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# Litigating Secrets

## COMPARATIVE PERSPECTIVES ON THE STATE SECRETS PRIVILEGE

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### 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 consequences ranging 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.<sup>1</sup> Its scope is coextensive with any kind of information classified as “secret” or a higher level of secrecy,<sup>2</sup> 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 *United States v. Reynolds*,<sup>3</sup> which was based in large part on English precedent. The privilege has never been

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<sup>1</sup> Press Release, Office of U.S. Senator Edward M. Kennedy, Kennedy Introduces State Secrets Protection Act (Jan. 22, 2008) (internal quotation marks omitted), available at [http://kennedy.senate.gov/newsroom/press\\_release.cfm?id=C56BD1D0-7AD3-46EA-9D30-A77317F28B70](http://kennedy.senate.gov/newsroom/press_release.cfm?id=C56BD1D0-7AD3-46EA-9D30-A77317F28B70); see also William G. Weaver & Danielle Escontrias, Origins of the State Secrets Privilege 3-4 (Feb. 10, 2008) (unpublished paper, available at <http://ssrn.com/abstract=1079364>).

<sup>2</sup> Weaver & Escontrias, *supra* note 1, at 7.

<sup>3</sup> 345 U.S. 1 (1953).

clarified by statute; Congress undertook reform efforts in 2008 out of concerns that the Bush administration overreached in its claims of privilege by seeking more dismissals during the pleadings stage, and that courts have not used a uniform standard to assess those claims.<sup>4</sup>

Congress reintroduced reform legislation in February 2009<sup>5</sup> 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.<sup>6</sup> The proposed legislation is pending even as the Obama administration released a new policy for the Department of Justice, mandating a more rigorous internal review prior to invoking the state secrets privilege.<sup>7</sup>

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 the balance between national security and the need to preserve the rule of law, individual rights, liberty interests, and government accountability. Congress's reform efforts continue to be necessary to restore the long-term appropriate balance among these competing interests.

This Article considers the modern application of the privilege in Scotland, England, Israel, and India—an analysis that 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 that have recently come to light in litigation involving both the United States and England.

This Article considers the reform efforts in the context of the experience of other nations. This Article concludes that

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<sup>4</sup> 154 CONG. REC. S198-201 (daily ed. Jan. 23, 2008) (statement by Sen. Kennedy on the State Secrets Protection Act).

<sup>5</sup> See Press Release, Office of U.S. Senator Patrick Leahy, Leahy, Specter, Feingold, Kennedy Introduce State Secrets Legislation (Feb. 11, 2009), available at <http://leahy.senate.gov/press/200902/021109b.html>.

<sup>6</sup> 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 try to have litigation against the government dismissed at the pleadings stage).

<sup>7</sup> See Memorandum from Eric Holder, U.S. Attorney Gen., to Heads of Executive Departments & Agencies (Sept. 23, 2009) [hereinafter Holder Memorandum], available at <http://www.usdoj.gov/opa/documents/state-secret-privileges.pdf> (establishing layers of internal review within the Department of Justice and including a new executive branch policy to report to Congress any invocations of the state secrets privilege).

the current application of the privilege follows English precedent and modern English practices, although English courts have recently expressed concern 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 United States. Other countries that take precedent from 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 proposed legislation. Finally, this Article finds that Israel, unlike the United States, 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 United States, namely the desire to curb perceived executive branch overreaching, to create a uniform and workable judicial standard, and to 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 considers and ultimately rejects concerns that congressional reform efforts impermissibly impinge on constitutionally reserved presidential powers,<sup>8</sup> and also 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 United Kingdom, 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

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<sup>8</sup> The U.S. Supreme Court described the state secrets privilege as “the evidentiary state secrets privilege” in *Tenet v. Doe*, 544 U.S. 1, 6, 8 (2005), making clear that the privilege is not a constitutionally-based privilege, but rather one developed by the courts, *id.* at 9.

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 four other countries drawing on the English legal tradition—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 United States 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,<sup>9</sup> calling for the passage of a “safe, fair, and responsible state secrets privilege Act.”<sup>10</sup> In March 2008, members of the House of Representatives introduced their own State Secret Protection Act of 2008,<sup>11</sup> seeking to establish “safe, fair, and responsible procedures and standards for resolving claims of state secret privilege.”<sup>12</sup> 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.

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<sup>9</sup> State Secrets Protection Act of 1998, S. 2533, 110th Cong. (2d Sess. 2008); *see also* Petition for Writ of Certiorari at 15-27, *El-Masri v. United States*, 128 S. Ct. 373 (2007) (No. 06-1613) (noting the importance of clarifying the application of the state secrets privilege).

<sup>10</sup> 154 CONG. REC. S93 (daily ed. Jan. 22, 2008) (introduction by Sen. Ted Kennedy).

<sup>11</sup> State Secrets Protection Act of 2008, H.R. 5607, 110th Cong. (2d Sess. 2008).

<sup>12</sup> *Id.*

The normal remedy in American law—the only remedy I know of—is for that person, once recovered from the 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?<sup>13</sup>

Although the impetus for legislative reform appeared to weaken with the election of President Obama,<sup>14</sup> 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 prompted Congress to reintroduce similar legislation in February 2009.<sup>15</sup>

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 individual litigants bringing suit against the government.<sup>16</sup> In doing so, Congress appropriately took into account the changing national security landscape in the years since the recognition by the Supreme Court of the U.S. privilege in *United States v. Reynolds*.<sup>17</sup>

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<sup>13</sup> *State Secrets Protection Act of 2008: Hearing on H.R. 5607 Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary*, 110th Cong. 77 (2008) (statement of Rep. Jerrold Nadler, Chairman, H. Comm. on the Judiciary).

<sup>14</sup> Mark Mazzetti & William Glaberson, *Obama Issues Directive to Shut Down Guantanamo*, N.Y. TIMES, Jan. 22, 2009 (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”).

<sup>15</sup> See Press Release, Office of U.S. Sen. Patrick Leahy, *supra* note 5 (reintroducing state secrets reform legislation and setting forth concerns regarding executive branch use of the privilege).

<sup>16</sup> 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).

<sup>17</sup> 345 U.S. 1 (1953).

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

The formal acknowledgement of the state secrets privilege in the United States is, perhaps surprisingly, rather recent. The 1953 case of *United States v. Reynolds*<sup>18</sup> stands as the seminal case in which the U.S. approach to invocations of the state secrets privilege was established.<sup>19</sup>

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.<sup>20</sup> The trial court directed the government to produce the report to the court for a determination of privilege.<sup>21</sup> When the government refused, the judge made an adverse inference and ordered a \$250,000 judgment for the plaintiffs.<sup>22</sup> The Third Circuit affirmed the decision, noting that a court should diligently refuse to accept blindly all claims of privilege; instead, a court should conduct an ex parte examination of the evidence to make an individualized privilege determination.<sup>23</sup>

The Supreme Court reversed, although it agreed with part of the Third Circuit's reasoning in 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."<sup>24</sup> The Court further reasoned that "[j]udicial control over the evidence in a case cannot be abdicated to the caprice of executive officers."<sup>25</sup> However, the Court acknowledged the strength of the evidentiary privilege of the

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<sup>18</sup> 345 U.S. 1 (1953).

<sup>19</sup> For an in-depth account of the *Reynolds* case, see LOUIS FISHER, IN THE NAME OF NATIONAL SECURITY: UNCHECKED PRESIDENTIAL POWER AND THE *REYNOLDS* CASE (2006).

<sup>20</sup> *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.

<sup>21</sup> *Id.* at 5.

<sup>22</sup> *Id.*

<sup>23</sup> *Reynolds v. United States*, 192 F.2d 987, 996-97 (3d Cir. 1953), *rev'd*, 345 U.S. 1 (1953).

<sup>24</sup> *Reynolds*, 345 U.S. at 11.

<sup>25</sup> *Id.* at 9-10.

executive,<sup>26</sup> and noted in passing that some commentators believed the privilege to be constitutionally grounded as well.<sup>27</sup>

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;<sup>28</sup> (2) the court has the responsibility to determine whether the disclosure in question would pose a “reasonable danger . . . [to] national security”;<sup>29</sup> (3) the court should take into account the plaintiff’s need for information to litigate its case;<sup>30</sup> (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;<sup>31</sup> 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 information,<sup>32</sup> whether the case involves issues of human rights or any other countervailing considerations.

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.”<sup>33</sup> 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: there were no military secrets in the report, as claimed by the government, but there was evidence that the plane lacked standard safeguards that might have prevented its crash—the very

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<sup>26</sup> *Id.* at 6-7.

<sup>27</sup> *Id.* at 6 n.9. The idea that the state secrets privilege is rooted in the President’s inherent constitutional authority was rejected in *Tenet v. Doe*, which made clear that the state secrets privilege is an evidentiary privilege, meaning Congress can be involved in setting parameters on the invocation and use of the privilege. 544 U.S. 1, 9 (2005).

<sup>28</sup> *Reynolds*, 345 U.S. at 7-8.

<sup>29</sup> *Id.* at 10.

<sup>30</sup> *Id.* at 11.

<sup>31</sup> *See, e.g.*, *Al-Haramain Islamic Found. v. Bush*, 507 F.3d 1190,1204 (9th Cir. 2007) (pointing out that the district court had the option of holding an ex parte, in camera review of the government’s wiretapping records in accordance with the strict procedures of FISA, but that it chose not to do so).

<sup>32</sup> *Reynolds*, 345 U.S. at 11.

<sup>33</sup> *Id.* at 10-11 (concluding that, given the “circumstances of the case,” no need to review the accident report existed because of an “available alternative”).



negligence on which the family members in *Reynolds* based their lawsuit.<sup>34</sup> 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.<sup>35</sup>

*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,<sup>36</sup> the Court based its reasoning on numerous other sources, including the English case of *Duncan v. Cammel, Laird, & Co.*<sup>37</sup> decided in 1942.<sup>38</sup> *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<sup>39</sup> and Wigmore's treatise on evidence.<sup>40</sup> 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,”<sup>41</sup> and that courts, not the executive branch itself, were the appropriate decision-makers regarding the privilege.<sup>42</sup>

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<sup>34</sup> Patrick Radden Keefe, *State Secrets—A Government Misstep in a Wiretapping Case*, THE NEW YORKER, Apr. 28, 2008, at 28; cf. *Herring v. United States*, 424 F.3d 384, 392 (3d Cir. 2005) (holding that the United States did not commit a fraud on the court in its representations during the *Reynolds* litigation).

<sup>35</sup> See Weaver & Pallitto, *supra* note 16, at 101 (noting that courts have looked at the underlying documents in less than one-third of cases in which the state secrets privilege was asserted).

<sup>36</sup> *Reynolds*, 345 U.S. at 7.

<sup>37</sup> *Id.* Prior to the Supreme Court decision, the Third Circuit distinguished the *Reynolds* case from the privilege decision in *Duncan v. Cammell, Laird & Co.*, [1942] A.C. 624 (H.L.), based on the differences in the nature of judicial roles in England and the United States. See *Reynolds v. United States*, 192 F.2d 987, 997 (3d Cir. 1951), *rev'd*, 345 U.S. 1 (1953).

<sup>38</sup> See Nicole Hallett, *Protecting National Security or Covering Up Malfeasance: The Modern State Secrets Privilege and its Alternatives*, 117 YALE L.J. POCKET PART 82, 83 (2007), available at <http://yalelawjournal.org/images/pdfs/589.pdf>.

<sup>39</sup> *Reynolds*, 345 U.S. at 7 n.11.

<sup>40</sup> 8 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2212a(4) (3d ed. 1940); see also *Reynolds*, 345 U.S. at 6-7.

<sup>41</sup> WIGMORE, *supra* note 38, § 2212a.

<sup>42</sup> 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

In *Reynolds*, the Supreme Court established a standardized doctrine by which to evaluate claims of a state secrets privilege; this doctrine balanced national security matters with adherence to the rule of law and attention to rights of individual litigants.<sup>43</sup> However, the balancing test set forth in *Reynolds* has often been subsumed 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.<sup>44</sup> 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.<sup>45</sup> Second, the unprecedented level of secrecy<sup>46</sup> within the George

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admissibility of evidence depends will furnish to bureaucratic officials too ample opportunities for abusing the privilege.

*Id.* § 2379.

<sup>43</sup> See also Ilann Margalit Maazel, *The State Secrets Privilege*, N.Y.L.J., July 24, 2008, at 3 (noting that the *Reynolds* doctrine was initially "narrow and sensible").

<sup>44</sup> Weaver & Pallitto, *supra* note 16. This judicial tendency is analyzed in further detail in *infra* Part II.

<sup>45</sup> Although the Obama administration has already begun to modify the executive branch's 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 Adam Liptak, *Early Test of Obama View on Power Over Detainees*, N.Y. TIMES, Jan. 3, 2009, at A1; 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).

<sup>46</sup> See, e.g., Sudha Setty, *No More Secret Laws: How Transparency of Executive Branch Legal Policy Doesn't Let the Terrorists Win*, 57 KAN. L. REV. 579, 596-98 (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, Att'y Gen., on the Freedom of Information Act to the Heads of all Federal Departments and Agencies (Oct. 12, 2001), available at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB84/Ashcroft%20Memorandum.pdf> ("When 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, Att'y Gen., 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](http://www.usdoj.gov/oip/foia_updates/Vol_XIV_3/page3.htm)

W. Bush administration led to suspicions that the government was not necessarily acting in good faith in invoking the privilege,<sup>47</sup> and that such trends would persist in future administrations.<sup>48</sup> Further, a “mosaic theory”<sup>49</sup> of terrorist

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(“The Department [of Justice] will no longer defend an agency’s withholding of information merely because there is a ‘substantial legal basis’ for doing so. 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, at A30.

