Nos. 06-17132 and 06-17137

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TASH HEPTING, *et al.*,

Plaintiffs-Appellees,

v.

AT&T CORP., *et al.*,

Defendants-Appellants.

On Appeal from the United States District Court
for the Northern District of California

BRIEF OF AMICUS CURIAE PROFESSOR ROBERT M. CHESNEY IN SUPPORT OF REVERSAL

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March 16, 2007

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INTEREST OF AMICUS CURIAE

Amicus curiae, Professor Robert M. Chesney, is an Associate Professor of Law at Wake Forest University School of Law specializing in national security law. Among other things, Professor Chesney is the Chair-Elect of the Association of American Law Schools' Section on National Security Law, the editor of the American Bar Association Standing Committee on Law and National Security's *National Security Law Report*, and a member of the Board of Directors for the Center on Law, Ethics, and National Security. Professor Chesney's legal scholarship focuses on the intersection of constitutional law and U.S. counterterrorism policies, and has included an in-depth survey and historical analysis of the state secrets privilege in American jurisprudence. The instant appeal squarely addresses the application of the state secrets privilege to the Terrorist Surveillance Program and other alleged counterterrorism surveillance activities. Professor Chesney files this brief with the consent of all the parties.

SUMMARY OF THE ARGUMENT

The state secrets privilege has deep historical roots, with antecedents in American law tracing back at least to the trial of Aaron Burr and in English law as far back as the early 1700s. In the half-century since the privilege took on its modern form in *United States v. Reynolds*, 345 U.S. 1 (1953), moreover, clear patterns have developed with respect to the type of information that the privilege protects. Among other things, the privilege has frequently been employed to prevent disclosure of the sources and methods involved in the collection of intelligence in general and of the existence of espionage relationships in particular. More to the point, courts in the past have repeatedly relied upon the privilege to preclude litigation based on allegations of unlawful surveillance operations within the United States. The assertion of the state secrets doctrine in this case accordingly is well within the historical scope of the privilege.

ARGUMENT

I. THE ORIGINS OF THE STATE SECRETS PRIVILEGE

Although the modern iteration of the state secrets privilege derives from *United States v. Reynolds*, 345 U.S. 1 (1953), the roots of the privilege extend back

considerably further. A brief review of those roots helps to place the nature and scope of the modern privilege in perspective.[1]

The state secrets privilege emerged gradually in Anglo-American legal history. Its earliest manifestation appears to have been a decision by the House of Lords in the treason trial of Bishop Francis Atterbury, a decision directly concerned with the need to protect the sources and methods of intelligence-gathering. *See Bishop Atterbury's Trial*, 16 How. St. Tr. 323, 495-96 (H.L. 1723). Bishop Atterbury sought to elicit testimony from government employees concerning their activities in opening and decrypting incriminating correspondence, but the Lords refused to allow the witnesses to answer on the policy ground that revelation of such information would be inimical to public safety. *See id.*; Eveline Cruickshanks & Howard Erskine-Hill, *The Atterbury Plot* 208-09 (J.C.D. Clark ed. 2004).

Similar reasoning was at work in the 1817 English decision *Rex v. Watson*, a case arising out of a treasonous plot that allegedly was to include an assault on the Tower of London. 2 Starkie's C. 148, 171 Eng. Rep. 591 (1817). The evidence

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[1] The following account derives from Robert M. Chesney, *State Secrets and the Limits of National Security Litigation*, 75 Geo. Wash. L. Rev. (forthcoming 2007) (Nov. 2006 draft). The preliminary manuscript of the article—including a table of all published opinions adjudicating assertions of the state secrets privilege from *Reynolds* through the end of 2006—is not readily accessible to the public and is therefore attached as an addendum to this brief.

against one of the defendants included a map of the Tower found in his belongings. This prompted the defense to offer evidence that accurate maps of the Tower could be purchased with ease in London. When the defense asked an employee of the Tower to confirm the accuracy of one such map, however, the court refused to permit the testimony on the ground that such an inquiry "might be attended with public mischief." *Id.*

Though it arose after the Revolution, *Watson* nonetheless would prove significant for the development of American law thanks to the intermediating role of Nineteenth Century treatise writers. In dealing with common law topics, these authors routinely relied on both American and English precedents, particularly in the early 1800s. This was true especially with respect to the law of evidence, with Thomas Starkie's treatise being a particularly influential example. *See* 1 Thomas Starkie, *A Practical Treatise on the Law of Evidence and Digest of Proofs in Civil and Criminal Proceedings* (Theron Metcalf ed., Boston, Wells and Lilley 1826). "There are some instances," Starkie wrote, "where the law excludes particular evidence not because in its own nature it is suspicious or doubtful, but on grounds of public policy, and because greater mischief and inconvenience would result from the reception than from the exclusion of such evidence . . . ." *Id.* at 103. Examples included a range of familiar privileges, including spousal privilege, attorney-client privilege, and the privilege against self-incrimination. *Id.* at 103-

06. In addition, however, Starkie cited a privilege category that he described as rooted in "grounds of state policy." *Id.* at 106.

Though Starkie did not draw the distinctions himself, the cases cited in support of his "state policy" privilege can be grouped into three categories. First, several reflect what we would recognize today as the informer's privilege. *Id.* Second, others describe what is now known as the deliberative-process privilege, in which intergovernmental communications are shielded in order to encourage candor and efficiency. *Id.* And finally there is *Watson*, a ruling that involved neither the need to protect the anonymity of informants nor the confidentiality of internal deliberations, but instead the need to maintain the secrecy of information the disclosure of which might harm public safety. *Id.*

Subsequent treatise writers followed Starkie's approach to state policy privileges. *See* 1 Simon Greenleaf, *A Treatise on the Law of Evidence* (7th ed., Boston, Little Brown & Co. 1854); 1 S. March Phillips & Andrew Amos, *A Treatise on the Law of Evidence* 177 (Boston, Elisha G. Hammond 1839); Henry Roscoe, *A Digest of the Law of Evidence in Criminal Cases* (George Sharswood ed., Philadelphia, P.H. Nicklin & T. Johnson 1836). Nonetheless, as of the mid-1800s there had been no American cases strictly comparable to *Bishop Atterbury's Trial* or *Rex v. Watson*. Chief Justice Marshall *had* strongly hinted at the existence of a comparable security-oriented privilege during the trial of Aaron Burr in

1807—taking pains to note in the course of a dispute over the government's obligation to produce certain letters that there had been no claim on the part of the government that production of the letters would endanger public safety—but had not actually so held. *United States v. Burr*, 25 F. Cas. 30 (Cir. Ct. Va. 1807).[2]

This would change in 1875, with the Supreme Court's decision in *Totten v. United States*, 92 U.S. 105 (1875). *Totten* famously involved the question of whether the estate of William Lloyd could sue the federal government in the Court of Claims on the basis of an alleged espionage agreement between Lloyd and President Lincoln pursuant to which Lloyd acted as a Union spy in Confederate territory. Writing for the Supreme Court, Justice Field concluded that the confidentiality inherent in an espionage relationship was comparable to if not stronger than the confidentiality associated with spousal, confessional, or attorney-client communications. *Id.* at 107. Because maintenance of such a suit would

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[2] *Marbury v. Madison*, 5 U.S. 137 (1803), had presented the distinct question of whether a former Secretary of State could be compelled to testify concerning information that he had learned in his official capacity, prompting Chief Justice Marshall to observe in dicta that the official would not be obliged to disclose information learned via confidential communications. *Id.* at 144. From this perspective, *Marbury* is best understood as a deliberative-process privilege case rather than one involving what is known today as the state secrets privilege. Other cases from the 1800s that are sometimes cited as progenitors of the state secrets privilege—including *Worthington v. Scribner*, 109 Mass. 487 (1872), and *Thompson v. German Valley Railroad Co.*, 22 N.J. Eq. 111 (N.J. Ct. Ch. 1871)—likewise can be distinguished as not involving the protection of information on public safety grounds.

require the disclosure of information that would run the risk of exposing "the details of dealings with individuals and officers . . . to the serious detriment of the public," Justice Field concluded that "public policy" forbid its continuation. *Id.* at 106-07.

