantial reform efforts with regard to national security and the rule of law.\textsuperscript{305} This legislative inertia and deference was particularly pronounced from 2001 through 2006, when both houses of Congress and the presidency were controlled by Republicans.\textsuperscript{306}

\footnotesize{\textsuperscript{304} See Part II, supra.}
Reform and oversight efforts began to increase when Democrats gained control of Congress in 2006 and initiated investigations and attempted to pass meaningful oversight measures. However, the Democratically-controlled Congress continued to defer to the Bush administration on most national security matters. For example, in July 2008 Congress passed amendments to the Foreign Intelligence Surveillance Act which stripped jurisdiction over allegations of illegal wiretapping from Article III courts, extend executive branch authority to conduct warrantless surveillance and immunize telecommunications companies from liability regarding their assistance to the government in conducting warrantless wiretapping of U.S. citizens.

The question for Congress in 2009 is how much oversight it is willing to exert over a Democratic President. Historically, congressional oversight of the executive branch falls by the wayside when Congress and the presidency are run by members of the same political party. Efforts to reform and clarify the state secrets privilege are a rare and clear example of legislative initiative to promote genuine oversight and curb executive branch overreaching; reform efforts should not be derailed by unsupported claims that national security programs would be compromised if the reforms to the privilege were enacted, nor by a lack of will to create uniform state secrets standards when Congress and the President are politically aligned. Congress should consider the long-term effects of not reforming the privilege and act to restore the rule of law and appropriate balance of power among the branches of government.

Second, although public outcry regarding the administration of national security programs has been muted at times, the cases which serve as the impetus for the proposed 2008 reforms are specific, public and graphic—El-Masri’s case of mistaken identity

308 Foreign Intelligence Surveillance Act of 1978 Amendments Act of 2008; see also Paul Kane, House Passes Spy Bill; Senate Expected to Follow, Wash. Post, June 21, 2008, at A18 (detailing the legislation approved by the House); Editorial, Spying on Americans, N.Y.Times, May 2, 2007 (condemning the legislation for its expansive grant of power to the President).
resulted in a horrific experience of abduction and torture which was reported widely and in much detail.\textsuperscript{309}

Third, whereas various oversight measures attempted by Congress have been met with constitutional avoidance by the executive branch, where it has refused to enforce portions of legislation as written,\textsuperscript{310} reform of the state secrets privilege would not be prone to the same fate since the power to apply the reforms would fall to the courts, not the executive branch. If the government fails to comply with a court’s request to provide documents for \textit{in camera} review, the government could be held in contempt or a court could decide to enter a default judgment in favor of the plaintiffs, as the lower court in \textit{Reynolds} did.

\textsuperscript{309} See, e.g., Mayer, \textit{supra} note 
, at 282-287.

\textsuperscript{310} Constitutional avoidance in the executive context has been used to mean that the President can “avoid” a constitutional dispute by asserting his own view of his constitutional obligations any time the actions of another branch make an incursion onto the constitutional right of the executive to exert its decision-making primacy in certain areas, such as in the conduct of war. \textit{See} Trevor Morrison, \textit{Constitutional Avoidance in the Executive Branch}, 106 \textit{COLUM. L. REV.} 1189, 1218-19 (2006) (critiquing the OLC’s use of avoidance to assert more presidential power than is granted under law). Congress has attempted to address the question of constitutional avoidance through 2002 appropriations legislation that included a provision mandating notification to Congress whenever the executive branch chooses not to enforce a law as written. \textit{See} The 21\textsuperscript{st} Century Department of Justice Appropriations Authorization Act, § 202, Pub. L. No. 107-273, 28 U.S.C. § 530(D) (2002). The Bush administration appears to have engaged in “meta-avoidance” by refusing to comply with the congressional notification requirement in the Act. \textit{See}, e.g., Presidential Signing Statement for 21\textsuperscript{st} Century Department of Justice Appropriations Authorization Act, 38 Weekly Comp. Pres. Doc. 1971, H.R. 2215 (Nov. 2, 2002) (noting that section 530D “purports to impose on the executive branch substantial obligations for reporting to the Congress activities of the Department of Justice involving challenges to or non-enforcement of law that conflicts with the Constitution. The executive branch shall construe section 530(D)...in a manner consistent with the constitutional authorities of the President to supervise the unitary executive branch...”). Congress continues to attempt to legislate its way around executive branch avoidance. \textit{E.g.}, OLC Reporting Act of 2008, S. 3501, Sept. 16, 2008 (introduced by Sens. Feingold and Feinstein); Office of Legal Counsel Reporting Act of 2008, H.R. 6929, Sept. 17, 2008 (introduced by Rep. Miller). Both bills propose amendments to 28 U.S.C. § 503(D) to oblige the Attorney General to report to Congress on non-enforcement of statutes based on OLC opinions claiming constitutional avoidance based on the OLC’s reading of presidential power under Article II.
CONCLUSION

Invocations of the state secrets privilege have occurred in every administration since *Reynolds* was decided and given the current national security landscape, litigation which involves sensitive government information is likely to continue for the foreseeable future.

The extensive and expansive use of the state secrets privilege by the Bush administration illustrates the need for process changes need to be implemented in order to deal with the most extraordinary situations, when national security concerns are heightened and the temptation to abuse power and maximize secrecy is at its highest. The Bush administration set a precedent that allows President Obama and any future president to continue on a path of exerting a tremendous amount of political power with very little oversight.311

The February 2009 decision of the Obama administration to embrace the Bush administration’s expansive view of the state secrets privilege underscores the need for reform as a part of a long term commitment to the rule of law even in the national security arena. The administration’s pressure on the British government reflects the transnational impact of U.S. policies: even when a foreign nation’s courts would limit the application of the privilege, the broad U.S. interpretation of the privilege has trumped internal decision-making. The long-term effects of such pressure are yet to be seen, but the *Mohamed* decision reflects the possibility that the U.S. application of the privilege could be exported more widely under threat to other countries of national security repercussions from the United States.

Reform is necessary to combat both the ossification of abusive practices and ensure that executive branch overreaching does not seep into the practices of other nations due to pressure from the United States. Passage of a strong state secrets reform measure

311 Nat Hentoff, A Decision Supreme, Village Voice, June 18, 2008, at 14 (“Unless explicitly repudiated by the next president and prohibited by law, the precedents of the Bush presidency will stand. The expanded powers of one president typically are carefully guarded by their successors…Republican or Democrat”) (citations omitted).
can ensure a fair standard in the courts and an opportunity for redress for those alleging grave violations of civil rights and civil liberties.