<sup>47</sup> *State Secrets Protection Act of 2008: Hearing Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary*, 110th Cong. 78 (2d Sess. 2008) (statement of Steven Shapiro, legal director of the A.C.L.U.) (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 Co. v. United States*, then-Solicitor General Erwin N. Griswold wrote:

[I]n 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.

Brief for the United States at 18, *New York Times Co. v. United States*, 403 U.S. 713 (1971) (No. 1873). 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.” Erwin N. Griswold, Editorial, *Secrets Not Worth Keeping; The Courts and Classified Information*, WASH. POST, Feb. 15, 1989, at A25.

<sup>48</sup> In September 2009 the Obama administration released a new set of guidelines governing invocation of the state secrets privilege by the administration. See Holder Memorandum, *supra* note 7. Although initial reaction from the public and Congress has been positive, many believe that a congressional check is still necessary to counteract the potential for abuse within the executive branch. See Charlie Savage, *Justice Dept. to Limit Use of State Secrets Privilege*, N.Y. TIMES, Sept. 23, 2009 at A16 (“Congress must still enact legislation that provides consistent standards and procedures for courts to use when considering state secrets claims. Our constitutional system requires meaningful, independent judicial review of governmental secrecy claims.” (internal quotation marks omitted) (quoting Representative Jerrold Nadler)). As of this writing, there is no information as to how the new policy has affected executive branch decision-making regarding the invocation of the state secrets privilege.

<sup>49</sup> The court in *Halkin v. Helms* explained the “mosaic theory” of national security as follows:

It requires little reflection to understand that the business of foreign intelligence gathering in this age of computer technology is more akin to the construction of a mosaic than it is to the management of a cloak and dagger affair. Thousands of bits and pieces of seemingly innocuous information can be analyzed and fitted into place to reveal with startling clarity how the unseen whole must operate.

598 F.2d 1, 8 (D.C. Cir. 1978). See, e.g., *Edmonds v. U.S. Dep’t of Justice*, 405 F. Supp. 2d 23, 33 (D.D.C. 2005) (reasoning that the mosaic theory justified the government

activity would create a broad protection over large swaths of relevant information that may not, at least regarding individual documents, satisfy the *Reynolds* standard.<sup>50</sup> Third, many critics see the state secrets privilege as a broad and expansive means for executive branch overreaching in which the bad actions of the administration are withheld from private litigants and the judicial system, and concealed from Congress and the public.<sup>51</sup>

The administration's warrantless wiretapping program was challenged numerous times in court, but the government's frequent 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 on several occasions<sup>52</sup> to protect records that would have allowed the plaintiffs to prove that they were subject to wiretapping and thus had standing to challenge the program.<sup>53</sup>

An emblematic case is that of the al-Haramain Islamic Foundation, an Islamic charity based in Saudi Arabia and operating worldwide, including in 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

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decision to not disclose information requested under FOIA); *see also* David E. Pozen, *The Mosaic Theory, National Security, and the Freedom of Information Act*, 115 *YALE L.J.* 628, 633-41 (2005) (outlining the history of the mosaic theory as it pertains to FOIA litigation).

<sup>50</sup> *E.g.*, *Ctr. for Nat'l Sec'y Studies v. U.S. Dep't of Justice*, 331 F.3d 918, 933 (D.C. Cir. 2003) (upholding FOIA's law enforcement exemption with regard to a mosaic theory of terrorism); *see also* *ACLU v. Dep't of Def.*, 389 F. Supp. 2d 547, 564-66 (S.D.N.Y. 2005) (upholding, in part, the government's use of the Glomar Doctrine—neither confirming nor denying the alleged government activity—to exempt it from FOIA disclosure requirements).

<sup>51</sup> *See* Robert M. Chesney, *State Secrets and the Limits of National Security Litigation*, 75 *GEO. WASH. L. REV.* 1249, 1252, 1269 (2007) (arguing that such practices extend beyond any particular administration).

<sup>52</sup> *E.g.*, *ACLU v. NSA*, 438 F. Supp. 2d 754, 758-66 (E.D. Mich. 2006), *vacated and remanded on other grounds*, 493 F.3d 644, 662-64 (6th Cir. 2007), *cert. denied*, 128 S. Ct. 1334 (2008); *see also* Recent Cases, *Federal Courts—Standing—Sixth Circuit Denies Standing to Challenge Terrorist Surveillance Program—ACLU v. NSA*, 493 F.3d 644 (6th Cir. 2007), 121 *HARV. L. REV.* 922, 922 (2008) (arguing that standing rules should be relaxed under such circumstances).

<sup>53</sup> *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.”); *ACLU v. NSA*, 438 F. Supp. 2d at 765 (state secrets privilege prevented plaintiffs from establishing data-mining claim); *Hepting v. AT&T*, 439 F. Supp. 2d 974, 984 (N.D. Cal. 2006).

(NSA).<sup>54</sup> 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.<sup>55</sup> The Bush administration sought to recover most copies of the report in the possession of Al-Haramain's counsel and others, but did not try to recover those copies that had been sent outside of the United States.<sup>56</sup>

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.<sup>57</sup> 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.<sup>58</sup> 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.<sup>59</sup> On remand, the district court was tasked to determine whether Foreign Intelligence Surveillance Act ("FISA") preempts the state secrets privilege such that the lawsuit could survive.<sup>60</sup> The court concluded that FISA trumped the state secrets privilege,<sup>61</sup> noting that "[t]he enactment of FISA was the fruition of a period of intense public and Congressional interest in the

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<sup>54</sup> *Al-Haramain*, 507 F.3d at 1193, 1195. Specifically, al-Haramain alleged violations of the Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. §§ 1801-71 (2007), which governed government surveillance of telecommunications activity, and the Fourth Amendment. *See Al-Haramain*, 507 F.3d at 1193, 1195; *see also* Carol D. Leonnig & Mary Beth Sheridan, *Saudi Group Alleges Wiretapping by U.S.*, WASH. POST, Mar. 2, 2006, at A1.

<sup>55</sup> *See Leonnig & Sheridan*, *supra* note 54.

<sup>56</sup> *See Keefe*, *supra* note 34, at 28, 31 (describing how the government did not act to recover copies that were sent to Al-Haramain personnel in Saudi Arabia).

<sup>57</sup> *Id.* at 31-32. The judge instead ordered that the plaintiffs create affidavits based on their recollections of the privileged document. *See Al-Haramain Islamic Found. v. Bush*, 451 F. Supp. 2d 1215, 1229 (D. Or. 2006), *rev'd and remanded*, 507 F.3d 1190 (9th Cir. 2007).

<sup>58</sup> *Al-Haramain*, 507 F.3d at 1204. The Ninth Circuit pointed out that the district court could have held an ex parte, in camera review of the wiretapping records in accordance with the strict procedures of FISA, but that it did not do so. *Id.* at 1205.

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

<sup>60</sup> *Id.* at 1206.

<sup>61</sup> *In re NSA Telecomm. Records Litig.*, 564 F. Supp. 2d 1109, 1111 (N.D. Cal. 2008).

problem of unchecked domestic surveillance by the executive branch.”<sup>62</sup>

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.<sup>63</sup> 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. . . . [T]he *Reynolds* protocol has no role where section 1806(f) applies.”<sup>64</sup> 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.<sup>65</sup> In April 2009, the district court indicated that the government would not have carte blanche to assert the privilege by instructing both parties to work together to draft a protective order to delineate how classified and sensitive information will be treated.<sup>66</sup> The court also admonished Obama administration lawyers for their continued attempts to garner a stay and delay the disclosure of information relevant to plaintiff’s case.<sup>67</sup>

A second motivating factor<sup>68</sup> for the current push of state secrets reform is growing evidence of extreme cases of detainee

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<sup>62</sup> *Id.* at 1115. The court relied on the post-Watergate Church Committee Report on the unconstitutional domestic surveillance activities of the Nixon administration, *see id.*, as well as the framework for assessing presidential actions taken in defiance of congressional will set forth in Justice Jackson’s concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952)).

<sup>63</sup> *Id.* at 1119.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 1131.

<sup>66</sup> Order at 2-3, *In re NSA*, 564 F. Supp. 2d 1109 (N.D. Cal. 2008) (No. 06-1791 VRW). In doing so, the court also rejected a far-reaching argument by the Obama administration that the court had no authority to order that counsel for al-Haramain be granted access to classified information over the objection of the executive branch. *See* Government Defendants’ Response to Court Orders Concerning Compliance with the January 5 Order and Response to Plaintiffs’ Supplemental Case Management Report at 7-10, *In re NSA*, 564 F. Supp. 2d 1109 (N.D. Cal. 2008) (No. M:06-CV-01791-VRW).

<sup>67</sup> Order at 1-2, *In re NSA*, 564 F. Supp. 2d 1109 (N.D. Cal. 2008) (No. 06-1791 VRW).

<sup>68</sup> 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* *Arar v. Ashcroft*, 532 F.3d 157 (2d Cir. 2008), *vacated and superseded*, No. 06-4216-CV, 2009 WL 3522887 (2d Cir. 2009) (en banc); *see also* William Fisher, *State*

mistreatment that 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<sup>69</sup> in what was later acknowledged as a case of mistaken identity.<sup>70</sup>

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.<sup>71</sup> According to El-Masri, in January 2004, he was transported to an airport where he was beaten, stripped naked, photographed, and then sodomized.<sup>72</sup> He was then subject to “extraordinary rendition” by the CIA, who transported him to a prison in Kabul, Afghanistan.<sup>73</sup>

El-Masri was finally released on May 28, 2004,<sup>74</sup> after having been in captivity for approximately five months, during which he was allegedly subject to numerous harsh interrogations by the CIA, which included “threats, insults, pushing, and shoving,”<sup>75</sup> as well as force-feeding through a nasal tube.<sup>76</sup> Upon his release, El-Masri sought out German officials, who launched an investigation regarding his allegations of abduction, detention, and abuse.<sup>77</sup>

In 2005, El-Masri sued George Tenet, the former director of the Central Intelligence Agency, the airlines complicit in his rendition, and various other individuals.<sup>78</sup> The

*Secrets Privilege Derails Rendition Suit*, ARAB AM. NEWS, July 11, 2008, at 8; Benjamin Weiser, *Appeals Court Hears Case of Canadian Citizen Sent by U.S. to Syria*, N.Y. TIMES, Dec. 10, 2009, at A39.

<sup>69</sup> For a full account of Khaled El-Masri’s story of rendition, see JANE MAYER, *THE DARK SIDE* 282-87 (2008).

<sup>70</sup> See Glenn Kessler, *Rice to Admit German’s Abduction Was an Error: On European Trip, Rice Faces Scrutiny on Prisoner Policy*, WASH. POST, Dec. 7, 2005, at A18; Dana Priest, *Wrongful Imprisonment: Anatomy of a CIA Mistake*, WASH. POST, Dec. 4, 2005, at A1.

<sup>71</sup> Complaint at ¶ 23, *El-Masri v. Tenet*, 437 F. Supp. 2d 530 (E.D. Va. 2006) (No. 1:05cv1417), available at [http://www.aclu.org/images/extraordinaryrendition/asset\\_upload\\_file829\\_22211.pdf](http://www.aclu.org/images/extraordinaryrendition/asset_upload_file829_22211.pdf).

<sup>72</sup> *Id.* ¶ 28.

<sup>73</sup> *Id.* ¶¶ 29-35 (alleging that El-Masri was blindfolded, shackled, forced into a diaper, and rendered unconscious by injections during his transport).

<sup>74</sup> *Id.* ¶ 43.

<sup>75</sup> *Id.* ¶ 40.

<sup>76</sup> *Id.* ¶ 44.

<sup>77</sup> *Id.* ¶ 57.

<sup>78</sup> *Id.* ¶¶ 65-72 (alleging violations of due process); *id.* ¶¶ 73-82 (alleging prolonged arbitrary detention); *id.* ¶¶ 83-92 (alleging torture and other degrading treatment); see *Reform of the State Secrets Privilege: Hearing Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary*, 110th Cong. 3 (2d Sess. 2008) [hereinafter *Privilege Hearings*] (prepared statement of H. Thomas Wells, Jr., President-Elect, ABA).

government argued for dismissal of the suit based on the state secrets privilege, claiming that national security interests would be compromised if the litigation were to continue, and that state secrets were central to El-Masri making his case against the government.<sup>79</sup> This privilege claim was made despite the United States' 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.<sup>80</sup> 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's filing an answer to El-Masri's complaint.<sup>81</sup> The federal appeals court sustained the dismissal,<sup>82</sup> and the Supreme Court denied certiorari in 2007.<sup>83</sup>

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.<sup>84</sup>

In contrast, the Ninth Circuit decision in *Mohamed v. Jeppesen Dataplan, Inc.*,<sup>85</sup> deviates significantly from the Fourth Circuit's reasoning in *El-Masri* and articulates a narrower standard for upholding an invocation of the state secrets privilege. In *Mohamed*, the district court dismissed a suit brought by five detainees against a Boeing subsidiary allegedly involved in the transportation of the detainees for government-directed rendition and torture.<sup>86</sup> The district court cited many of the same reasons that the courts in *El-Masri* relied on, including the need to dismiss the suit because the

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<sup>79</sup> *Privilege Hearings*, *supra* note 78, at 3.

<sup>80</sup> Jennifer Granick, *Secrecy Mustn't Crush Rule of Law*, WIRE, June 21, 2006.