Even with *Totten*, development of a distinctive "state secrets" privilege continued rather slowly in subsequent years. Simply put, there were relatively few occasions for invocation of such a concept in the late 1800s, as the scale of the government's security-related activities remained relatively small and the opportunities for civil litigation against the government remained relatively limited. Nonetheless, the state secrets privilege began to take on its modern form in a trio of pre-World War II cases involving commercial disputes relating to military hardware. *See Pollen v. United States*, 85 Ct. Cl. 673 (1937) (precluding discovery relating to gun sights); *Pollen v. Ford Instrument Co.*, 26 F. Supp. 583 (E.D.N.Y. 1939) (same, citing *Totten*); *Firth Sterling Steel Co. v. Bethlehem Steel Co.*, 199 F. 353 (E.D. Pa. 1912) (citing *Totten* in the course of precluding discovery associated with armor-piercing projectiles). The enactment of the Federal Tort Claims Act in the aftermath of World War II, combined with the ongoing expansion of the defense and intelligence establishments, eventually would provide the occasion for the Supreme Court to expressly recognize the privilege's existence and distinct nature. Writing in *United States v. Reynolds*

(1953) , Chief Justice Vinson cited *Totten, Firth*, and *Ford Instrument Co.*, among other cases, as demonstrating the existence of a "military and state secrets" privilege. 345 U.S. at 6-7 & n.11.

II. USE OF THE PRIVILEGE IN THE MODERN ERA TO PROTECT THE SOURCES AND METHODS EMPLOYED BY THE INTELLIGENCE COMMUNITY

The analytical framework provided in *Reynolds* is familiar,[3] and in any event is the focus of considerable attention from the parties themselves. The more pressing task, for present purposes, is to discuss the type of information that has been protected by the privilege in the years following *Reynolds* and consider the extent to which the invocation of the privilege in the present case constitutes a departure from past practice.[4]

A close review of the contexts in which the privilege has been invoked—and usually sustained—in published opinions over the past fifty-three years suggests that state secrets cases can be grouped into several categories based on the nature

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[3] The particulars of that analytical framework are discussed in considerable detail in Chesney, *supra* note 1, manuscript at 33-38.

[4] This is not an inquiry into the *frequency* with which the privilege has been asserted in recent years. The question of frequency is not one that sheds useful empirical light on the nature of the privilege, as the number of occasions for invoking the privilege necessarily will vary from year to year. *See* Chesney, *supra* note 1, manuscript at 52-54 (elaborating the point).

of the information to be protected.[5] First, following in the path of the early Twentieth Century cases such as *Firth Sterling*, there are numerous instances in recent decades in which the privilege has been invoked to protect technical information of military significance. *See, e.g., McDonnell Douglas Corp. v. United States*, 37 Fed. Cl. 270 (1996) (dismissing complaint relating to stealth technology). Second, there also have been numerous cases involving covert aspects of the internal operations of intelligence agencies. *See, e.g., Sterling v. Tenet*, 416 F.3d 338 (4th Cir. 2005) (affirming dismissal of Title VII suit where covert duties of CIA employees necessarily were at issue).

Third, courts have frequently acted to protect information reflecting the sources and methods of intelligence collection, including in particular the existence of relationships between private entities and the government.[6] *See, e.g., Tenet v. Doe*, 544 U.S. 1 (2005) (applying *Totten* to preclude litigation of suit premised on

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[5] A table describing such opinions appears as an appendix to Chesney, *supra* note 1.

[6] Following *Reynolds*, courts have at times referred to the state secrets privilege in the course of considering whether to require disclosure of communications between the United States and foreign governments. *See, e.g., Xerox Corp. v. United States*, 12 Cl. Ct. 93 (1987) (denying discovery of letter from a United Kingdom revenue official to the United States). Such cases might best be understood as justified by a distinct public policy interest in protecting intergovernmental communications (along the lines of the deliberative process privilege) rather than the state secrets concept, which is rooted in security considerations.

existence of espionage relationship); *El-Masri v. United States*, __ F.3d __, No. 06-1667, 2007 WL 625130 (4th Cir. Mar. 2, 2007) (affirming dismissal on state secret grounds of civil suit brought by individual subjected to rendition from Macedonia to Afghanistan, notwithstanding extensive publicity concerning the program). More to the point, they have done so in the past with specific reference to allegations of unconstitutional or otherwise unlawful surveillance within the United States by the NSA and other components of the Intelligence Community. *See, e.g., Halkin v. Helms*, 690 F.2d 977 (D.C. Cir. 1982) (CIA surveillance) ("*Halkin II*"); *Salisbury v. United States*, 690 F.2d 966 (D.C. Cir. 1982) (NSA surveillance).

The first and third of these categories—protection of technical information and protection of sources and methods (including espionage relationships)—are directly implicated by the *Hepting* plaintiffs' claims. *First*, the declarations of (then) Director of National Intelligence, John D. Negroponte (ER 54-60), and National Security Agency Director, Lieutenant General Keith B. Alexander (ER 61-65), indicate that litigation of the *Hepting* plaintiffs' claims would require disclosure of sensitive information regarding the technical methods by which the United States conducts electronic surveillance and intelligence operations. *See* ER 58-59 ¶ 12 ("[D]isclosure of those who are not targeted would reveal to adversaries that certain communication channels are secure or, more broadly, would tend to

reveal the methods being used to conduct surveillance."); ER 64 ¶ 8. Disclosure of such technical information would be necessary in order to litigate the plaintiffs' claims because the scope of liability under various federal surveillance statutes turns on the particular mechanisms by which surveillance activities are conducted. *See, e.g.*, 18 U.S.C. § 2702(a)(1) (liability for disclosure of communications content under the Stored Communication Act attaches when the communication is "in electronic storage"); 18 U.S.C. § 3121 (proscribing use of pen register and trap-and-trace devices). Thus, the *Hepting* litigation is properly understood as falling within the category of state secrets cases protecting technical information from disclosure.

Second, the state secrets assertion in *Hepting* also seeks to protect information regarding the sources and methods of intelligence collection. Cases such as *Halkin v. Helms*, 598 F.2d 1 (D.C. Cir. 1978); *ACLU v. Brown*, 609 F.2d 277 (7th Cir. 1979); and *Ellsberg v. Mitchell*, 709 F.2d 51 (D.C. Cir. 1983), demonstrate that government surveillance and intelligence-collection programs fall squarely within the ambit of the state secrets privilege. *See also* Chesney, *supra* note 1, manuscript at 45-46 & n.211 (discussing the dismissal on state secrets grounds of surveillance-based litigation in the 1970s and 1980s). This is especially true where the targets or methods of the surveillance have not been publicly disclosed or acknowledged. *See Ellsberg*, 709 F.2d at 65 (dismissal of surveillance

claims proper when the government has not admitted that the plaintiff was surveilled); *Halkin*, 598 F.2d at 6-7 ("In the case before us the acquisition of the plaintiffs' communications is a fact vital to their claim. No amount of ingenuity of counsel in putting questions on discovery can outflank the government's objection that disclosure of this fact is protected by the privilege."); *Halkin II*, 690 F.2d at 998; *see also El-Masri*, slip op. at 20 (holding that even if "the state secrets privilege does not apply to the information that media outlets have published concerning [the classified program at issue in that case], dismissal of [the] Complaint would nonetheless be proper because the public information does not include the facts that are central to litigating his action").

In the *Hepting* litigation, both Director Negroponte and General Alexander have invoked the state secrets privilege with respect to the targets, sources, and methods of alleged NSA surveillance, and also with respect to any alleged relationship between AT&T and the NSA. *See* ER 58-59 ¶ 12 (noting plaintiffs' "allegations about NSA's purported involvement with AT&T" and invoking the state secrets privilege with respect to "intelligence activities, sources, methods, relationships, or targets"); ER 64 ¶ 8 ("[T]he United States can neither confirm nor deny alleged NSA activities, relationships, or targets. To do otherwise when challenged in litigation would result in the exposure of intelligence information, sources, and methods and would severely undermine surveillance activities in

general."). Hence, in this manner, too, the state secrets privilege invoked in *Hepting* falls comfortably within the traditional boundaries of the state secrets doctrine as established in prior cases.

Because the plaintiffs' claims at their very core require disclosure of information regarding the NSA's highly-classified intelligence activities, the state secrets privilege would appear to require their dismissal.

III. DISMISSAL OF THE COMPLAINT IS A FREQUENT RATHER THAN RARE CONSEQUENCE OF INVOKING THE STATE SECRETS PRIVILEGE

As explained above, the information covered by the state secrets assertion in *Hepting* falls within the heartland of information generally understood to be protected by the state secrets privilege. This case, however, tracks existing state secrets jurisprudence not only in terms of the type of information protected, but in the remedy that is sought to vindicate that privilege.