<sup>81</sup> See *El-Masri v. Tenet*, 437 F. Supp. 2d 530, 535 (E.D. Va. 2006); *Privilege Hearings*, *supra* note 78, at 3. *El-Masri* is 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, 11 (D.C. Cir. 1978) (affirming a partial dismissal of a suit involving domestic surveillance issues).

<sup>82</sup> See *El-Masri v. United States*, 479 F.3d 296 (4th Cir. 2007).

<sup>83</sup> See *El-Masri v. United States*, 128 S. Ct. 373 (2007); Linda Greenhouse, *Justices Turn Aside Case of Man Accusing C.I.A. of Torture*, N.Y. TIMES, Oct. 10, 2007, at A20.

<sup>84</sup> *Privilege Hearings*, *supra* note 78, at 3.

<sup>85</sup> 563 F.3d 992 (9th Cir. 2009).

<sup>86</sup> 539 F. Supp. 2d 1128, 1130 (N.D. Cal. 2008).



subject matter at issue was itself a state secret that, if revealed, could jeopardize national security interests.<sup>87</sup> The Ninth Circuit reversed, adhering closely to the standard as articulated by the Court in *Reynolds* and rejecting the government's claims that the suit needed to be dismissed outright based on its subject matter.<sup>88</sup> The court instead remanded the case to the district court, giving the plaintiffs an opportunity to prosecute their claim without relying on privileged evidence.<sup>89</sup>

The dismissal of *El-Masri*, which was affirmed by the Fourth Circuit and was subsequently denied certiorari, in conjunction with the recent Ninth Circuit decision in *Mohamed*, make clear that Congress should step in and clarify the state secrets privilege.<sup>90</sup> The current application of the state secrets privilege raises numerous questions that require clarification: when the government can invoke the privilege, and what can be protected from disclosure;<sup>91</sup> whether it is appropriate to grant a motion to dismiss based on a state secrets claim at the initial pleadings stage;<sup>92</sup> the appropriate relief for a valid claim of the privilege;<sup>93</sup> and how deeply the court must examine the government's claim.<sup>94</sup>

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—including allegations of gross violations of the right to privacy and the right to due process—raised in current cases that were not present in *Reynolds*. Additionally, critics have noted that the nature of national security concerns has changed significantly in recent decades, and the courts' ability to

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<sup>87</sup> *Id.* at 1134-36.

<sup>88</sup> *Mohamed*, 563 F.3d at 997, 1009.

<sup>89</sup> *Id.* at 1009. The Ninth Circuit further clarified that documents considered "classified" for Freedom of Information Act purposes are not necessarily "secret" for purposes of the state secrets privilege, and that the government had the burden of establishing the need for genuine secrecy. *Id.* at 1006-08.

<sup>90</sup> 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 A18 (noting that the proposed Congressional measures were necessary given the courts' reflexive dismissal of cases involving national security issues).

<sup>91</sup> Petition for Writ of Certiorari, *supra* note 9.

<sup>92</sup> *Id.* at 17-21.

<sup>93</sup> *Id.* at 21-22.

<sup>94</sup> *Id.* at 22-24.

adjudicate cases while protecting sensitive information has improved dramatically in the decades since *Reynolds*.<sup>95</sup>

The *El-Masri* 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 been broadened inappropriately and “has become unmoored from its evidentiary origins” and now provides a type of blanket immunity for bad actions by the government.<sup>96</sup>

Indeed, the Bush administration invoked the state secrets privilege with far greater frequency, in cases of greater national significance, and sought broader immunity for alleged bad acts by the government than did previous administrations.<sup>97</sup> It also extended the ability to classify documents as “secret” to additional administrative agencies.<sup>98</sup> These claims of state secrets, as El-Masri noted, have been raised frequently at the initial pleadings stage, allowing the government to seek dismissal prior to discovery.<sup>99</sup> Further, courts often have not examined the documents over which the

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<sup>95</sup> *Id.* at 28-29 (citing the frameworks for judicial treatment of sensitive information laid out in the Freedom of Information Act, the Foreign Intelligence Surveillance Act, and the Classified Information Procedures Act).

<sup>96</sup> *Id.* at 12.

<sup>97</sup> *E.g.*, Amanda Frost, *The State Secrets Privilege and Separation of Powers*, 75 *FORDHAM L. REV.* 1931, 1939 (2007) (“The Bush Administration raised the privilege in twenty-eight percent [28%] more cases per year than in the previous decade, and has sought dismissal in ninety-two percent [92%] more cases per year than in the previous decade.”); Weaver & Pallitto, *supra* note 16, at 100 (claiming that the Bush administration is using the state secrets privilege with “offhanded abandon”). Compare Chesney, *supra* note 51, at 1252 (claiming that a survey of the invocation of the state secrets privilege in the post-*Reynolds* era indicates that “recent assertions of the privilege are not different in kind from the practice of other administrations”), with Video: Ben Wizner, Staff Attorney, ACLU, Panel Remarks at American Constitution Society for Law and Policy Discussion: The State Secrets Privilege: Time for Reform? (2008), available at <http://aclslaw.org/node/6503> (claiming that the frequent invocation of the state secrets privilege to secure dismissal at the initial pleadings stage is unique to the Bush administration).

<sup>98</sup> See Weaver & Escontrias, *supra* note 1, 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).

<sup>99</sup> See *Al-Haramain Islamic Found., Inc. v. Bush*, 451 F. Supp. 2d 1215, 1217 (D. Or. 2006); *ACLU v. NSA*, 438 F. Supp. 2d 754, 758 (E.D. Mich. 2006); *Terkel v. AT&T Corp.*, 441 F. Supp. 2d 899, 900 (N.D. Ill. 2006); *Hepting v. AT&T Corp.*, 439 F. Supp. 2d 974, 979 (N.D. Cal. 2006); see also *Edmonds v. U.S. Dep’t of Justice*, 323 F. Supp. 2d 65 (D.D.C. 2004) (invoking the privilege to terminate a whistleblower suit by an FBI translator who was retaliated against); William F. Jasper, *Shooting the Messenger*, *NEW AM.*, July 7, 2008, at 20 (detailing the level of retaliation against Sibel Edmonds and her inability to seek recourse in the courts).

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.<sup>100</sup> Given the likelihood of continued litigation raising issues of national security for the foreseeable future, re-assessing *Reynolds* in light of modern standards is necessary.<sup>101</sup>

### C. Proposed Reforms

The 2008 and 2009 proposed reforms mark the first sustained attempt by Congress to address the concerns of lawmakers, scholars, and activists to allow courts greater flexibility in their evaluation and application of the privilege while protecting sensitive government information.<sup>102</sup>

Both the 2009 Senate and House bills offer 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 (CIPA) of 1980, which established procedures for the use of classified information in criminal trials.<sup>103</sup>

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

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<sup>100</sup> Petition for Writ of Certiorari, *supra* note 9, at 14.

<sup>101</sup> Critics have argued for many years that the state secrets privilege needs to be clarified for courts to apply a consistent standard. *See, e.g.*, 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).

<sup>102</sup> Courts have held that statutes can preempt the application of the state secrets privilege. *See, e.g.*, Halpern v. United States, 258 F.2d 36, 37, 44 (2d Cir. 1958) (noting that the Invention Secrecy Act should govern the court’s treatment of sensitive evidence instead of the state secrets privilege); *In re NSA Telecomm. Records Litig.*, 564 F. Supp. 2d 1109, 1124 (N.D. Cal. 2008) (noting that the Foreign Intelligence Surveillance Act (FISA) 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 A17 (noting FISA’s limitations on executive branch activities).

<sup>103</sup> 18 U.S.C. app. 3 §§ 1-16 (2006). 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* Letter from Michael B. Mukasey, U.S. Attorney Gen., to Senator Patrick J. Leahy, Chairman of the Senate Comm. on the Judiciary (Mar. 31, 2008) [hereinafter Mukasey Letter], available at <http://www.usdoj.gov/archive/ola/views-letters/110-2/03-31-08-ag-ltr-re-s2533-state-secrets.pdf>.

clearances” to review the materials.<sup>104</sup> 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.<sup>105</sup> 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.<sup>106</sup>

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.<sup>107</sup> Judges would be prevented from dismissing cases based on the privilege before plaintiffs have had a chance to engage in evidentiary discovery,<sup>108</sup> and the level of deference to be accorded to the executive branch would change from the current standard of giving the “utmost deference”<sup>109</sup> to administration claims to one in which judges give only “substantial weight” to such claims.<sup>110</sup>

#### 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,

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<sup>104</sup> S. 417, 111th Cong. § 4052 (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. *Id.*

<sup>105</sup> *Id.* § 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. *Id.* § 4054(d)(2).

<sup>106</sup> *Id.* § 4054(e)(2)(B).

<sup>107</sup> See James Oliphant, *Committee Passes “State Secrets” Bill*, SWAMP, Apr. 24, 2008, [http://www.swamppolitics.com/news/politics/blog/2008/04/committee\\_passes\\_state\\_secrets.html](http://www.swamppolitics.com/news/politics/blog/2008/04/committee_passes_state_secrets.html) (last visited Sept. 20, 2009). S. 417 section 4054(b) 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.

<sup>108</sup> *Id.* § 4055 (“After reviewing all pertinent evidence, privileged and non-privileged, a Federal court may dismiss a claim or counterclaim on the basis of the state secrets privilege . . .”).

<sup>109</sup> “[U]tmost deference” was also the standard accorded to executive claims of privilege in *United States v. Nixon*, 418 U.S. 683, 685 (1974).

<sup>110</sup> See S. 2533, 110th Cong. § 4054(e)(3) (as reported by Senator Patrick J. Leahy, with an amendment, Aug. 1, 2008). Finally, the Attorney General would have been obligated to report to Congress within 30 calendar days “on any case in which . . . the state secrets privilege” was invoked, and any member of the House and Senate Intelligence and Judiciary Committees would have been permitted to request and examine any piece of evidence deemed protected by a court. *Id.* § 4058(a)(1).

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;<sup>111</sup> that the courts are not the appropriate decision-makers regarding national security matters;<sup>112</sup> that other aspects of S. 2533, including reporting requirements to Congress, are constitutionally suspect;<sup>113</sup> and that the proposed reforms would compromise the state secrets privilege to the detriment of national security.<sup>114</sup>

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.<sup>115</sup> Instead, the Bush administration and other critics argued that the state secrets privilege is grounded in the President's inherent executive power,<sup>116</sup> a position articulated by the Supreme Court in the dicta of *United States v. Nixon*,<sup>117</sup> and mentioned in passing in a footnote in *Reynolds*.<sup>118</sup>

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<sup>111</sup> Mukasey Letter, *supra* note 103, at 2-3.

<sup>112</sup> *Id.* at 3-4.

<sup>113</sup> *Id.* at 4-5.

<sup>114</sup> *Id.* at 5-6. The Mukasey Letter also detailed four other concerns: that the state secrets privilege is a well-settled doctrine, the *Reynolds* standard was appropriate for evaluating a claim of privilege, the proposed reforms could affect pending litigation, and the proposed amendments lacked clarity as to classification procedures. *Id.* at 1, 2, 7.

<sup>115</sup> See, e.g., *El-Masri v. Tenet*, 437 F. Supp. 2d 530, 535-36 (E.D. Va. 2006) (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*, 414 F. Supp. 2d 258 (E.D.N.Y. 2006) (No. 04-CV-249); Memorandum of Points and Authorities in Support of the United States' Assertion of the Military and State Secrets Privilege; Defendants' Motion to Dismiss or, in the Alternative, for Summary Judgment; and Defendants' Motion to Stay Consideration of Plaintiffs' Motion for Summary Judgment at 10, *ACLU v. NSA*, 438 F. Supp. 2d 754 (E.D. Mich. 2006) (No. 2:06-cv-10204) (arguing that the "privilege derives from the President's Article II powers to conduct foreign affairs and provide for the national defense"); see also Chesney, *supra* note 51, at 1308-09 (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).

<sup>116</sup> See generally JOHN YOO, *THE POWERS OF WAR AND PEACE* (2005) (arguing that inherent executive authority during wartime limits Congressional control over the conduct of war to the exercise of its spending and impeachment powers).

<sup>117</sup> *United States v. Nixon*, 418 U.S. 683, 711 (1974) ("Nowhere in the Constitution . . . is there any explicit reference to a privilege of confidentiality, yet to the extent this interest relates to the effective discharge of a President's powers, it is constitutionally based."); see *Dep't of Navy v. Egan*, 484 U.S. 518, 527 (1988) ("[The President's] authority to classify and control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to occupy a position in the Executive Branch that will give that person access to such information flows primarily from this constitutional investment of power in the President . . . .");

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 the national security [interests].”<sup>119</sup> In 2005, the Court decided *Tenet v. Doe*<sup>120</sup> and made clear the distinction between applying the state secrets privilege and deciding the threshold question of justiciability. In *Tenet*, two foreign nationals who allegedly worked on behalf of the Central Intelligence Agency (CIA) in return for the promise of financial support and residency in the United States brought claims against the CIA.<sup>121</sup> The Supreme Court dismissed the claims of the alleged agents based squarely on the justiciability doctrine announced in *Totten v. United States* rather than looking to the state secrets privilege for guidance.<sup>122</sup> In the course of its reasoning in *Tenet*, the Court clarified that the state secrets privilege addressed in *Reynolds* ought to be viewed as purely evidentiary<sup>123</sup> in nature.<sup>124</sup>

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El-Masri v. United States, 479 F.3d 296, 303-04 (4th Cir. 2007) (noting that the state secrets privilege has a “firm foundation in the Constitution”); Halkin v. Helms, 598 F.2d 1, 9 (D.C. Cir. 1978); Black v. Sheraton Corp. of Am., 371 F. Supp. 97, 100 (D.D.C. 1974) (noting that the privilege is constitutionally based to maintain an appropriate separation of powers).

<sup>118</sup> See *United States v. Reynolds*, 345 U.S. 1, 6 n.9 (1953) (noting that the government claims that the statute determining whether the government can withhold documents “is only a legislative recognition of an inherent executive power which is protected in the constitutional system of separation of power”).

<sup>119</sup> *In re United States*, 872 F.2d 472, 474 (D.C. Cir. 1989); *In re NSA Telecomm. Records Litig.*, 564 F. Supp. 2d 1109, 1118 (N.D. Cal. 2008); *Hepting v. AT&T Corp.*, 439 F. Supp. 2d 974, 980-85 (N.D. Cal. 2006); see also *Al-Haramain Islamic Found. v. Bush*, 507 F.3d 1190, 1196 (9th Cir. 2007) (“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.’” (quoting *Reynolds*, 345 U.S. at 10)).

<sup>120</sup> 544 U.S. 1 (2005).

<sup>121</sup> *Id.* at 3-5.

<sup>122</sup> *Id.* at 8-10 (relying on *Totten v. United States*, 92 U.S. 105 (1875)).

<sup>123</sup> 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 not comply with a judicial request for in camera review, but that the government does not necessarily lose its case. See Aziz Huq, Dir. Liberty & Nat’l Sec. Project, Brennan Ctr. For Justice, N.Y. Univ. Sch. of Law, Remarks at the American Constitution Society for Law and Policy Panel Discussion: The State Secrets Privilege: Time for Reform? (Apr. 4, 2008), available at <http://acslaw.org/node/6578>. The adverse inference also costs less than the remedy applied by the district court in *Reynolds*, which entered judgment for the plaintiffs upon the government’s refusal to produce the flight accident report for in camera review. *Reynolds*, 345 U.S. at 5.

<sup>124</sup> The *Tenet* Court distinguished the evidentiary privilege from the justiciability doctrine articulated in *Totten*, 92 U.S. at 107 (in which litigation was dismissed at the pleading stage in an action to enforce a secret espionage contract,

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.<sup>125</sup> For example, the government, in asking the Supreme Court not to grant El-Masri's petition for certiorari, cited *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."<sup>126</sup>

This argument relied on the premise that judges cannot adequately evaluate some issues that relate to national security matters.<sup>127</sup> The district court in *El-Masri* emphasized this purported judicial deficiency, quoting from the 1948 case of *C. & S. Air Lines v. Waterman S.S. Corp.*,<sup>128</sup> "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."<sup>129</sup>

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.<sup>130</sup> Further, the ability of the courts to

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because the government could neither confirm nor deny the contract's existence), describing *Totten* as "unique and categorical . . . a rule designed not merely to defeat the asserted claims, but to preclude judicial inquiry." *Tenet*, 544 U.S. at 6 n.4. By contrast, the Court described the state secrets privilege as dealing strictly with evidence, not justiciability. *Id.* at 9-10.

<sup>125</sup> See *United States v. Nixon*, 418 U.S. 683, 710 (1974) (reasoning that courts "traditionally show" the "utmost deference" to executive branch requests for privilege).

<sup>126</sup> Brief for the United States in Opposition at 14, *El-Masri v. United States*, 128 S. Ct. 373 (2007) (No. 06-0613), available at <http://www.fas.org/sgp/jud/statesec/elmasri-govt-opp.pdf> (citing *Nixon*, 418 U.S. at 710).

<sup>127</sup> See Chesney, *supra* note 51, at 1267-69.

<sup>128</sup> 333 U.S. 103, 111 (1948).

<sup>129</sup> *El-Masri v. Tenet*, 437 F. Supp. 2d 530, 536 n.7 (E.D. Va. 2006).

<sup>130</sup> See *Boumediene v. Bush*, 128 S. Ct. 2229, 2277 (2008) (affirming the role of the judiciary in determining constitutionality of counterterrorism measures, noting, "Security depends upon a sophisticated intelligence apparatus and the ability of our Armed Forces to act and to interdict. There are further considerations, however. Security subsists, too, in fidelity to freedom's first principles."); see also Weiser, *supra* note 68 (noting the observation of Second Circuit Judge Barrington Parker, Jr. that courts regularly weigh in on questions of foreign policy); *State Secret Protection Act of 2009: Hearing on H.R. 984 Before the Subcomm. on the Constitution, Civil Rights and*

deal with sophisticated and sensitive matters of national importance has increased dramatically since the *Reynolds* decision.<sup>131</sup> 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<sup>132</sup> 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.<sup>133</sup> Any President who subscribes to a robust view of a unilateralist unitary executive theory<sup>134</sup>—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

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*Civil Liberties*, 111th Cong. 24-25 (2009) (statement of Hon. Patricia M. Wald, Retired C.J., U.S. Court of Appeals for the District of Columbia) (asserting that federal courts are capable of handling sensitive information related to national security issues). Federal courts have dealt effectively with serious national security issues, such as terrorism, for many years. *E.g.*, *United States v. Yousef*, 327 F.3d 56, 171 (2d Cir. 2003) (affirming convictions for conspiracy to attack the World Trade Center in 1993); *United States v. McVeigh*, 153 F.3d 1166, 1176 (10th Cir. 1998) (affirming the death sentence for Timothy McVeigh for his role in the 1993 Oklahoma City bombing).

<sup>131</sup> Various developments have contributed to this trend. One development includes the 1958 amendments to the Federal Housekeeping Statute, 5 U.S.C. § 301 (2006). *See Exxon Shipping Co. v. U.S. Dep't of the Interior*, 34 F.3d 774, 777 (9th Cir. 1994) (“According to the legislative history of the 1958 amendments, Congress was concerned that the statute had been twisted from its original purpose as a ‘housekeeping’ statute into a claim of authority to keep information from the public and, even, from the Congress. 1958 U.S.C.C.A.N. 3352 (1958).” (citation omitted) (internal quotation marks omitted)); *id.* (“The House Report accompanying the 1958 amendment explained that the proposed amendment would ‘correct’ a situation that had arisen in which the executive branch was using the housekeeping statute as a substantive basis to withhold information from the public. H.R. REP. NO. 85-1461, at 2 (1958).”). Other developments include 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 19, at 124-64; THE CONSTITUTION PROJECT, REFORMING THE STATE SECRETS PRIVILEGE 5 (2007), available at <http://www.constitutionproject.org/manage/file/52.pdf>.

<sup>132</sup> *See Mukasey Letter, supra* note 103, at 4-5.

<sup>133</sup> *See State Secrets Protection Act*, S. 417, 111th Cong. § 2(a) (2009) (to be codified at 28 U.S.C. § 4058).

<sup>134</sup> *See Setty, supra* note 46, at 596-98.



avoidance.<sup>135</sup> If Congress attempted 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.<sup>136</sup> 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.<sup>137</sup>

Fourth, the administration raised the concern that the proposed reforms, if enacted, would lead to the disclosure of

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<sup>135</sup> Constitutional avoidance in the executive context has been understood 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. *See* Trevor Morrison, *Constitutional Avoidance in the Executive Branch*, 106 COLUM. L. REV. 1189, 1218-19, 1230 (2006) (critiquing the OLC's use of avoidance to assert more presidential power than is granted under law). Congress 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, Pub. L. No. 107-273 § 202, 116 Stat. 1758, 1771 (codified at 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. *See, e.g.*, Statement on Signing the 21st Century Dep't of Justice Appropriations Authorization Act, 38 WEEKLY COMP. PRES. DOC. 1971, 1971 (Nov. 2, 2002) (noting that § 530(D) "purports to impose on the executive branch substantial obligations for reporting to the Congress activities of the Department of Justice involving challenges to or nonenforcement 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. *E.g.*, OLC Reporting Act of 2008, S. 3501, 110th Cong. § 2 (2008) (introduced by Sens. Feingold and Feinstein); Office of Legal Counsel Reporting Act of 2008, H.R. 6929, 110th Cong. § 2 (2008) (introduced by Rep. Miller). Both bills propose amendments to 28 U.S.C. § 530(D) to obligate 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.

<sup>136</sup> Morrison, *supra* note 135, 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. *Department of Justice Oversight: Hearing Before the S. Comm. on the Judiciary*, 110th Cong. 5, 13-14 (2007) [hereinafter *Oversight Hearing Transcript*] (statements of Chairman Sen. Leahy and Att'y Gen. Gonzales). Senator Arlen 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. *Id.* at 13.

<sup>137</sup> 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. *See* S. REP. NO. 110-442, at 33-35 (2008). Thus, an administration intent on using the avoidance doctrine might do so in the context of this congressional reporting requirement.

more state secrets and compromise national security as a result.<sup>138</sup> 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*<sup>139</sup>—to the higher standard that disclosure is “reasonably likely to cause significant harm” to national security.<sup>140</sup> 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,<sup>141</sup> it offered no evidence supporting such a claim.<sup>142</sup> Further, although then-Attorney General Mukasey

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<sup>138</sup> The court in *El-Masri* acknowledged the potential danger to national security in disclosing state secrets during litigation. 437 F. Supp. 2d 530, 537 (E.D. Va. 2006) (“[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.”).

<sup>139</sup> *United States v. Reynolds*, 345 U.S. 1, 101 (1953).

<sup>140</sup> See State Secrets Protection Act, S. 417, 111th Cong. § 2(a) (2009) (to be codified at 28 U.S.C. § 4051).

<sup>141</sup> See Setty, *supra* note 46, at 612; Prepared Statement of Hon. Alberto R. Gonzales, Attorney General of the United States (2006), available at [http://www.fas.org/irp/congress/2006\\_hr/020606gonzales.html](http://www.fas.org/irp/congress/2006_hr/020606gonzales.html); Heidi Kitrosser, *Congressional Oversight of National Security Activities: Improving Information Funnels*, 29 CARDOZO L. REV. 1049, 1056 (2008) (“[T]he 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 survey their conversations, knowing about the program would remind them of this fact and might lead them to infer that surveillance is broader than they had assumed.” (footnotes omitted)); Bruce Ackerman, *Terrorism and the Constitutional Order*, 75 FORDHAM L. REV. 475, 478-79 (2006) (arguing that the rhetoric surrounding the war on terror encourages a public and congressional overreaction of ceding powers to the President); see also Joby Warrick & Dan Eggen, *Hill Briefed on Waterboarding in 2002*, WASH. POST, Dec. 9, 2007, at A1 (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.).

<sup>142</sup> See Setty, *supra* note 46, at 613 (noting that repeated claims by the Bush administration that Office of Legal Counsel opinions could not be disclosed because of a purported risk to national security were unsupported and ultimately undermined by

framed the reforms as creating a “Hobson’s Choice of either disclosing classified activities or losing cases,”<sup>143</sup> this overstates the effect of overhauling the *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 *Reynolds* standard was preferable to creating a stronger judicial oversight mechanism. To date, the common application of *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 *Reynolds* has engendered. To evaluate whether *Reynolds* and its progeny offer the appropriate standard to apply,<sup>144</sup> 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 arose from international sources but has evolved independently, particularly since the *Reynolds* decision in 1953. Both the English and Scottish origins of the 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. *The U.K. Origins of the U.S. State Secrets Privilege*

Although precedent from England was not the only legal basis for the *Reynolds* decision, it played an instrumental role for the Supreme Court, which had little domestic doctrine to

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the Bush administration’s own eventual disclosure of the legal policies); Editorial, *Politics, Pure and Cynical*, N.Y. TIMES, Mar. 14, 2007, at A22.

<sup>143</sup> Mukasey Letter, *supra* note 103, at 6.

<sup>144</sup> *Id.* at 1-2, 7 (arguing that *Reynolds* and the cases following that have been deferential to the executive branch articulate the appropriate standard for determining claims of the state secrets privilege).

rely upon. However, what the *Reynolds* court viewed as simply English precedent actually represented two distinct and, to some extent, contrary legal precedents from England and Scotland.

### 1. English Precedent

The first indication that crown privilege<sup>145</sup> extended to protect the government against disclosure of state secrets can be found during the reign of Charles I of England.<sup>146</sup> The heart of the privilege is to protect the public interest by keeping sensitive information out of public purview.<sup>147</sup> In Charles I's time, the privilege was used to prevent courts from gaining jurisdiction over habeas corpus claims of prisoners unless the Crown agreed to show cause for the detention.<sup>148</sup> This was a controversial proposition since habeas rights had existed since the time of the Magna Carta.<sup>149</sup> 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.<sup>150</sup>

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.<sup>151</sup> However, the notion of a state secrets privilege over security-related information was established and uncontested by Parliament or the courts in future years.<sup>152</sup> Still, the scope and parameters of the privilege remained murky even through the 1800s: while some judges believed that a court could invoke the privilege *sua sponte* even absent a

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<sup>145</sup> Crown privilege is one of the crown prerogatives, defined by Blackstone as "those [powers] which [the crown] enjoys alone." 1 WILLIAM BLACKSTONE, COMMENTARIES 266, 269 (London, A. Strahan & W. Woodfall, 12th ed. 1793-95).

<sup>146</sup> Weaver & Escontrias, *supra* note 1, at 13.

<sup>147</sup> *Id.* at 14-15.

<sup>148</sup> *Id.* at 17.

<sup>149</sup> *Id.* at 19 (citing Magna Carta ¶ 39 (1215)).

<sup>150</sup> *Id.* at 22.

<sup>151</sup> *Id.* at 23.