As many courts, including this Court, have explained, the state secrets privilege, when properly invoked, is "absolute." *Kasza v. Browner*, 133 F.3d 1159, 1166 (9th Cir. 1998) (citing *Reynolds*, 345 U.S. at 11). Although in certain circumstances litigation may proceed without the privileged information, often times the state secrets privilege poses an insurmountable barrier to continued litigation of the case, and the suit must be dismissed at the threshold. *See id.* "While dismissal of an action based on the state secrets privilege is harsh, 'the

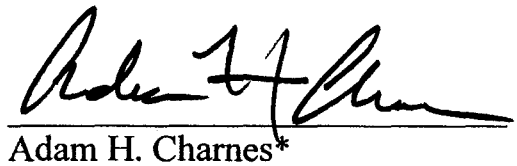
results are harsh in either direction and the state secrets doctrine finds the greater public good—ultimately the less harsh remedy—to be dismissal.'" *Id.* at 1167 (quoting *Bareford v. Gen. Dynamics Corp.*, 973 F.2d 1138, 1144 (5th Cir. 1992)).

An examination of recent state secrets cases demonstrates that, quite often, dismissal is unavoidable in the face of a valid state secrets assertion. Between 1973 and 2000, courts published at least sixty-three opinions relating to the state secrets privilege. *See* Chesney, *supra* note 1, manuscript at app. In at least twenty-seven of these cases, the government moved for dismissal of the complaint as a remedy, and such motions were granted on twenty-three of those occasions. Accordingly, it cannot fairly be said that the United States' motion for dismissal or summary judgment based on the state secrets privilege in *Hepting* varies in a significant way from past state secrets practices or precedents.

CONCLUSION

Any attempt to portray the United States' invocation of the state secrets privilege in the circumstances of this case as novel, overreaching, or an example of a larger trend toward aggrandizement of executive authority would be historically inaccurate. The perhaps-uncomfortable reality is that administrations of both major political parties have invoked the state secrets privilege frequently and with considerable success to dismiss civil litigation in circumstances closely analogous to those here.

Respectfully submitted,



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ADDENDUM

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State Secrets and the Limits of National Security Litigation

George Washington Law Review
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STATE SECRETS AND THE LIMITS OF NATIONAL SECURITY LITIGATION

Robert M. Chesney

Abstract

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

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

I address these questions through a survey of the origin and evolution of the privilege, compiling along the way a comprehensive collection of state-secrets decisions issued since the Supreme Court's seminal 1953 decision in United States v. Reynolds *(the collection appears in the article's appendix). Based on the survey, I find that the Bush administration does not differ qualitatively or quantitatively from its predecessors in its use of the privilege, which since the early 1970s has frequently been the occasion for abrupt dismissal of lawsuits alleging government misconduct. Recognizing that the privilege strikes a harsh balance among the security, individual rights, and democratic accountability interests at stake, however, I conclude with a discussion of reforms Congress might undertake if it wished to ameliorate the privilege's impact. In particular, I suggest that special procedures might be adopted to permit litigation to continue in a protected setting notwithstanding proper invocation of the privilege in contexts where unconstitutional government conduct is alleged.*

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STATE SECRETS AND THE LIMITS OF NATIONAL SECURITY LITIGATION

DRAFT

Robert M. Chesney*

The state secrets privilege has played a significant role in the Justice Department's response to civil litigation arising out of post-9/11 policies, culminating in a controversial decision by Judge T.S. Ellis concerning a lawsuit brought by a German citizen – Khaled El-Masri – whom the U.S. allegedly had rendered (by mistake) from Macedonia to Afghanistan for interrogation.[1] Reasoning that the "entire aim of the suit is to prove the existence of state secrets," Judge Ellis held that the complaint had to be dismissed in light of the privilege.[2] The government also has interposed the privilege in connection with litigation arising out of warrantless surveillance activities, albeit with less success so far.[3]

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

Part I begins by employing the El-Masri rendition and subsequent litigation as a case study illustrating the impact of the state secrets privilege on security-related civil litigation. Part II then contextualizes the state secrets debate by identifying the competing

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[1] *See* El-Masri v. Tenet, 437 F. Supp.2d 530 (E.D. Va. 2006).

[2] *Id.* at 539.

[3] *See, e.g.,* Al-Haramain Islamic Foundation, Inc. v. Bush, _ F. Supp.2d __ (D. Or. 2006); American Civil Liberties Union v. National Security Agency, _ F. Supp.2d __ (E.D. Mich. 2006); Terkel v. AT&T Corp., __ F. Supp.2d __ (N.D. Ill. 2006); Hepting v. AT&T Corp., _ F. Supp.2d __ (N.D. Cal. 2006) ("*Hepting II*"); Hepting v. AT&T Corp., __ F. Supp.2d __ (N.D. Cal. 2006) ("*Hepting I*").

[4] *See, e.g.,* William G. Weaver & Robert M. Pallitto, *State Secrets and Executive Power*, 120 POL. SCI. Q. 85 (2005).

policy considerations implicated by government secrecy in general and the state secrets privilege in particular.

Against that backdrop, Part III surveys the origin and evolution of the state secrets privilege in order to shed light on both the analytical framework employed by courts in assessing assertions of the privilege and also the underlying theoretical justifications for it. The survey demonstrates that courts today continue to follow the analytical framework pioneered by the Supreme Court in its 1953 decision *United States v. Reynolds,*[5] which can be summarized as follows: (a) the claim of privilege must be formally asserted by the head of the department charged with responsibility for the information;[6] (b) the reviewing court has the ultimate responsibility to determine whether disclosure of the information in issue would pose a "reasonable danger" of harm to national security;[7] (c) the court should calibrate its inquiry (*viz.*, the extent of deference it gives to the executive's assertion that the reasonable danger standard is met) with regard to the plaintiff's need for access to the information; (d) the court should conduct its review of the information itself on an *ex parte, in camera* basis if it proves necessary to examine it directly in order to decide whether the reasonable danger standard is met; and (e) if the court concludes that the standard is met, the privilege attaches and cannot be overcome by a showing of need or offsetting considerations (as can be done, for example, in the context of the work-product doctrine). Among other things, the survey indicates that an early effort to categorically exclude suits alleging government misconduct from the operation of the privilege did not gain traction, but that evidence of public disclosure of the allegedly secret information can negate it. The survey also suggests that Congress can override the privilege through legislation in at least some contexts, buttressing the conclusion that the privilege is best conceived of as consisting of a constitutionally-required core complimented by layers of common law doctrine rooted in prudential concerns about the impact of national security litigation.

The historical survey in Part III also provides a foundation for addressing the claim that the Bush Administration has employed the privilege with unprecedented frequency or in unprecedented contexts in recent years. I conclude that neither claim is persuasive, though I do not mean to suggest as a result that there is no reason to call for reform of the privilege.

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[5] 345 U.S. 1 (1953).
[6] *See id.* at 7-8.
[7] *See id.* at 10.

The quantitative inquiry is a pointless one in light of the significant obstacles to drawing meaningful conclusions from the limited data available. Even if those concerns are set aside, moreover, the data in any event does not provide strong evidence of a quantitatively different approach to the privilege in recent years. The appendix to this article catalogues all 89 judicial opinions published between 1954 and 2006 that fairly can be described as adjudicating assertions of the state secrets privilege (a previously unpublished data set). For what it is worth, the pattern in these reported opinions shows only that the privilege has been asserted frequently for the past several decades.

The more significant (and testable) question is whether these cases at least indicate a *qualitative* difference in the nature of the privilege in recent years, a question that variously could be framed as an inquiry into (a) the types of information as to which the privilege has been asserted; (b) the process by which judges are to examine assertions of the privilege; or (c) the remedies sought by the government in connection with such assertions. On all three measures, the reality is that recent assertions of the privilege are not different in kind from what came before.