<sup>152</sup> *Id.* at 23-26 (citing *Trial of the Seven Bishops*, 12 How. St. Tr. 183, 309-11 (1688) (refusing 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) (denying a witness's request to have Privy Council proceedings revealed in court); *Bishop Atterbury's Case*, 16 How. St. Tr. 323, 495 (1723) (precluding testimony before the House of Lords regarding encrypted communications); *The Trial of Maha Rajah Nundocomar*, 20 How. St. Tr. 923, 1057 (1775) (denying the claim of privilege over Privy Council records)).

government claim of privilege,<sup>153</sup> others 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.<sup>154</sup>

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*,<sup>155</sup> 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.”<sup>156</sup> *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.<sup>157</sup>

The doctrine of the state secrets privilege was not substantially revisited until the 1942 case of *Duncan v. Cammel, Laird & Co.* (“*Cammel Laird*”),<sup>158</sup> a key case cited to support an expansive reading of the privilege by the *Reynolds* court. In *Cammel Laird*, the House of Lords followed 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 ninety-nine people.<sup>159</sup> The families of the sailors who had been killed claimed damages from the builders, Cammel, Laird & Co.

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<sup>153</sup> *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* *Chesney*, *supra* note 51, at 1275-76; *Weaver & Escontrias*, *supra* note 1, at 28.

<sup>154</sup> *Gugy v. Maguire*, 13 Low. Can. 33, 38 (1863) (Mondolet, J., dissenting) (“I can not, 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.”).

<sup>155</sup> (1860) 157 Eng. Rep. 1415.

<sup>156</sup> *Id.* at 1421.

<sup>157</sup> *Id.* at 1421-22 (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”).

<sup>158</sup> [1942] A.C. 624 (H.L.).

<sup>159</sup> *Id.* at 625-26.

The House of Lords upheld an affidavit issued by the British Admiralty claiming that public interest immunity precluded disclosure of the plans of the submarine,<sup>160</sup> 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.”<sup>161</sup> The Lords further held that if a government officer offers a good faith affidavit as to the need for nondisclosure, then “the judge ought not to compel the production of it.”<sup>162</sup>

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.<sup>163</sup> Counsel for the government said that it was not, relying on the Scottish case of *Earl v. Vass*<sup>164</sup> 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 the government’s good faith determination of nondisclosure was sufficient.<sup>165</sup> The *Cammell 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 that such an imbalance was necessary to preserve the public interest.<sup>166</sup>

The *Cammell Laird* court also looked at *Admiralty Commissioners v. Aberdeen Steam Trawling*,<sup>167</sup> in which the Inner House of the Court of Session “insisted that the view of the government department was final.”<sup>168</sup> The *Cammell Laird* court also relied upon the reasoning of *Aberdeen Steam* to support the conclusion that the government was better suited to make the final determination of privilege because a court

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<sup>160</sup> *Id.* 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.*

<sup>161</sup> *Id.* at 641 (internal quotations omitted).

<sup>162</sup> *Id.* at 639.

<sup>163</sup> *Id.* at 627-28.

<sup>164</sup> (1822) 1 Shaw 229.

<sup>165</sup> *Cammell Laird*, [1942] A.C. at 631-32.

<sup>166</sup> *Id.* at 633.

<sup>167</sup> *Admiralty Comm’rs v. Aberdeen Steam Trawling & Fishing Co.*, (1908) 1909 S.C. 335 (Scot. 1st Div.).

<sup>168</sup> *Cammell Laird*, [1942] A.C. at 639-40.

may find certain information “innocuous,” whereas government officials who properly understand the context of the information would know better<sup>169</sup>—one of the same arguments offered by the Bush administration in opposition to the Senate’s current proposed reforms.<sup>170</sup>

The appellants argued that the Lords should undertake an 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.<sup>171</sup> 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.<sup>172</sup> The Lords found neither argument persuasive,<sup>173</sup> 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.”<sup>174</sup>

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;”<sup>175</sup> and second, that *Cammel Laird*’s rationale was faulty because it erroneously relied on the Scottish case law<sup>176</sup> to defend a broad, deferential state secrets privilege.<sup>177</sup> 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.<sup>178</sup>

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<sup>169</sup> *Id.* at 640-41.

<sup>170</sup> See Mukasey Letter, *supra* note 103, at 3-4. Mukasey argued that national security officials “occupy a position superior to that of the courts in evaluating the consequences of a release of sensitive information.” *Id.* at 3 (internal quotation marks omitted).

<sup>171</sup> *Cammel Laird*, [1942] A.C. at 627-28.

<sup>172</sup> *Id.* at 628.

<sup>173</sup> *Id.* at 636-38 (noting the need for a broad public interest immunity to encourage unhindered discussion among government officials).

<sup>174</sup> *Id.* at 641.

<sup>175</sup> ROBERT STEVENS, *THE ENGLISH JUDGES: THEIR ROLE IN THE CHANGING CONSTITUTION* 27 (Hart 2d ed. 2005).

<sup>176</sup> *Earl v. Vass*, (1822) 1 S.C. (S.) 229.

<sup>177</sup> *Weaver & Escontrias*, *supra* note 1, at 31-32.

<sup>178</sup> *Id.* at 32.

## 2. Scottish Precedent

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.<sup>179</sup>

In fact, the application of the state secrets privilege in Scotland has 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.<sup>180</sup> 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.<sup>181</sup> On the other hand, when applying this balancing standard on a case-by-case basis, Scottish courts stated that the party seeking sensitive information was required to show a significant level of necessity for the court to order disclosure.<sup>182</sup>

Both *Vass* and *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 *Cammel Laird* that Scottish law on the application of the privilege differed greatly from English law by assigning a much greater role for the judiciary. Nonetheless, the English court conflated the English and Scottish standards in *Cammel Laird*, arguably creating the faulty standard that set the stage for *Reynolds*.

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<sup>179</sup> *E.g.*, *Whitehall v. Whitehall*, [1957] S.C. (H.L.) 30, 37-38.

<sup>180</sup> See 19 W.M. MORISON, DECISIONS OF THE COURT OF SESSIONS 7905 (1804) (discussing the *Stevens* case).

<sup>181</sup> See *Leven v. Young*, (1818) 1 Murray 350, 370 (Scot. 1st Div.).

<sup>182</sup> Weaver & Escontrias, *supra* note 1, at 37 (citations omitted).



B. *History of the U.S. State Secrets Privilege*

Prior to *Reynolds*, U.S. jurisprudence on the state secrets privilege was limited and vague, and failed to set forth a standardized doctrine 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 *Reynolds*,<sup>183</sup> but some evidence does exist that courts accepted the general notion of executive privilege, albeit in the specific context of an informer's privilege<sup>184</sup> and deliberative privilege,<sup>185</sup> not a state secrets privilege. As early as *Marbury v. Madison*, the Court mentions the existence of presidential prerogatives not delineated in the Constitution,<sup>186</sup> 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.<sup>187</sup> Ironically, *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.

Soon after *Marbury*, the Court in *United States v. Burr*, in analyzing the defendant's constitutional right to subpoena witnesses and evidence in support of his defense, noted that the government's right to refuse disclosure of evidence did not turn on whether revealing the document would "endanger the public safety."<sup>188</sup> However, the question of government nondisclosure did not actually arise in *Burr*.<sup>189</sup> The Jefferson administration did not attempt to withhold any documents

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<sup>183</sup> *Id.* at 43.

<sup>184</sup> Chesney, *supra* note 51, at 1280 (describing an informer's privilege as one which "shields evidence of communications between informers and government officials to encourage such disclosures").

<sup>185</sup> *Id.* at 1274 (describing the deliberative process privilege as one which "provides qualified protection to some government communications to facilitate internal discussions and operations").

<sup>186</sup> 5 U.S. (1 Cranch) 137, 169-70 (1803).

<sup>187</sup> Weaver & Escontrias, *supra* note 51, at 40.

<sup>188</sup> *United States v. Burr*, 25 F. Cas. 30, 37 (C.C.D. Va. 1807) (No. 14,682d).

<sup>189</sup> 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 51, at 1272-73.

from production to the court;<sup>190</sup> the court stated both that “it need only be said that the question [of invoking a privilege to prevent disclosure of evidence] does not occur at this time,”<sup>191</sup> and that “[i]f [a document] does contain any matter which it would be imprudent to disclose, which it is not the wish of the executive to disclose, such matter, if it be not immediately and essentially applicable to the point, will, of course, be suppressed.”<sup>192</sup> Almost twenty 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.”<sup>193</sup>

The nature of a state secrets privilege remained relatively static until the 1875 Supreme Court decision of *Totten v. United States*.<sup>194</sup> The plaintiff in *Totten* brought suit to enforce an alleged government contract for espionage during the Civil War;<sup>195</sup> 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 itself regards as confidential, and respecting which it will not allow the confidence to be violated.”<sup>196</sup> *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.<sup>197</sup>

However, the relevance of *Totten* to the state secrets privilege is open to debate. Although the *Reynolds* Court cited

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<sup>190</sup> Weaver & Escontrias, *supra* note 1, at 46 (citing 11 THE WRITINGS OF THOMAS JEFFERSON 241 (Thomas Jefferson Mem'l Ass'n of the U.S., 1904)).

<sup>191</sup> *Burr*, 25 F. 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 present[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).

<sup>192</sup> *Burr*, 25 F. Cas. at 37.

<sup>193</sup> See Chesney, *supra* note 51, at 1273-75 (citing THOMAS STARKIE, A PRACTICAL TREATISE ON THE LAW OF EVIDENCE AND DIGEST OF PROOFS IN CIVIL AND CRIMINAL PROCEEDINGS 106 (Boston, Wells & Lilly ed. 1826)).

<sup>194</sup> 92 U.S. 105 (1875).

<sup>195</sup> *Id.* at 105-06.

<sup>196</sup> *Id.*

<sup>197</sup> Some describe *Totten* as standing for a narrow doctrine covering espionage agreements, and distinguishable from the state secrets doctrine. See Ilann M. Maazel, *The State Secrets Privilege*, N.Y. L.J., Jul. 24, 2008, at 3.

to *Totten* as evidence that an evidentiary privilege against revealing state secrets existed,<sup>198</sup> the Supreme Court stated unequivocally in 2005 that *Totten* does not involve the state secrets privilege.<sup>199</sup> 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.<sup>200</sup>

Even setting *Totten* aside as distinct from the state secrets privilege,<sup>201</sup> the application of a national security-related privilege is found in several cases in the early twentieth century.<sup>202</sup> Other national-security cases involved the invocation of a state secrets privilege in the criminal context. For example, in *United States v. Haugen*,<sup>203</sup> 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.<sup>204</sup> 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 questions of state secrets increased significantly, largely due to the enactment of the Federal Tort Claims Act,<sup>205</sup> which permitted individuals to sue the government for allegedly tortious conduct. This development set the stage for the

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<sup>198</sup> *United States v. Reynolds*, 345 U.S. 1, 6-7 (1952).

<sup>199</sup> *See Tenet v. Doe*, 544 U.S. 1, 10 (2005).

<sup>200</sup> *See id.* 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.

<sup>201</sup> *But see Chesney*, *supra* note 51, at 1278 (arguing that *Totten* is properly viewed as part of the spectrum of possible determinations after a government claim of state secrets privilege).

<sup>202</sup> *E.g.*, *Pollen v. United States*, 85 Ct. Cl. 673, 674, 680-81, 684 (Ct. Cl. 1937) (dismissing a suit involving gun designs); *Pollen v. Ford Instrument Co.*, 26 F. Supp. 583, 583, 585-86 (E.D.N.Y. 1939) (citing *Totten* in the decision to deny a discovery request); *Firth Sterling Steel Co. v. Bethlehem Steel Co.*, 199 F. 353, 355 (E.D. Pa. 1912) (citing *Totten* in the decision to dismiss a suit involving the designs for armor-piercing projectiles).

<sup>203</sup> 58 F. Supp. 436 (E.D. Wash. 1944), *aff'd*, 153 F.2d 850 (9th Cir. 1946).

<sup>204</sup> *Id.* at 438.

<sup>205</sup> 28 U.S.C. §§ 1346(b), 2671-2680 (2006).

Supreme Court to establish a standard for the state secrets privilege in the seminal case of *United States v. Reynolds*.<sup>206</sup>

The early 1970s saw an increase in the number of lawsuits in which the government invoked the state secrets privilege.<sup>207</sup> This trend was fueled by several factors. In 1971 the Supreme Court held in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics* that private litigants could seek compensation for the government's constitutional violations, which opened the door for numerous types of lawsuits against the government.<sup>208</sup> Further, the Watergate scandal broke and propelled a massive push for government accountability, including the fortification of the Freedom of Information Act,<sup>209</sup> the establishment of additional congressional oversight mechanisms, and the passage of the Foreign Intelligence Surveillance Act.<sup>210</sup>

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.<sup>211</sup> The problem faced by courts has been determining which of these 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 *in camera* review of documents over which the privilege has been claimed in only about twenty percent of state secrets privilege cases.<sup>212</sup>

In the post-September 11, 2001 era, the question of proper invocation of the state secrets privilege resurfaced, particularly in light of controversial programs such as warrantless surveillance and extraordinary rendition. Some of

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<sup>206</sup> 345 U.S. 1 (1953).

<sup>207</sup> See Chesney, *supra* note 51, at 1292-93 (listing several cases during the 1970s in which the state secrets privilege was invoked).

<sup>208</sup> See 403 U.S. 388, 392 (1971) (citations omitted).

<sup>209</sup> 5 U.S.C. § 552 (1976).

<sup>210</sup> Pub. L. No. 95-511, 92 Stat. 1783 (codified at 50 U.S.C. § 1801) (1978).

<sup>211</sup> Posting of Bill Weaver to National Security Advisors Blog, [http://natseclaw.typepad.com/natseclaw/2007/05/ok\\_lets\\_stop\\_ta.html](http://natseclaw.typepad.com/natseclaw/2007/05/ok_lets_stop_ta.html) (May 16, 2007, 23:04).

<sup>212</sup> *Id.*; see also Ryan Singel, *Feds Go All Out to Kill Spy Suit*, WIRED.COM, May 2, 2006, <http://www.wired.com/politics/security/news/2006/05/70785> (quoting Stephen Aftergood, director of the Project on Government Secrecy, as saying that the lack of *in camera* inspections reflects a “judicial lack of self-confidence in the fact of national security claims made by the executive branch”).

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,<sup>213</sup> somewhat akin to the situation in *Reynolds*. Other cases involved government contracting and business management issues,<sup>214</sup> or internal policies and procedures arguably related to national security.<sup>215</sup> 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.<sup>216</sup>

### 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 Part also examines how countries facing significant national

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<sup>213</sup> *E.g.*, *Crater Corp. v. Lucent Techs., Inc.*, 423 F.3d 1260, 1262-63 (Fed. Cir. 2005); *McDonnell Douglas Corp. v. United States*, 323 F.3d 1006, 1010 (Fed. Cir. 2003) (upholding the claim of state secrets privilege); *DTM Research, LLC v. AT&T Corp.*, 245 F.3d 327 (4th Cir. 2001) (upholding claim of state secrets privilege and quashing a subpoena for government's information on data mining); *United States ex rel. Schwartz v. TRW, Inc.*, 211 F.R.D. 388, 393-94 (C.D. Cal. 2002) (holding that the government had not met the technical requirements of the *Reynolds* standard).

<sup>214</sup> *E.g.*, *Sterling v. Tenet*, 416 F.3d 338, 341 (4th Cir. 2005) (upholding claim of privilege to dismiss a Title VII complaint related to employment discrimination); *Monarch Assurance P.L.C. v. United States*, 244 F.3d 1356, 1357 (Fed. Cir. 2001) (upholding claim of privilege to dismiss a complaint related to fraudulent contracting); *see also Tenet v. Doe*, 544 U.S. 1, 11 (2005) (dismissing the complaint based on the precedent of *Totten*, not on the state secrets privilege *per se*).

<sup>215</sup> *E.g.*, *Tenenbaum v. Simonini*, 372 F.3d 776, 777-78 (6th Cir. 2004) (affirming summary judgment in a case alleging religious discrimination as the motivation for a counterintelligence operation); *Darby v. U.S. Dep't of Def.*, 74 Fed. App'x 813, 814 (9th Cir. 2003) (affirming summary judgment in a whistleblower suit); *Trulock v. Lee*, 66 Fed. App'x 472, 473-78 (4th Cir. 2003) (affirming dismissal of complaint in a case alleging defamation during a counterintelligence operation); *Burnett v. Al Baraka Inv. & Dev. Corp.*, 323 F. Supp. 2d 82, 84 (D.D.C. 2004) (quashing, in part, deposition subpoena in whistleblower's claim regarding security breaches); *Edmonds v. U.S. Dep't of Justice*, 323 F. Supp. 2d 65, 67, 81-82 (D.D.C. 2004) (dismissing complaint in whistleblower case).

<sup>216</sup> *See Al-Haramain Islamic Found., Inc. v. Bush*, 507 F.3d 1190, 1192-93 (9th Cir. 2007); *El-Masri v. Tenet*, 437 F. Supp. 2d 530, 532-33 (E.D. Va. 2006).

security challenges that rely heavily on U.K. precedent—such as Israel and India—deal with questions of state secrets during litigation.<sup>217</sup>

#### A. *Scotland*

In the years after *Reynolds* was decided, Scottish courts clarified that *Vass*—albeit misread by the English court in *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.<sup>218</sup> 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.<sup>219</sup>

*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,”<sup>220</sup> 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].”<sup>221</sup>

This distinction between the Scottish and English approaches was revisited in *Conway v. Rimmer* in 1968.<sup>222</sup> 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

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<sup>217</sup> India and Israel provide useful comparative examples because they are functioning democratic nations with constitutionally mandated separation of powers, they face serious ongoing national security threats, and, like the United States in the context of the state secrets privilege, derive some legal processes from the United Kingdom.

<sup>218</sup> *E.g.*, *Conway v. Rimmer*, [1968] A.C. 910, 960-61 (H.L.).

<sup>219</sup> *Whitehall v. Whitehall*, [1957] S.C. (H.L.) 30, 37 (citing *Glasgow v. Cent. Land Bd.*, [1956] S.C. (H.L.) 1, 11).

<sup>220</sup> *Glasgow*, [1956] S.C. at 9-10.

<sup>221</sup> *Id.* at 11.

<sup>222</sup> *Conway*, [1968] A.C. 910.

ordering the production.”<sup>223</sup> The court ultimately decided, despite the government’s affidavit to the contrary, that any harm from disclosure was minimal, and that the documents in question should be produced, as they were “vital to the litigation.”<sup>224</sup>

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 involving issues of public interest.<sup>225</sup> 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.”<sup>226</sup> In creating a more detailed approach to the balancing test, the court openly acknowledged that “[i]mmunity from unauthorised disclosure and from accountability are two sides of the same coin,”<sup>227</sup> which informs the Court’s careful and narrow approach to applying the privilege.

The *Conway* court also specifically undertook a dissection of the *Cammell Laird*<sup>228</sup> opinion that conflated the English and Scottish standards, concluding that the *Cammell Laird* court’s determination to uphold the claim of public interest privilege was correct, but that the muddling of the Scottish standard was not.<sup>229</sup> The Lords ultimately concluded that:

it is worth remembering that the conclusion [in *Cammell 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

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<sup>223</sup> *Id.* at 911.

<sup>224</sup> *Id.* at 911, 918. The court noted that there is no case in which the executive becomes the “final arbiter of the privilege claimed,” since that right is reserved solely for the court. *Id.* at 918. The court also reaffirmed its right to examine documents in camera in order to make its privilege determination. *Id.*

<sup>225</sup> *Id.* at 920, 937.

<sup>226</sup> *Conway*, [1968] A.C. at 923.

<sup>227</sup> *Id.* at 924.

<sup>228</sup> *Duncan v. Cammell, Laird & Co.*, [1942] A.C. 624.

<sup>229</sup> *Conway*, [1968] A.C. at 938.

prevails since the decision of this House in *Glasgow Corporation v. Central Land Board*.<sup>230</sup>

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 deference toward government claims for a public interest immunity certificate is the 1983 case of *Air Canada v. Secretary of State for Trade*,<sup>231</sup> in which 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.<sup>232</sup> The lower court decided to examine the documents in camera, which led to an interlocutory appeal by the government.<sup>233</sup> 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.<sup>234</sup>

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 is 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 upholding the claim of privilege) with regard to the evidence in question and allow the plaintiff

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<sup>230</sup> *Id.* at 977.

<sup>231</sup> (1983) 2 A.C. 394 (H.L.) (appeal taken from Eng.) (U.K.).

<sup>232</sup> *Id.* at 394.

<sup>233</sup> *Id.* at 395.

<sup>234</sup> *Id.*



to continue its case if possible without the benefit of the evidence in question.

However, the ongoing U.K. case of Binyam Mohamed highlights the complexities of such deference to the executive branch, and how political and foreign policy considerations can undermine government accountability for alleged human rights abuses.

Binyam Mohamed is a British resident who traveled to Afghanistan in 2001.<sup>235</sup> According to Mohamed, he traveled to escape a lifestyle that led to drug addiction in England.<sup>236</sup> According to U.S. authorities, Mohamed trained with the Taliban in Afghanistan to prepare for an attack within the United States.<sup>237</sup> Mohamed was arrested in Pakistan in 2002 as he attempted to return to the U.K.; he claims that he was then detained and tortured in Pakistan, and then transported to Morocco, where he was held incommunicado and tortured repeatedly during the following eighteen months.<sup>238</sup> 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<sup>239</sup> until February 2009.<sup>240</sup>

Mohamed and others alleging they were subjected to extraordinary rendition by the United States filed suit in California in 2007 against the company that operated the airplanes which transported the detainees to various detention centers around the world.<sup>241</sup> In May 2008, the United States charged Mohamed under the Military Commissions Act<sup>242</sup> with

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<sup>235</sup> *Profile: Binyam Mohamed*, BBCNEWS.COM, Feb. 23, 2009, [http://news.bbc.co.uk/2/hi/uk\\_news/7870387.stm](http://news.bbc.co.uk/2/hi/uk_news/7870387.stm).

<sup>236</sup> *Id.*

<sup>237</sup> *Id.*

<sup>238</sup> *Id.* Mohamed alleges that he was beaten, scalded and cut with a scalpel by his captors. *See id.*

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

<sup>240</sup> Raymond Bonner, *Detainee Who Claims Abuse to Return to Britain*, N.Y. TIMES, Feb. 22, 2009, at A5.

<sup>241</sup> Amended Complaint at 1-6, *Mohamed v. Jeppesen Dataplan, Inc.*, 563 F.3d 992 (9th Cir. 2009) (No. 07-2798).

<sup>242</sup> 10 U.S.C. §§ 948-950 (2006).

conspiracy to commit terrorism,<sup>243</sup> relying on confessions which Mohamed alleged were elicited under the threat of torture.<sup>244</sup>

Mohamed's attorneys began separate proceedings in English courts seeking release of evidence in the possession of the British government that the United States had compiled against Mohamed.<sup>245</sup> 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.<sup>246</sup>

The Divisional Court of the Queen's Bench Division reconsidered in early 2009 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.<sup>247</sup> The public interest immunity certificate asserted that the summary report must remain undisclosed because the U.S government had threatened to "re-evaluate its intelligence sharing relationship with the United

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<sup>243</sup> This proceeding was later dropped, as the convening judge determined the prosecution could not proceed without the use of evidence obtained through torture. See William Glaberson, *U.S. Drops Charges for 5 Guantanamo Detainees*, N.Y. TIMES, Oct. 21, 2008, at A1.

<sup>244</sup> Mohamed v. Sec'y of State for Foreign and Commonwealth Affairs, [2008] EWHC (Admin) 2048, [38]-[47] (Eng.).

<sup>245</sup> *Profile: Binyam Mohamed*, *supra* note 235. In May 2007, Mohamed and several other plaintiffs brought suit against the Boeing subsidiary that allegedly organized the "torture flights" of detainees subjected to extraordinary rendition, alleging the company's complicity in torture and other human rights abuses. See Amended Complaint, *supra* note 241, at 4-6. That suit was initially dismissed based on the George W. Bush administration's assertion of the state secrets privilege. Mohamed v. Jeppesen Dataplan, Inc., 539 F. Supp. 2d 1128, 1134-1136 (N.D. Cal. 2008) (relying on *Al-Haramain* and *El-Masri*). The plaintiffs appealed this judgment to the Ninth Circuit Court of Appeals, which heard argument on the matter in February 2009. Mohamed v. Jeppesen Dataplan, 563 F.3d 992 (9th Cir. 2009), *amended and superseded by* 579 F.3d 943 (9th Cir. 2009). At that point, representatives of the Obama administration reiterated the Bush administration argument that the suit was properly dismissed based on the invocation of the state secrets privilege. See John Schwartz, *Obama Backs Off a Reversal on Secrets*, N.Y. TIMES, Feb. 10, 2009.

<sup>246</sup> Mohamed v. Sec'y of State for Foreign and Commonwealth Affairs, [2008] EWHC (Admin) 2048, [150]-[160] (Eng.).

<sup>247</sup> 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 Mohamed v. Secretary of State for Foreign and Commonwealth Affairs, [2009] EWHC (Admin) 152, [14] (Eng.).

Kingdom” and possibly withhold vital national security information from the United Kingdom should the summary be disclosed to Mohamed’s attorneys.<sup>248</sup>

The English 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.”<sup>249</sup> 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.<sup>250</sup>

The English court took pains to detail all of the reasons that disclosure was desirable, including upholding the rule of law,<sup>251</sup> comporting with international and supranational standards,<sup>252</sup> ensuring that allegations of serious criminality are not dismissed inappropriately,<sup>253</sup> maintaining accountability over the executive branch of government,<sup>254</sup> and protecting the public and media interest in disclosure of government activities.<sup>255</sup> The court also appeared surprised that the United States government was apparently interfering in a matter of government accountability in another country.<sup>256</sup>

In applying the test, the court relied heavily on its long-standing precedent of offering deference to the executive

<sup>248</sup> *Id.* [62].

<sup>249</sup> *Id.* [18] (noting that this case revolved around a question of the rule of law, not around the rights of an individual litigant).

<sup>250</sup> *Id.* [34] (citing *R v. H*, [2004] 2 A.C. 134, [38(3)]).

<sup>251</sup> *Id.* [18], [19].

<sup>252</sup> *See Mohamed*, [2009] EWHC (Admin) 152, [20], [21], [26], [101]-[105].

<sup>253</sup> *Id.* [25(iv)], [25(ix)].

<sup>254</sup> *Id.* [32].

<sup>255</sup> *Id.* [37] (“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.”).

<sup>256</sup> *Id.* [67]-[72]. The court noted:

[I]n 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 any 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.