To say that the current administration does not depart from past practice in its use of the privilege, however, is not to endorse the status quo as normatively desirable. In recognition of the fact that concerns for democratic accountability are especially acute when the privilege is asserted in the face of allegations of unconstitutional government conduct, I conclude in Part IV with a discussion of reforms Congress might undertake in that context. Rather than support an effort to empower or encourage judges to second-guess executive views regarding the sensitivity of classified information – a task that they are institutionally ill-suited to perform – I seek to stimulate debate regarding alternatives to dismissal such as transfer of suits implicating the privilege to secure judicial fora akin to (or perhaps even including) the Foreign Intelligence Surveillance Court, where special procedures – possibly including *ex parte* litigation – might accommodate the government's interest in security while providing at least a measure of better treatment for the individual and societal interests at stake. National security lawsuits challenging such policies as rendition and warrantless surveillance still would face tremendous hurdles, of course, but courts would at least be able to grapple on the merits with the legal and factual issues that they raise.

I. THE EXTRAORDINARY RENDITION OF KHALED EL-MASRI

In February 2005, the *New Yorker* published an article by Jane Mayer titled "Outsourcing Torture: The Secret History of America's 'Extraordinary Rendition' Program."[8] The article caused a sensation of sorts, alleging the existence of a CIA program in which

> "[t]errorism suspects in Europe, Africa, Asia, and the Middle East have often been abducted by hooded or masked American agents, then forced onto a Gulfstream V jet . . . . Upon arriving in foreign countries, rendered suspects often vanish. Detainees are not provided with lawyers, and many families are not informed of their whereabouts. The most common destinations for rendered suspects are Egypt, Morocco, Syria, and Jordan, all of which have been cited for human-rights violations by the State Department, and are known to torture suspects."[9]

Drawing on information provided by Mike Scheuer (who had been head of the CIA's Bin Laden Unit during the 1990s), Mayer explained that the rendition program actually had begun in the mid-1990s as a response to the tension that arose when the CIA knew the location of a suspected terrorist but, in Scheuer's words, "we couldn't capture them because we had nowhere to take them."[10] In its original form, the rendition program described by Scheuer involved the use of U.S. assets to capture a terrorism suspect overseas and to transfer that person to the custody of another state either for criminal prosecution or in order to serve an existing sentence.[11] A number of successful operations followed, most but not all of which focused on the transfer of suspects to Egyptian custody.[12] According to Scheuer, the CIA's relationship with Egyptian intelligence was so close that "Americans could give the

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[8] *See* Jane Mayer, "Outsourcing Torture: The Secret History of America's 'Extraordinary Rendition' Program," *The New Yorker* (Feb. 14, 2005), available at http://www.newyorker.com/printables/fact/050214fa_fact6.

[9] *Id.*

[10] *Id.*

[11] *See id.* The CIA's rendition program may or may not have been distinct from the FBI's pre-9/11 efforts to bring suspects to the United States for criminal prosecution other than by use of extradition procedures. *See* Wendy Patten, "Human Rights Watch Report to the Canadian Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar," June 7, 2005, at 4-5. *See also* United States v. Yunis, 924 F.2d 1086 (D.C. Cir. 1991) (describing "Operation Goldenrod," in which the FBI in 1987 lured a hijacking suspect out of Lebanon onto the high seas, seized him, and with the assistance of the Navy brought him to the U.S. to stand trial).

[12] *See* Mayer, *supra* note _.

Egyptian interrogators questions they wanted put to the detainees in the morning . . . and get answers by the evening."[13]

Since 9/11, the rendition program has grown beyond these initial parameters, though its current scope and purpose are the subjects of considerable dispute.[14] Critics and supporters agree that CIA renditions are no longer limited to persons as to whom existing criminal process is pending in the receiving state. They dispute, however, the purpose for which renditions take place.

According to critics, the essence of what has come to be known as "extraordinary rendition" is to transfer a suspect to a foreign state in order to place that person in the hands of unscrupulous security services who will then use abusive interrogation methods; the U.S. would reap whatever intelligence benefits there may be from such measures, while maintaining a degree of plausible deniability.[15] The government denies that this is so, stating that the U.S. does not transfer individuals in circumstances where it is more likely than not that the person will be tortured or subjected to other forms of cruel, inhuman, or degrading treatment.[16]

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

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[13] *Id.*

[14] For detailed summaries and critiques of post-9/11 renditions, see Meg Satterthwaite, *Rendered Meaningless: Extraordinary Rendition and the Rule of Law*, GEO. WASH. L. REV. (forthcoming 2007); Leila Sadat, *Ghost Prisoners and Black Sites: Extraordinary Rendition Under International Law*, CASE W. RES. J. INT'L L. (forthcoming 2006).

[15] *See, e.g.,* The Committee on Human Rights of the Association of the Bar of the City of New York & The Center for Human Rights and Global Justice, New York University School of Law, "Torture by Proxy: International and Domestic Law Applicable to 'Extraordinary Renditions,'" at 5, *available at* http://www.nyuhr.org/docs/TortureByProxy.pdf#search=%22torture%20by%20proxy%20international%20law%20and%20domestic%20law%20applicable%20to%20extraordinary%20renditions%22.

[16] *See, e.g.,* Response of the United States of America, U.N. Committee Against Torture, May 5, 2006, at 27 & 36-37 (stating that it is U.S. "policy" to apply the more-likely-than-not standard as to all government components even in circumstances deemed by the U.S. to be beyond the formal scope of Article 3 of the Convention Against Torture and Other Forms of Cruel, Inhuman, and Degrading Treatment).

> "For decades, the United States and other countries have used 'renditions' to transport terrorist suspects from the country where they were captured to their home country or to other countries where they can be questioned, held, or brought to justice. In some situations a terrorist suspect can be extradited according to traditional judicial procedures. But there have long been many other cases where, for some reason, the local government cannot detain or prosecute a suspect, and traditional extradition is not a good option. In those cases the local government can make the sovereign choice to cooperate in a rendition. Such renditions are permissible under international law and are consistent with the responsibilities of those governments to protect their citizens."[17]

The very next day, notably, it appears that Secretary Rice also conceded certain facts associated with a particular rendition episode. According to German Chancellor Angela Merkel, Secretary Rice admitted to her that the U.S. had erroneously rendered a German citizen named Khaled El-Masri from Macedonia to Afghanistan in the winter of 2004.[18] Although Rice's staff later contended that there had been no admission of error on the part of the United States, Secretary Rice did add publicly that

> "When and if mistakes are made, we work very hard and as quickly as possible to rectify them. Any policy will sometimes have mistakes and it is our promise to our partners that should that be the case, that we will do everything that we can to rectify

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[17] *See* Secretary of State Condoleezza Rice, Remarks on Her Departure for Europe, Dec. 5, 2005, *available at* http://www.state.gov/secretary.rm/2005/57602.htm.

[18] *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. *See also* Joint Press Briefing by Condoleeza Rice and Angela Merkel, Dec. 6, 2006, *available at* http://www.state.gov/secretary/rm/2005/57672.htm (quoting Merkel as stating that the U.S. "has admitted that this man had been erroneously taken and that as such the American Administration is not denying that it has taken place"). Notably, *Der Spiegel* claimed back in February 2005 that then-Director of Central Intelligence Porter Goss made the same concession to Germany's then-Interior Minister Otto Schily during a visit by the latter to DC, with "the Americans quietly admitt[ing] to kidnapping el-Masri and vaguely imply[ing] how the whole matter had somehow gotten out of hand." Georg Mascolo & Holger Stark, *The U.S. Stands Accused of Kidnapping*, Der Spiegel (Feb. 7-14, 2005), *available at* http://www.spiegerl.de/international/spiegel/0,1518,druck-341636,00.html. According to *Der Spiegel*, the mistake resulted from a mistaken believe that Khaled El-Masri was the same person as a wanted al Qaeda member known as "Khalid al-Masri." *See id.*

those mistakes. I believe that this will be handled in the proper courts here in Germany and if necessary in American courts as well."[19]

This belief would soon be put to the test. That very day, El-Masri filed a civil suit in the United States District Court for the Eastern District of Virginia, seeking damages and other appropriate relief arising out of his rendition experience.[20] Appearing at a news conference in Washington by way of a satellite link to Germany, El-Masri explained that he also sought an official apology and an account from the U.S. as to "why they did this to me and how this came about."[21] Notwithstanding Secretary Rice's apparent endorsement of judicial relief, however, this path ultimately foundered in the face of the government's assertion of the state secrets privilege.

A. To the Salt Pit

What precisely had happened to Khaled El-Masri? According to his complaint,[22] his troubles began at a border crossing between Serbia and Macedonia on December 31, 2003. El-Masri had boarded a bus that morning in his hometown of Ulm, Germany, en route to Skopje, Macedonia.[23] At the border, Macedonian authorities removed him from the bus and eventually confined him in a hotel room in Skopje.[24] There he remained incommunicado for twenty-three days, subjected all the while to repeated interrogations focused on his alleged involvement with al Qaeda.[25]

On the twenty-third day of his captivity, the Macedonians blindfolded El-Masri, placed him in a car, and drove him to an airport.[26] There he came into the custody of men he believed to be CIA agents. El-

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[19] Joint Press Briefing, *supra* note __.
[20] *See* Kessler, *supra* note __ (indicating that El-Masri's suit was filed on Tuesday December 6, 2005).
[21] *Id.*
[22] The following account derives from the allegations made by El-Masri in his lawsuit against former Director of Central Intelligence George Tenet and others. *See* El-Masri v. Tenet, No. 05-cv-1417 (E.D. Va.) (Complaint), available at http://www.aclu.org/safefree/extraordinaryrendition/22211lgl20051206.html (last visited Oct. 9, 2006). Because the case was dismissed at the pleading stage, see *El-Masri*, 437 F. Supp.2d 530, it is not yet clear whether and to what extent the U.S. government contests this narrative.
[23] *See* Complaint, *supra* note _, at ¶¶ 22-23.
[24] *See id.* ¶ 23.
[25] *See id.* ¶¶ 24-26.
[26] *See id.* ¶¶ 27-28.

Masri claims that in short order he was beaten by unseen assailants, stripped, subjected to a body-cavity exam, clothed in a diaper and tracksuit, hooded, shackled to the floor of a plane, and, finally, knocked out by a pair of injections.[27] When he came too, he was in Afghanistan.[28] He had, in short, been subjected to "extraordinary rendition."

El-Masri was taken from the airport to what he later concluded was prison known as the "Salt Pit," located in northern Kabul.[29] There he was placed in a cold cell containing no bed, but only a dirty blanket and a few items of clothing for use as a makeshift pillow.[30] El-Masri had to make do with "a bottle of putrid water in the corner of his cell."[31] The first night, he was taken to be examined by a person who appeared to be an American doctor; when El-Masri complained of the conditions in his cell, the doctor replied that conditions in the prison were the responsibility of the Afghans.[32]

Interrogations began the next night.[33] After El-Masri was warned that he "was in a country with no laws," the interrogator quizzed him regarding his associations with al Qaeda members and a possible trip to a jihadist training camp in Pakistan.[34] He was interrogated again on three or four other occasions, "accompanied by threats, insults, pushing, and shoving."[35] Eventually, in March, El-Masri began a hunger strike.[36] After twenty-seven days, he met with two American officials (along with the Afghan "prison director"), one of whom stated to El-Masri that he should not be held at the prison, though the decision to release him would have to come from Washington.[37] El-Masri continued his hunger strike after this meeting; after the strike reached thirty-seven days he was force-fed through an intra-nasal tube.[38]

In May, El-Masri was interviewed by a psychologist who indicated that he would soon be released.[39] Later that month, El-Masri was questioned on four separate occasions by a man who appeared to be

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[27] *See id.* ¶¶ 29-30.
[28] *See id.* ¶ 32.
[29] *See id.* ¶¶ 34-35.
[30] *See id.* ¶ 34.
[31] *Id.* at ¶ 36.
[32] *See id.* at ¶ 37.
[33] *See id.* at ¶ 38.
[34] *Id.* at ¶¶ 38-39.
[35] *Id.* at ¶ 40.
[36] *See id.* at ¶ 41.
[37] *See id*.
[38] *See id.* at ¶¶ 41, 44.
[39] *See id.* at ¶ 46.

German.[40] During the last of these meetings, the individual informed El-Masri once more that he was soon to be released, cautioning that he "was never to mention what had happened to him, because the Americans were determined to keep the affair a secret."[41]

El-Masri was released at last on May 28th.[42] That morning, his own clothes were returned to him, and he was placed (blindfolded) aboard a flight without being told the country of destination.[43] Upon landing, he was placed in a vehicle (still blindfolded) that drove around for several hours.[44] Eventually, he was told to get out of the vehicle, and his blindfold was removed.[45] It was night, and El-Masri found that he was on a deserted road.[46] He was told to walk down the road without looking back.[47] When he rounded a bend, he encountered border guards who informed him that he was in Albania. From the border station, Albanian officials took El-Masri directly to the airport in Tirana.[48] He was escorted through the airport and placed on a flight bound for Frankfurt.[49] When the flight arrived in Germany later that day, El-Masri was free for the first time since his captivity had begun five months earlier.[50] Eventually he made his way to his home in Ulm, only to discover that his wife and children had left Germany to live in Lebanon during his long, unexplained absence.[51] Though later reunited with his family, "El-Masri was and remains deeply traumatized" by these events.[52]

Assuming that these allegations are true, there would be no question that Khaled El-Masri has been subjected to a grievous injustice because of the rendition program and, as Secretary Rice herself suggested,[53] that the United States would have at least a moral obligation to do what it could to compensate him. Whether El-Masri can compel the government to provide such compensation through litigation is a different question, however, one that implicates the tension between the

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[40] *See id.* at ¶¶ 47-48.
[41] *Id.* at ¶ 48.
[42] *See id.* at ¶ 49.
[43] *See id.* at ¶¶ 50-51.
[44] *See id.* at ¶¶ 52-53.
[45] *See id.* at ¶ 53.
[46] *See id.*
[47] *See id.*
[48] *See id.* at ¶ 54.
[49] *See id.* at ¶¶ 55-56.
[50] *See id.* at ¶ 56.
[51] *See id.*
[52] *Id.* at ¶ 58.
[53] *See* Joint Press Briefing, *supra* note __.

executive branch's responsibility for national defense and foreign affairs and the judiciary's responsibility for vindicating individual rights.

B. To the Eastern District of Virginia

In December 2005, El-Masri filed a civil suit for damages in the United States District Court for the Eastern District of Virginia against former Director of Central Intelligence George Tenet, as well as a number of John Doe defendants and three corporations that El-Masri alleged functioned as fronts for CIA rendition operations.[54] The complaint asserted three causes of action. First, El-Masri asserted a *Bivens* claim[55] premised on violations of both the substantive and procedural aspects of the Fifth Amendment Due Process Clause. In particular, El-Masri argued that he had been subjected to conduct that "shocks the conscience" and that he had been deprived of his liberty without due process.[56] Second, El-Masri invoked the Alien Tort Statute ("ATS") [57] as a vehicle to assert a claim based on violation of the customary international law norm against prolonged arbitrary detention.[58] Third, El-Masri also relied upon the ATS to assert a claim for violation of the customary international law norm against torture and other forms of cruel, inhuman, or degrading treatment.[59]

Whether these causes-of-action were well-founded as a legal matter was open to considerable debate. For example, much uncertainty surrounds the issue of which customary international law norms can be enforced via an ATS claim in light of the strict criteria set forth by the Supreme Court in *Sosa v. Alvarez-Machain*,[60] and El-Masri – as a non-citizen held outside the United States – faced even greater obstacles in his attempt to assert constitutional rights.[61] Had the court come to grips with the merits, therefore, it is possible that the complaint would have

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[54] *See id.*
[55] *See* Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971) (recognizing private right of action to recover damages for violations of constitutional rights by federal agents).
[56] *See* El-Masri Complaint, *supra* note __, at ¶ 65.
[57] *See* 28 U.S.C. § 1350. *Cf.* Sosa v. Alvarez-Machain, 542 U.S. 692 (2004) (construing the ATS not to apply to claims "for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when § 1350 was enacted," which is to say piracy, infringements of ambassadorial privileges, and violations of "safe conduct" assurances).
[58] *See* El-Masri Complaint, *supra* note __, at ¶ 73.
[59] *See id.* at ¶ 83.
[60] *See supra* note __.
[61] *See* United States v. Verdugo-Urquidez, 494 U.S. 259, 273 (1990).