*Id.* at [69].

branch in matters of national security.<sup>257</sup> The court found that the Foreign Secretary acted in good faith in issuing the public interest immunity certificate;<sup>258</sup> that an opportunity for government accountability may still exist with ongoing investigations within the U.K. into Mohamed's allegations;<sup>259</sup> and that the position of the U.S. government had not changed with the change of presidential administrations.<sup>260</sup> The court then decided that there was no basis on which it could question the Foreign Secretary's issuance of the public interest immunity certificate.<sup>261</sup>

In an extremely unusual move, the court re-opened its ruling on public interest immunity and in October 2009 reversed its previous decision to withhold the information regarding Mohamed's treatment by the U.S. government.<sup>262</sup> The court reasoned that there was an extremely low likelihood that the Obama administration would actually withhold important intelligence from the U.K. government,<sup>263</sup> and noted that "a vital public interest requires, for reasons of democratic accountability and the rule of law in the United Kingdom, that a summary of the most important evidence relating to the British security services in wrongdoing be placed in the public domain in the United Kingdom."<sup>264</sup>

The series of U.K. court decisions in the *Mohamed* case reflects both the strength of English precedent that mandates a

<sup>257</sup> See *Mohamed*, [2009] EWHC (Admin) 152, [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." *Id.* [66].

<sup>258</sup> *Id.* [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). See *Ministers Face Torture Pressure*, BBCNEWS.COM, Feb. 4, 2009, [http://news.bbc.co.uk/2/hi/uk\\_news/politics/7870049.stm](http://news.bbc.co.uk/2/hi/uk_news/politics/7870049.stm) (noting that Foreign Secretary David Miliband denied that the U.S. made a threat; Miliband instead stated that the U.S.-U.K. security relationship was based on trust and the trust depended on intelligence remaining confidential).

<sup>259</sup> *Mohamed*, [2009] EWHC (Admin) 152, [102], [104], [105].

<sup>260</sup> *Id.* [78].

<sup>261</sup> *Id.* [79].

<sup>262</sup> *Mohamed v. Sec'y of State for Foreign and Commonwealth Affairs*, [2009] EWHC 2549, [7] (Admin) (Eng.), Case No. CQ/4241/2008, Oct. 16, 2009 (noting that reopening of a case should be done in "exceptional circumstances" if necessary in the "interest of justice").

<sup>263</sup> *Id.* at [39], [49], [69vi], [104]. The court noted that the objections made by the Obama administration to disclosing the information in question were not as strong as the threats made by the Bush administration. *Id.*

<sup>264</sup> *Id.* at [105].

high level of deference to the government in matters related to public interest immunity, and the 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 U.K. court in the *Mohamed* decision weighed the balance and ultimately based its decision on the need to maintain the rule of law and to allow for some public accountability for whatever role the U.K. government had in maltreating Mohamed.<sup>265</sup>

The latest *Mohamed* opinion is also evidence of the fact that although the English and U.S. standards on state secrets are in some ways very similar, the expansion of the use of the state secrets privilege by the Bush administration—and supported to some extent by the Obama administration—reflects a significantly broader privilege being invoked and granted in the United States. While U.S. administrations may demand broad grants of immunity for bad acts and high levels of secrecy in the litigation context, peer nations attempting to limit their application of similar privileges are being put in a difficult position by the U.S. government.<sup>266</sup>

### 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

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<sup>265</sup> *Id.* The court continues to withhold the seven paragraphs of information at issue pending an appeal by the U.K. government. See John F. Burns, *Britain: High Court Approves Releasing U.S. Intelligence Documents on Torture*, N.Y. TIMES, Oct. 16, 2009, at A5.

<sup>266</sup> See Defendant's Open Submissions at 6-9, *Mohamed v. Secretary of State for Foreign and Commonwealth Affairs*, Claim No. CQ/4241/2008, (EWHC (Admin) May 11, 2009) (attaching a May 6, 2009 letter from the Obama administration reiterating its position that disclosure of information in question—even if made unilaterally by English courts over the objection of Her Majesty's Government—would likely lead to the withholding of valuable counterterrorism information from the United Kingdom).

actions is considered justiciable.<sup>267</sup> The Israeli Supreme Court dismantled various doctrinal barriers to judicial review in the 1990s, such as standing and justiciability, in order to facilitate more private actions.<sup>268</sup> 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 litigation ought to continue or be dismissed as non-justiciable.<sup>269</sup> This is particularly remarkable given the difficult national security situation Israel faces.<sup>270</sup>

In *Public Committee Against Torture in Israel v. Israel*,<sup>271</sup> the central issue was whether preventative strikes undertaken by the Israeli military in response to alleged terrorist attacks were illegal.<sup>272</sup> The 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.<sup>273</sup> 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.<sup>274</sup>

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<sup>267</sup> Aharon Barak, *Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 16, 153 (2002).

<sup>268</sup> 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.

<sup>269</sup> In this regard, the justiciability analysis of Israeli courts can be likened to *Totten* and other state secrets privilege cases which have been dismissed at the pleadings stage, for example, *El-Masri*, based on the supposed centrality of the protected material to the claims brought in the lawsuit.

<sup>270</sup> See, e.g., Public Comm. Against Torture in *Isr. v. Israel* 2005 Isr. HCJ 769/02, 10, 16, 47; Public Comm. Against Torture in *Isr. v. Israel* 1999 Isr. HCJ 5100/94, ¶ 1 (“The State of Israel has been engaged in an unceasing struggle for both its very existence and security, from the day of its founding.”); Schulhofer, *supra* note 268, at 1919 (describing the security risks faced by Israel since its founding).

<sup>271</sup> *Public Comm. Against Torture*, HCJ 769/02.

<sup>272</sup> *Id.* ¶¶ 1-3.

<sup>273</sup> *Id.* ¶¶ 3-6.

<sup>274</sup> *Id.* ¶ 9 (the government, in arguing against justiciability, cited Israeli High Court of Justice precedent, HCJ 5872/01 Barakeh v. Prime Minister [2002] IsrSC 56(3) 1, 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 *Public Committee Against Torture* case is analogous to the question faced by the U.S. Supreme Court in *Totten*. Although the U.S. Supreme Court in *Tenet* specified that *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, see, e.g., *El-Masri v. United States*, 128 S. Ct. 373 (2007)—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<sup>275</sup>—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.<sup>276</sup>

In *Public Committee Against Torture*, the court rejected the notion of normative non-justiciability—that the matter does not fall within the realm of law—but applied a four-pronged standard to analyze the question of institutional justiciability—determining whether the courts are the appropriate institution to deal with an issue: (1) a case that involves the impingement of human rights is always justiciable;<sup>277</sup> (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;<sup>278</sup> (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;<sup>279</sup> 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.<sup>280</sup>

If the first and second prongs of the institutional justiciability analysis come into conflict in a particular situation, courts must undertake a proportionality analysis.<sup>281</sup> Applying these criteria to the situation at hand, the Court found that the claims were deeply entwined with alleged human rights violations;<sup>282</sup> 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

<sup>275</sup> *Public Comm. Against Torture*, HCJ 769/02, ¶ 48.

<sup>276</sup> *Id.* ¶ 49.

<sup>277</sup> *Id.* ¶ 50 (citing HCJ 606/78 Oyeb v. Minister of Def., 33(2) IsrSC 113, 124).

<sup>278</sup> *Id.* ¶ 51 (citing HCJ 4481/91 Bargil v. Israel 37(4) IsrSC 210, 218).

<sup>279</sup> *Id.* ¶ 53.

<sup>280</sup> *Id.* ¶ 54.

<sup>281</sup> *Id.* ¶ 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.”).

<sup>282</sup> *Id.* ¶¶ 1-3.

the effect of the specific military strikes on individual civilians;<sup>283</sup> that international courts and tribunals had already opined on this issue;<sup>284</sup> and that this was the type of *ex post* situation that was most appropriate for judicial review, despite the sensitive nature of the claims.<sup>285</sup>

Following the court's rejection of the government's claim of non-justiciability,<sup>286</sup> the court determined that targeted killings are not, *per se*, illegal under customary international law, and must be evaluated on a case-by-case basis.<sup>287</sup> The Israeli Supreme Court has consistently found that executive branch national security policy is judicially reviewable, has rejected the idea that only the executive branch can adequately evaluate a national security-related issue,<sup>288</sup> and has expressed none of the concern voiced by the Bush administration over judicial involvement in the decision to disclose security-related documents.<sup>289</sup>

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 *Adalah Legal Centre for Arab Minority Rights in Israel v. Minister of the Interior*, Justice Procaccia explained the balancing act that Israeli courts undertake:

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 it 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

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<sup>283</sup> *Id.* ¶¶ 8, 51.

<sup>284</sup> *Id.* ¶¶ 19-46, 56 (discussing the application of international customary law).

<sup>285</sup> *Id.* ¶ 54.

<sup>286</sup> The institutional non-justiciability argument has been successful in other cases. See *Bargil v. Israel*, 1993 Isr. HCJ 4481/91 (finding executive branch policies governing Israeli settlements to be non-justiciable).

<sup>287</sup> *Public Comm. Against Torture*, HCJ 769/02, ¶ 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.

<sup>288</sup> See, e.g., *Schnitzer v. Chief Military Censor*, 1989 Isr. HCJ 680/88. This case also reflects how many of the state secrets cases in Israel relate to alleged violations of the Official Secrets Act. See *id.* at ¶¶ 3-7.

<sup>289</sup> See Mukasey Letter, *supra* note 103.



considerations of the authorities and the proportionality of the measures that they wish to implement.<sup>290</sup>

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*,<sup>291</sup> 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, would pose a risk to national security.<sup>292</sup> The Court ultimately agreed with the government's position that the information needed to remain undisclosed. Likewise, in *Adalah*, 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.<sup>293</sup>

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<sup>294</sup> and demonstrate the importance accorded to rule-of-law issues in the court's analysis.<sup>295</sup>

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<sup>290</sup> *Adalah Legal Centre for Arab Minority Rights in Isr. v. Minister of Interior*, 2006 Isr. HCJ 7052/03 443, 692-93 (citing *Ajuri v. IDF Commander in the West Bank* [1], at 375-76; *Livnat v. Chairman of Constitution, Law and Justice Comm.*, HCJ 9070/00, 810).

<sup>291</sup> 2004 Isr. HCJ 5211/04.

<sup>292</sup> *Id.*

<sup>293</sup> *Adalah*, HCJ 7052/03, ¶¶ 10-12 (opinion of A. Procaccia, J.) (explaining the two-step balancing test undertaken to determine military necessity).

<sup>294</sup> *See* Public Comm. Against Torture in Isr. v. Israel, 1999 Isr. HCJ 5100/94, ¶¶ 38-40 (finding that the Israeli military's use of physical interrogation techniques on Palestinian detainees was not legally protected activity); Hallett, *supra* note 38; *see also* Deborah Sontag, *Israel Court Bans Most Use of Force in Interrogations*, N.Y. TIMES, Sept. 7, 1999, at A1.

<sup>295</sup> *See, e.g., Public Comm. Against Torture*, HCJ. 5100/94, ¶¶ 38-40. 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.* ¶ 39.

#### 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.<sup>296</sup>

Deference to executive branch decision-making is deep-rooted, despite the passage of freedom of information statutes<sup>297</sup> and acknowledgement by the Indian Supreme Court that freedom of information is a positive right recognized in Article 19 of the Indian Constitution.<sup>298</sup>

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, a legacy of British colonial rule in India.<sup>299</sup>

<sup>296</sup> *E.g.*, People's Union for Civil Liberties & Anr. v. Union of India & Ors., (1998) 1 S.C.C. 301 (upholding denial of request for disclosure of information).

<sup>297</sup> *E.g.*, Freedom of Information Act, No. 5 of 2003; India Code (2009), available at <http://indiacode.nic.in/>; 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 (2003).

<sup>298</sup> S.P. Gupta v. President of India A.I.R. 1982 S.C. 234 ("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 Government must be the rule, and secrecy an exception justified only where the strictest requirements of public interest so demands.").

<sup>299</sup> India operates under the edicts of the Official Secrets Act of 1923 (OSA), enforced in India by the British colonial government. See Winfield & Evans, *supra* note 297, at 25. Under the OSA, any disclosure of information—intentional or inadvertent—likely to affect the sovereignty, integrity or security of India is punishable by imprisonment for up to fourteen years. Although similar provisions of the Official Secrets Act were removed in England in 1989, the provisions of the 1923 Act remain in effect in India, despite criticism of its application. See Sarbari Sinha, *Official Secrets and a Frame-Up*, FRONTLINE, May 7, 2005, available at <http://www.frontlineonnet.com/fl2210/stories/20050520000607400.htm> (addressing how revocation of the Official Secrets Act would curb potential abuses of police powers).

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>. Gilani was arrested and charged with sedition under Sections 3 and 9 of the Official Secrets Act for

Several right-to-information cases are helpful in understanding the level of deference accorded to executive branch assertions of nondisclosure. *S.P. Gupta v. Union of India* was an early articulation of the view that disclosure of information related to government activities ought to be the norm, and that nondisclosure should be sanctioned only after a balancing test in which the court weighed disclosure against a government claim of public interest immunity.<sup>300</sup>

However, courts have continued to apply the balancing test from *Gupta* by giving the utmost deference to an executive branch claim for nondisclosure in the name of public interest. In *Dinesh Trivedi v. Union of India*,<sup>301</sup> the Indian Supreme Court considered whether to order the publication of background documents underlying the Vohra Committee Report, a government compilation of information related to corruption in all branches and levels of government. Members of Parliament, including petitioner Dinesh Trivedi, alleged that the Home Minister refused to disclose evidence about government corruption, not as a matter of public interest, but as a means to avoid government embarrassment.<sup>302</sup> The government offered an affidavit from the Home Secretary in response, affirming that a summary report that had been made available to Parliament was accurate, but that additional documents could not be disclosed as a matter of public interest.<sup>303</sup>

The court reiterated the test set forth in *Gupta*, noting, “Sunlight is the best disinfectant. But it is equally important to be alive to the dangers that lie ahead.”<sup>304</sup> The Court relied heavily on the government assertion that publication of the report may be injurious to the public interest, and further hypothesized that the public furor toward individuals named in the report—should it be published in full—could lead to harassment and violence.<sup>305</sup> The court, therefore, held that

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possessing a document that was generated in Pakistan and was publicly available in 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 generally* IFTIKAR GILANI, MY DAYS IN PRISON (2005) (detailing the arrest and detention experience of Gilani).