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

In early March 2006, five days before the defendants were due to respond to the complaint, the United States filed a motion requesting an immediate stay of all proceeding in the case. Simultaneously, the government filed a statement of interest in which it formally asserted the so-called "state secrets privilege," arguing that El-Masri's suit could not proceed without exposure of classified information relating to national security and foreign relations.[62] The stay was granted,[63] and the following week the United States simultaneously moved both to intervene formally as a defendant and to have the complaint dismissed on state-secret grounds (or, in the alternative, for summary judgment on that basis).[64]

According to the government's motion, the state secrets privilege is a doctrine that follows from the powers and responsibilities committed to the executive branch by Article II of the Constitution.[65] It is absolute in that it cannot be overcome by any showing of need by the opposing party.[66] At the very least, it functions to preclude discovery of privileged information; at the most – as when the very subject matter of the litigation is itself a secret within the scope of the privilege – it may warrant dismissal of a suit.[67] Because both the claims and the defenses at issue in *El-Masri* "would require the CIA to admit or deny the existence of clandestine CIA activity," the government asserted, the suit simply could not proceed.[68] In support, the government submitted both an unclassified declaration from the Director of Central Intelligence and also, on an *ex parte, in camera* basis, a classified version of the Director's declaration.[69]

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[62] *See* El-Masri v. Tenet, Docket #14 (Motion for an Immediate Stay of All Proceedings by United States of America); *id.* Docket # 17 (Statement of Interest, Assertion of a Formal Claim of State Secrets Privilege by United States of America)
[63] *See id.* Docket # 21.
[64] *See id.* Docket # 25, 27, 28.
[65] El-Masri v. Tenet, Memorandum of Points and Authorities in Support of the Motion by Intervenor United States to Dismiss or, in the Alternative, for Summary Judgment, at 4 ("Government's Memorandum"), *available at* http://www.aclu.org/pdfs/safefree/govt_mot_dismiss.pdf.
[66] *See id.* at 5.
[67] *See id.* at 4-5.
[68] *Id.* at 1.
[69] *See* El-Masri v. Tenet, 437 F. Supp.2d 530 (E.D. Va. 2006).

On El-Masri's behalf, the ACLU responded by contending that the central facts at issue in his case – including not just the details of his detention in Macedonia and Afghanistan but also the role of the United States in orchestrating events pursuant to the rendition program – were no longer secrets at all, and that El-Masri could support his claims without the need for discovery of classified information.[70] The district court, however, was unpersuaded.[71]

The court agreed with the government that the "privilege derived from the President's constitutional authority over the conduct of this country's diplomatic and military affairs," and that when properly asserted it was absolute in nature.[72] Relying on the Supreme Court's 1953 decision in *United States v. Reynolds*[73] – a decision widely recognized as having established the analytical framework applicable to assertions of the privilege – the court concluded that the government had (a) followed the requisite formalities for assertion of the privilege in this instance (by having the Director of Central Intelligence make the claim himself upon personal consideration of the issue) and (b) satisfied the standard for determining whether the information in question is sufficiently related to national security or foreign relations to warrant protection. As to the latter, the court explained:

> "It is enough to note here that the substance of El-Masri's publicly available complaint alleges a clandestine intelligence program, and the means and methods the foreign intelligence services of this and other countries used to carry out the program. . . . [A]ny admission or denial of the allegations by defendants in this case would reveal the means and methods employed pursuant to this clandestine program and such a revelation would present a grave risk of injury to national security."[74]

The court rejected El-Masri's argument that the U.S. government's public statements acknowledging the existence of the rendition program "undercuts the claim of privilege," reasoning that there is a

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[70] El-Masri v. Tenet, Memorandum of Points and Authorities in Opposition to the United States' Motion to Dismiss or, in the Alternative, for Summary Judgment, *available at* http://www.aclu.org/pdfs/safefree/elmasri_final_brief.pdf.

[71] *See* El-Masri v. Tenet, 437 F. Supp.2d 530 (E.D. Va. 2006). This decision currently is on appeal to the Fourth Circuit.

[72] *Id.*

[73] 345 U.S. 1 (1953).

[74] *Id.*

> "critical distinction between a general admission that a rendition program exists, and the admission or denial of the specific facts at issue in this case. A general admission provides no details as to the means and methods employed in these renditions, or the persons, companies, or governments involved."[75]

Having concluded that the government had properly asserted the state secrets privilege as to such details, the question remained whether El-Masri's suit could proceed. The court concluded that it could not, as the government could not plead in response to the complaint without "reveal[ing] considerable detail about the CIA's highly classified overseas programs and operations."[76] Because "the entire aim of the suit is to prove the existence of state secrets," there was no prospect of adopting special procedures tailored to prevent their disclosure while permitting the case to proceed.[77] "Thus, while dismissal of the complaint deprives El-Masri of an American judicial forum for vindicating his claims, well-established and controlling legal principles require that in the present circumstances, El-Masri's private interests must give way to the national interest in preserving state secrets."[78]

II. THE SECRECY DILEMMA

In order to fully appreciate the clash of values implicit in the government's invocation of the state secrets privilege in *El-Masri*, it helps to situate the case against the backdrop of the larger theoretical debate regarding the proper role of government secrecy in an open, democratic society. That debate has been with us since the early days of the republic,[79] and as a result there are innumerable ways to convey its essential points. For present purposes, however, it seems especially fitting to draw on an event that occurred at the peak of the most recent era prior to 9/11 in which the demands of secrecy, democracy, and litigation came into sustained conflict.

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[75] *Id.*
[76] *Id.*
[77] *Id.*
[78] *Id.*
[79] For an insightful discussion, see Saikrishna B. Prakash, *A Critical Commentary on the Constitutionality of Executive Privilege*, 83 MINN. L. REV. 1143 (1999).

A. The Tensions Inherent in Government Secrecy

In April 1975, Attorney General Edward Levi appeared before the Association of the Bar of the City of New York to deliver an address on the topic of government secrecy. Levi had been appointed by President Ford just two months earlier, at a time in which the public's faith in government had reached an all-time low as a result of a range of factors, including most notably the Watergate scandal and revelations in the media and Congress of abusive surveillance practices carried out in the name of national security. In speaking to the leaders of the bar in New York City that night in April, Levi was engaged in a conscious effort to address that crisis of confidence. In a characteristically measured and direct way, his comments captured the essence of the secrecy dilemma.

Levi opened by conceding that "[i]n recent years, the very concept of confidentiality in government has been increasingly challenged as contrary to our democratic ideals, to the constitutional guarantees of freedom of expression and freedom of the press, and to our structure of government."[80] He was speaking, of course, less than a year after the Supreme Court had foreclosed President Nixon's attempt to invoke executive privilege to prevent a special prosecutor from obtaining recordings and transcripts of White House conversations for use in a criminal prosecution.[81] In that context, Levi observed, it had come to seem that "[a]ny limitation on the disclosure of information about the conduct of government . . . constitutes an abridgment of the people's right to know and cannot be justified."[82] Indeed, to some "governmental secrecy serves no purpose other than to shield improper or unlawful action from public scrutiny."[83]

Having thus acknowledged the current public mood, Levi pled first for appreciation of the government's legitimate need for some degree of confidentiality. That need, he asserted, "is old, common to all governments, essential to ours since its formation."[84] At bottom, "confidentiality in government go[es] to the effectiveness – and

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[80] Attorney General Edward Levi, Address to the Association of the Bar of the City of New York, Apr. 28, 1975, at 1 (Gerald R. Ford Presidential Library and Museum, Edward Levi Papers, Speeches and Scrapbooks Collection, Volume I).
[81] *See* United States v. Nixon, 418 U.S. 683 (1974) (recognizing constitutional status of executive privilege for internal executive branch deliberations, but holding that the privilege gave way to the competing interests of a pending criminal prosecution).
[82] Levi, *supra* note __, at 1-2.
[83] *Id.* at 2.
[84] *Id.*

sometimes the very existence – of important governmental activity."[85] Among other things, government must "have the ability to preserve the confidentiality of matters relating to the national defense," a proposition that he viewed as "[c]losely related [to] the need for confidentiality in the area of foreign affairs."[86] Invoking the example of the secrecy regarding the breaking of Axis codes during World War II, Levi pointed out that "[i]n the context of law enforcement, national security, and foreign policy the effect of disclosure" of sensitive information actually might be to prevent the government from acquiring critical intelligence, "endanger[ing] what has been said to be the basic function of any government, the protection of the security of the individual and his property."[87]

Levi also acknowledged, however, that "of course there is another side – a limit to secrecy."[88] Invoking the First Amendment, Levi argued that "[a]s a society we are committed to the pursuit of truth and to the dissemination of information upon which judgments may be made."[89] This consideration matters in particular in light of our democratic form of government: "The people are the rulers," Levi reminded his audience, but "it is not enough that the people be able to discuss . . . issues freely. They must also have access to the information required to resolve those issues correctly. Thus, basic to the theory of democracy is the right of the people to know about the operation of their government."[90] Levi reinforced the point with words from James Madison:

> "A popular Government without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives."[91]

Thus, Levi concluded, "we are met with a conflict of values."[92] On one hand, a "right of complete confidentiality in government could not only produce a dangerous public ignorance but also destroy the basic representative function of government."[93] On the other, "a duty of

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[85] *Id.* at 4.
[86] *Id.* at 18-19.
[87] *Id.* at 18-21.
[88] *Id.* at 10.
[89] *Id.*
[90] *Id.* at 10-11.
[91] *Id.* at 11 (quoting Letter from James Madison to W.T. Barry, Aug. 4, 1822, 9 Writings of James Madison 103 (G. Hunt ed. 1910)).
[92] *Id.* at 13.
[93] *Id.*

complete disclosure would render impossible the effective operation of government. Some confidentiality is a matter of practical necessity."[94] Levi closed by observing that

> "[m]easured against any government, past or present, ours is an open society. But as in any society conflicts among values and ideals persist, demanding continual reassessment and reflection. The problem which I have discussed this evening is assuredly one of the most important of these conflicts. It touches our most deeply-felt democratic ideals and the very security of our nation."[95]

In the final analysis, Levi's aim was to impress upon a potentially-skeptical audience that the government does have a genuine need for secrecy in some circumstances while at the same time acknowledging that deference to that need will come at a cost in terms of accountability and the democratic process. He did not add, though it would have been very much in the spirit of his remarks to do so, that this tension is all the more acute when the government's assertion of confidentiality takes place not just at the expense of the public's generalized right to know – as when the government invokes a security-based exception to its Freedom of Information Act obligations – but also at the expense of a specific litigant who has turned to the judiciary in an effort to vindicate his or her rights in the face of alleged government misconduct. In the latter context, deference to the government's interest in maintaining confidentiality for security-related reasons conflicts not only with considerations of democratic accountability but also with enforcement of the rule of law itself.

B. Criticism of the State Secrets Privilege

El-Masri demonstrates that the state secrets privilege in at least some circumstances can present precisely this exacerbated form of the general government secrecy dilemma. One might object, of course, that it is far from clear that El-Masri's substantive claims were viable as a legal matter, and thus that invocation of the state secrets privilege in his case might not actually have entailed the additional costs described above. That objection fails to account, however, for the threshold harm to El-Masri in being denied the opportunity to establish even the legal sufficiency of his claims, a harm that arguably is experienced by the larger public as well. In any event, one need only imagine the same fact pattern arising with respect to an American citizen – thus eliminating

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[94] *Id.*
[95] *Id.* at 29.

questions regarding the legal sufficiency of the claim without altering the state secrets problem – in order to appreciate the larger significance of precluding adjudication of El-Masri's claims.[96]

Precisely for this reason, the state secrets privilege has long been the subject of academic criticism.[97] Louis Fisher, for example, has

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[96] It does not appear that any U.S. person with a manifest claim to constitutional rights (and thus the option for a *Bivens* claim) has been subjected to an extraordinary rendition. The closest example involves Maher Arar, a Syrian-Canadian dual-citizen who was detained while transiting JFK Airport en route from Zurich to Montreal and was eventually removed, first to Jordan and then on to Syria. Arar's case does not fit precisely within the rendition paradigm because he was removed pursuant to the formal procedures of U.S. immigration law, but nonetheless is best thought of in rendition terms in light of his allegation that the aim of the removal was to place him in Syrian custody for interrogation purposes. In any event, Arar's brief territorial connection with the U.S. placed him in a better position than the typical rendition subject to assert constitutional claims, a proposition that he put to the test in a civil suit asserting a *Bivens* claim comparable to El-Masri's. Much like *El-Masri*, government invoked the state secrets privilege as a ground to dismiss Arar's suit. The district court ultimately declined to reach that issue, however, holding instead that there is a national security-exception to *Bivens* such that there is no private right of action for alleged constitutional violations that "raise[] crucial national-security and foreign policy considerations implicating 'the complicated multilateral negotiations concerning efforts to halt international terrorism.'" Arar v. Ashcroft, 414 F. Supp.2d 250, 281 (E.D.N.Y. 2006). For a discussion of the merits of that opinion, compare Julian Ku, *Why Constitutional Rights Litigation Should Not Follow the Flag*, 28 NAT'L SEC. L. REP. 1 (2006), with Stephen I. Vladeck, *Rights Without Remedies: The Newfound National Security Exception to* Bivens, 28 NAT'L SEC. L. REP. 1 (2006).

[97] *See, e.g.,* Note, *The Military and State Secrets Privilege: Protection for the National Security or Immunity for the Executive?*, 91 YALE L. J. 570, 586-87 (1982) (arguing that the "current judicial practice of ignoring the loss of evidence caused by upholding a privilege claim neglects the courts' duty to enforce constitutional and congressional restraints on executive activities"); Frank Askin, *Secret Justice and the Adversary System*, 18 HAST. CONST. L. Q. 745, 760 (1991) (arguing that judicial deference to claims of secrecy is "unjustified by the realities of governmental operations," as "[b]ureaucrats will almost always opt for secrecy"); Sandra D. Jordan, *Classified Information and Conflicts in Independent Counsel Prosecutions: Balancing the Scales of Justice after Iran-Contra*, 91 COLUM. L. REV. 1651, 1679 (1991) (contending that the judiciary lacks "a meaningful working standard to evaluate" national security-based secrecy claims); J. Steven Gardner, *The State Secret Privilege Invoked in Civil Litigation: A Proposal for Statutory Relief*, 29 WAKE FOR. L. REV. 567, 587-88 (1994) (asserting that the "most forceful" objection to the state secrets privilege is that it "violates the constitutionally mandated separation of powers"); Jonathan Turley, *Through a Looking Glass Darkly: National Security and Statutory Interpretation*, 53 S.M.U. L. REV. 205, 248 (2000) (arguing that

devoted an entire book to the proposition that the state secrets privilege is "an unnecessary . . . doctrine that is incoherent, contradictory, and tilted away from the rights of private citizens and fair procedures and supportive of arbitrary executive power."[98] Fisher argues that "[b]road deference by the courts to the executive branch, allowing an official to determine what documents are privileged, undermines the judiciary's duty to assure fairness in the courtroom and to decide what evidence may be introduced."[99] It is, in his view, a problem of constitutional magnitude: "The framers adopted separation of powers and checks and balances because they did not trust human nature and feared concentrated power. To defer to agency claims about privileged documents and state secrets is to abandon the independence that the Constitution vests in Congress and the courts, placing in jeopardy the individual liberties that depend on institutional checks."[100]

In similar fashion, William Weaver and Robert Pallitto argue that there are at least three "powerful arguments for judicial oversight of executive branch action even if national security is involved."[101] First, they observe that "it is perverse and antithetical to the rule of law" to permit the government to employ the state secrets privilege to "avoid judgment in court" or public exposure in connection with unlawful conduct.[102] Second, an overly-robust conception of the privilege would create an "incentive on the part of administrators to use the privilege to avoid embarrassment, to handicap political enemies, and to prevent criminal investigation of administrative action."[103] Third, "the privilege, as now construed, obstructs the constitutional duties of courts to oversee executive action."[104]

"use of the privilege easily fulfills the countermajoritarian nightmare in statutory interpretation," in that it enables "circumvention or rejection of a statutory program"); Sean C. Flynn, *The Totten Doctrine and Its Poisoned Progeny*, 25 VT. L. REV. 793 (2001); Kenneth W. Graham, Jr., *Government Privilege: A Cautionary Tale for Codifiers*, 38 LOY. L. A. L. REV. 861 (2004); Meredith Fuchs, *Judging Secrets: The Role Courts Should Play in Preventing Unnecessary Secrecy*, 58 Admin. L. Rev. 131 (2006); Raoul Berger, Executive Privilege: A Constitutional Myth 216-24 (1974).

[98] LOUIS FISHER, IN THE NAME OF NATIONAL SECURITY: UNCHECKED PRESIDENTIAL POWER AND THE *REYNOLDS* CASE 253 (2006).

[99] *Id.* at 258.

[100] *Id.* at 262.

[101] William G. Weaver & Robert M. Pallitto, *State Secrets and Executive Power*, 120 POL. SCI. Q. 85, 90 (2005).