<sup>300</sup> *S.P. Gupta v. Union of India*, (1982) 87 S.C.C. Supp. ¶¶ 73-74.

<sup>301</sup> *Shri Dinesh Trivedi, M.P. & Ors. v. Union of India & Ors.*, (1997) 4 S.C.C. 306.

<sup>302</sup> *Id.* ¶ 6.

<sup>303</sup> *Id.* ¶¶ 9-10.

<sup>304</sup> *Id.* ¶ 14.

<sup>305</sup> *Id.* ¶ 16.

publication of the full report and its underlying documents was unnecessary.<sup>306</sup>

In 2004, the Indian Supreme Court synthesized much of the reasoning from its earlier right to information cases in deciding the secrecy case of *People's Union for Civil Liberties v. Union of India*.<sup>307</sup> Here, the court evaluated whether a government report on a nationwide nuclear reactor program<sup>308</sup> must be disclosed in response to a request by various citizens' rights groups alleging concerns about the safety of the reactors, and over the objection of the government. The Atomic Energy Act of 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."<sup>309</sup> In this regard, the government's argument in favor of secrecy was bolstered by the statutory language authorizing nondisclosure.<sup>310</sup>

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.<sup>311</sup> 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.<sup>312</sup>

The court acknowledged the fundamental right to information as set forth in Article 19(1) India's constitution.<sup>313</sup> The court also noted that the general rule of disclosure is necessary to "ensure the continued participation of the people

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<sup>306</sup> *Id.* ¶¶ 16-20.

<sup>307</sup> *See People's Union for Civil Liberties & Anr. v. Union of India & Ors.* (1998) 1 S.C.C. 301.

<sup>308</sup> The specific report in question was a November 1995 report by the Atomic Energy Regulatory Board (A.E.R.B.) documenting safety defects and weaknesses in the nuclear reactor system. *See id.* at Writ Proceedings section.

<sup>309</sup> *See id.* (referring to the purpose of the Atomic Energy Act, 1962).

<sup>310</sup> *See id.* at 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).

<sup>311</sup> *See id.* at Writ Proceedings section.

<sup>312</sup> *See id.*

<sup>313</sup> *Id.* at High Court Judgment section; *see also* INDIA CONST. art. 19, § 1.

in the democratic process” and that “[s]unlight is the best disinfectant” against government overreaching.<sup>314</sup>

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.”<sup>315</sup> The court noted that Article 19(2) of 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 enquiry to soothe popular sentiments, it will undoubtedly have a chilling effect on the independence of the decision-maker.”<sup>316</sup>

The Court also examined India’s Evidence Act, which set forth the standard for evidentiary privilege.<sup>317</sup> 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.”<sup>318</sup> 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.”<sup>319</sup> The Court found this standard to be consistent with the English cases on public interest immunity.<sup>320</sup>

The Attorney General volunteered to submit the government report to the Court for an *in camera* review, but

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<sup>314</sup> *People’s Union for Civil Liberties*, 1 S.C.C. at Right of Information section.

<sup>315</sup> *State Can Withhold Information on Vital Issues: SC*, TRIBUNE (Chandigarh, India), Jan. 11, 2004, available at <http://www.tribuneindia.com/2004/20040112/nation.htm#1>.

<sup>316</sup> *People’s Union for Civil Liberties*, 1 S.C.C. at Right of Information section.

<sup>317</sup> *See id.* at Criteria for Determining the Question of Privilege section.

<sup>318</sup> The Indian Evidence Act, No. 1 of 1872; India Code (2009), available at <http://indiacode.nic.in/>. (ch. IX, § 123, Evidence as to Affairs of State).

<sup>319</sup> *Id.* (Ch. IX., Sec. 162, Production of Documents).

<sup>320</sup> *People’s Union for Civil Liberties*, 1 S.C.C. at Criteria for Determining the Question of Privilege section (citing *State of Uttar Pradesh v. Raj Narain*, A.I.R. 1975 S.C. 865, 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”).

the Court declined, stating that there were no grounds to examine the report itself.<sup>321</sup> 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 of 1962 made specific provisions allowing the government to object to disclosure.<sup>322</sup> The Court relied on the government affidavits regarding potential threats to national security to support its decision to deny the petitioner's claim.<sup>323</sup> 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,<sup>324</sup> 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.<sup>325</sup>

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 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.<sup>326</sup>

However, the changes envisioned in the passage of 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.<sup>327</sup> These delays are

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<sup>321</sup> See *id.* at Conclusion.

<sup>322</sup> See *id.* at Writ Proceedings section.

<sup>323</sup> See *id.* at 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).

<sup>324</sup> 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 *id.* at High Court Judgment section.

<sup>325</sup> *E.g.*, D.K. Basu v. State of West Bengal (1997) 1 S.C.C. 216, ("Transparency of action and accountability perhaps are [the two] safeguards which this court must insist upon.").

<sup>326</sup> The RTI replaced the Freedom of Information Act, which was perceived to be too weak in mandating government disclosure. See The Right to Information Act, No. 22 of 2005, India Code (2009), available at <http://indiacode.nic.in/>.

<sup>327</sup> See Anita Aikara, *Information Delayed is Information Denied*, DAILY NEWS & ANALYSIS, Sept. 7, 2008, <http://www.dnaindia.com/dnainprint.asp?newsid=1188257> (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*

compounded with the backlog of years and sometimes decades in the actual litigation of a suit,<sup>328</sup> 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 its usual posture of avoiding disclosure of information that has only an attenuated connection to national security issues.<sup>329</sup> 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.<sup>330</sup>

#### 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

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*Case Disposal*, DAILY NEWS & ANALYSIS, Aug. 23, 2008, <http://www.dnaindia.com/dnprint.asp?newsid=1185178> (noting that the estimated time for an RTI claim to be processed in Maharashtra was 18 to 24 months).

<sup>328</sup> A recent report to Parliament by the Indian Law Minister noted that the Indian Supreme Court currently has a backlog of 48,000 cases waiting to be heard. *See 48,000 Pending Cases in SC; 38 Lakh in HCs: Bhardwaj*, ZEENEWS.COM, Oct. 20, 2008, <http://www.zeenews.com/Nation/2008-10-20/477538news.html>.

<sup>329</sup> 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*, A.I.R. 1975 S.C. 865 (carving out national security as the area in which the Prime Minister can unilaterally decide what information to disclose).

<sup>330</sup> 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." *Right to Information Act of 2005—Sec. 19 Appeal No. CIC/WB/A/2006/00878* at 5, Central Information Commission, Nov. 29, 2006 (decided Sept. 10, 2007), available at [http://cic.gov.in/CIC-Orders/Decision\\_10092007\\_08.pdf](http://cic.gov.in/CIC-Orders/Decision_10092007_08.pdf).

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 development facility. *See Rajshri Mehta, Govt Rejects RTI Plea on MoU with Dow*, DAILY NEWS & ANALYSIS, Apr. 15, 2008, <http://www.dnaindia.com/dnprint.asp?newsid=1159813>.

of the privilege may be more narrow than that of the United States, and that the English court in *Mohamed* considered expanding the scope of its own public interest immunity under 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 United States fall short of the Israeli standard of justiciability in national security matters—the Israeli standard explicitly requires consideration of allegations of human rights abuses, whereas the proposed safeguards in the United States do not.<sup>331</sup>

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.<sup>332</sup> Although the nature of the allegations should not

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<sup>331</sup> See State Secrets Protection Act, S. 2533, 110th Cong. (2008); State Secrets Protection Act, H.R. 5607, 110th Cong. (2008).

<sup>332</sup> Under S. 2533, such a dismissal could not occur until the discovery phase has at least begun. State Secrets Protection Act, S. 2533, 110th Cong. (2008).



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.

*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 *Totten* and its progeny. Although the Supreme Court clarified in *Tenet v. Doe* that questions of justiciability should be considered independently of the state secrets privilege,<sup>333</sup> courts have struggled with this distinction.<sup>334</sup> It would be appropriate and useful for Congress to assist in the clarification between the state secrets privilege and *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 privilege precisely because reform efforts had opened avenues for individual litigants to seek redress and information from the government.<sup>335</sup> 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 *Totten*'s non-justiciability standard. Congressional reform efforts should include a justiciability assessment by which courts dismiss cases that fall squarely within the ambit of *Totten* (involving secret deals related to national security and espionage), but should make

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<sup>333</sup> *Tenet v. Doe*, 544 U.S. 1, 10-11 (2005).

<sup>334</sup> *Id.* at 11. For example, even the Third Circuit decision in *Reynolds* conflated *Totten* with aspects of the state secrets privilege. *See Reynolds v. United States*, 192 F.2d 987, 996 (3d Cir. 1951), *rev'd*, 345 U.S. 1 (1953); Chesney, *supra* note 47, at 1284-85 (arguing that *Totten* be considered part of state secrets jurisprudence).

<sup>335</sup> *See supra* Part II.

clear that all other cases should be evaluated under the state secrets privilege, with an additional criterion of accounting for allegations of human rights abuses. Such a measure would preclude subsequent abuse of the *Totten* doctrine as an alternative means for the executive branch to avoid liability or disclosure of allegedly sensitive information.

C. *Reforming the Privilege Should Remain a Priority*

The national security programs created or enhanced since 2001 as 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.<sup>336</sup> This legislative inertia and deference was particularly pronounced from 2001 through 2006, when both houses of Congress and the presidency were controlled by Republicans.<sup>337</sup>

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.<sup>338</sup> 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, extended executive branch authority to conduct warrantless surveillance, and immunized telecommunications companies from liability regarding their

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<sup>336</sup> See, e.g., Kathleen Clark, *Ethical Issues Raised by the OLC Torture Memorandum*, 1 J. NAT'L SEC. LAW & POL'Y 455, 464-66 (2005); Peter Margulies, *True Believers at Law: National Security Agendas, the Regulation of Lawyers, and the Separation of Powers*, 68 MD. L. REV. 1, 2-3 (2005); Sudha Setty, *The President's Question Time: Power, Information and the Executive Credibility Gap*, 17 CORNELL J. L. & PUB. POL'Y 247, 256-260 (2008).

<sup>337</sup> See Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2371 n.264 (2006) (“[C]oncluding that congressional committees exercised over 26% more oversight in times of divided government than unified government between 1961 and 1977.” (citing JOEL D. ABERBACH, *KEEPING A WATCHFUL EYE: THE POLITICS OF CONGRESSIONAL OVERSIGHT* 59-75 (1990))).

<sup>338</sup> See Setty, *supra* note 336, at 260-62.

assistance to the government in conducting warrantless wiretapping of U.S. citizens.<sup>339</sup>

The question for Congress in 2009 is how much oversight it is willing to exert over a Democratic President, particularly as President Obama has recently issued stricter internal guidelines for the Department of Justice to use in determining whether to invoke the state secrets privilege.<sup>340</sup> 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 resulted in a horrific experience of alleged abduction and torture, which was reported widely in great detail.<sup>341</sup>

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),<sup>342</sup> reform of the state secrets privilege would avoid the same fate, since the power to apply the reforms would fall to the courts instead of the executive branch. If the government fails to comply with a court's request to provide documents for in camera review, the government could be held

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<sup>339</sup> Foreign Intelligence Surveillance Act of 1978 Amendments Act of 2008, 50 U.S.C. §§ 1881-1885 (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).

<sup>340</sup> See Holder Memorandum, *supra* note 7.

<sup>341</sup> See, e.g., MAYER, *supra* note 69, at 282-87.

<sup>342</sup> See *supra* notes 133-134 and accompanying text.

in contempt or a court could decide to enter a default judgment in favor of the plaintiffs, as the lower court in *Reynolds* did.

## 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 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.<sup>343</sup>

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: the broad U.S. interpretation of the privilege almost trumped the domestic analysis of the privilege by U.K. courts. The long-term effects of such pressure are yet to be seen, but the decisions in the *Mohamed* case reflect 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.

The Obama administration's new policy to determine whether to invoke the state secrets privilege is demonstrably better than the previous policy: the new structure mandates layers of review within the Justice Department, including an initial determination by a Justice Department official, a recommendation by a newly established State Secrets Review

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<sup>343</sup> Nat Hentoff, *Consider the Constitutions of Obama and McCain as You Choose Sides*, VILLAGE VOICE, June 17, 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." (alteration in original) (internal quotation marks omitted) (quoting Prof. David Orr, Oberlin College)).

Committee, and approval of the Attorney General before invoking the state secrets privilege in court.<sup>344</sup> As promising as this new policy seems, congressional reform is still needed to ensure an external, long-term check on executive branch overreaching that would exist independent of what internal policy is adopted by an administration. Passage of a strong state secrets reform measure can ensure a fair standard in the courts and an opportunity for redress for those alleging grave violations of civil rights and civil liberties.

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<sup>344</sup> See Holder Memorandum, *supra* note 7, at 2-3.