[102] *Id.*

[103] *Id.*

[104] *Id.*

Complicating matters, concerns associated with the state secrets privilege in recent years has become inextricably intertwined with the larger debate concerning the Bush Administration's generally expansive approach to executive branch authority, particularly in connection with the war on terrorism. That larger debate is, in significant part, a debate concerning the extent to which the executive branch must comply with statutory and other restraints when acting in pursuit of national security goals.[105] The debate itself is hampered by the secrecy that often comes hand-in-hand with the pursuit of security-related policies, however, particularly insofar as the state secrets privilege is concerned. Assertions of the privilege may have the immediate effect of curtailing judicial review, and also the indirect effect of reducing the capacity of both Congress and the voting public to act as a check on the executive. If we assume for the sake of argument that at least some extraordinary renditions are unlawful, for example, the practical effect of the result in *El-Masri* is to prevent a court from reaching that determination and potentially intervening to prevent further unlawful conduct.[106] Likewise, assertion of the privilege also reduces the information on this topic available to Congress and the public, to similar effect.

Some will argue that this is as it should be, as courts ought not to interfere with wartime measures undertaken by the President in the exercise of his Article II responsibilities, legal or not.[107] This is, too say the least, a controversial proposition. But it also is one that ought to be addressed in the first instance by the courts themselves. In some circumstances, a robust embrace of the state secrets privilege could prevent that from occurring. Put another way, the privilege has the capacity to prevent courts from engaging the most significant constitutional issue underlying the post-9/11 legal debate: whether and to what extent recognition of an armed conflict with al Qaeda permits the executive branch to act at variance with the framework of laws that otherwise restrain its conduct.[108]

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[105] For an illustrative discussion, see Michael D. Ramsey, *Torturing Executive Power*, 93 GEO. L. J. 1213 (2005) (discussing assertions of Article II authority to violate statutory restraints in wartime).

[106] In this respect, assertion of the privilege has a similar impact as would vigorous enforcement of the statutes criminalizing leaks of classified information. For a discussion of the latter problem, see volume 26 of the NATIONAL SECURITY LAW REPORT, which collects essays on the topic.

[107] *See, e.g.,* JOHN YOO, THE POWERS OF WAR AND PEACE (2006) (arguing that Congress should rely on the power of the purse and on impeachment to check the executive branch's conduct in the security realm).

[108] The capacity of the state secrets privilege to preclude consideration of this question is by no means limited to the context of rendition, of course. Indeed, the issue arguably is even more squarely presented by the controversy

Bearing these considerations in mind, the decision to dismiss Khaled El-Masri's lawsuit on state secrets grounds takes on a much broader significance. The stakes just described are among the weightiest possible constitutional considerations, on both sides of the balance. The decision in *El-Masri* in this light thus is an occasion for deeper exploration of the nature and scope of the privilege, as a prelude to consideration of what reforms if any might be desirable or even possible.

III. THE ORIGIN AND EVOLUTION OF THE STATE SECRETS PRIVILEGE

Notwithstanding the magnitude of the competing policy considerations underlying the state secrets privilege, its nature and scope remain the subject of considerable uncertainty. Is it a constitutional rule derived from the separation of powers, or is it merely a common law rule of evidence of no greater stature than, for example, the spousal privilege? The question matters a great deal. If the former, there is relatively little that Congress might do should it wish to alter – let alone override – the privilege's impact on national security-related litigation. If the latter, on the other hand, Congress is at liberty to chart its own course in reconciling the tension between the government's legitimate need for secrecy and the obligation to provide justice in particular cases.

A careful review of the origin and evolution of the privilege suggests that both explanations are true to some extent. The privilege emerged in the traditional common law way, through a series of judicial decisions tracing back at least to the early 19th century. These early pronouncements – some of which had constitutional overtones –a dealt with a series of evidentiary questions that were quite distinct from one another and which did not necessarily concern matters of a diplomatic or

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surrounding the Administration's policy (or perhaps policies) associated with warrantless surveillance of communications relating to persons that have been linked in some fashion to al Qaeda (and perhaps other groups or individuals as well). As in *El-Masri*, the government has interposed the state secrets privilege as a ground to terminate civil suits concerning such surveillance, with mixed success thusfar. *Compare* Terkel v. AT&T Corp., __ F. Supp.2d __, 2006 WL 2088202 (N.D. Ill. July 25, 2006) (dismissing complaint for lack of standing after finding state secrets privilege applicable) *with* Hepting v. AT&T Corp., __ F. Supp.2d __, 2006 WL 2038464 (N.D. Cal. July 20, 2006) (concluding that the fact of the surveillance program was no longer a secret and thus permitting suit to continue); ACLU v. NSA, _ F. Supp.2d __, 2006 WL 2371463 (E.D. Mich. Aug. 17, 2006) (same); Al-Haramain Islamic Found., Inc. v. Bush, __ F. Supp.2d __, 2006 WL 2583425 (D. Or. Sep. 7, 2006) (upholding assertion of state secrets privilege except as to information contained in document that accidentally had been disclosed to plaintiffs).

military nature. In the hands of mid-19th century treatise-writers actively seeking to rationalize and systematize the body of common law evidentiary rules, however, these disparate threads eventually were woven together under the umbrella concept of a multi-faceted "public interest" privilege, some aspects of which were referred to under the heading of "state secrets." The state secrets privilege in its modern form emerged against the backdrop of this common law doctrine during the mid-20th century, thanks especially to the Supreme Court's seminal decision in *Reynolds*, which established an analytical framework for review of privilege assertions that remains in use today. Published opinions addressing the privilege remained uncommon for some years thereafter, but have since become relatively frequent, beginning with a spate of national security-related litigation in the early 1970s and continuing through to the present day. From that period onward, opinions discussing the privilege frequently have sounded separation of powers themes, suggesting a constitutional foundation to reinforce the common law shell of the doctrine.

A separate question that arises in connection with the survey concerns the accuracy of recent criticisms to the effect that the Bush Administration has broken with past practice in asserting the privilege, measured either quantitatively or qualitatively. Neither criticism, I conclude, is warranted. The fundamental lesson of the survey is that the state secrets privilege has always produced harsh results from the perspective of individual litigants. Even if it were possible to do so, moreover, attempts to allocate political responsibility for the privilege to any single administration ultimately distracts from the more important task of considering whether and to what extent legislative reform of the privilege might be appropriate.

A. "Public Interest" Privileges in the Anglo-American Common Law Tradition

The first glimmer of the state secrets privilege in American law is found in *Marbury v. Madison*. *Marbury* is of course famous for Chief Justice Marshall's deft assertion of the Judiciary's power to nullify federal statutes on constitutional grounds, a landmark ruling concerning the separation of powers between the Judiciary and Congress. In the course of the litigation in that case, however, the Court also had occasion to address a basic question of evidentiary procedure that smacked of distinct concerns associated with the separation of powers between the Judiciary and the Executive.

Marbury had sought to elicit testimony from Attorney General Levi Lincoln – who had been the acting Secretary of State in the opening

months of the Jefferson administration – concerning whether the commissions at issue in that case had been found in the Secretary of State's office. Lincoln objected, arguing that he should not testify "as to any facts which came officially to his knowledge while acting as secretary of state."[109] Ultimately, the Court sided with Marbury, reasoning that there was nothing confidential about the information he sought concerning the location of the commissions at a particular point in time. It noted in dicta, however, that Lincoln would not have been "obliged" to disclose information "communicated to him in confidence."[110]

The *Marbury* dicta raised more questions than it answered. Did the Court mean to suggest that confidential communications to executive branch officials are privileged and hence both inadmissible and beyond the scope of discovery, or was the point to suggest that courts lack the capacity to subject a cabinet official to judicial process (e.g., contempt proceedings) in order to compel compliance with any discovery order that might be issued? Assuming the former, was the basis for protection rooted in the common law of evidence, in constitutional considerations associated with the independence of the executive branch, or both?

Four years later, Chief Justice Marshall had an occasion to revisit the issue of confidential government information in connection with the treason trial of Aaron Burr. During the trial, Burr sought production of an inculpatory letter that General James Wilkinson, governor of the Louisiana Territory, had sent to President Jefferson describing Burr's alleged conspiracy.[111] Marshall proceeded with caution, noting on one hand that it was "certain" that there were some papers in the President's possession that the court "would not require" to be produced, but on the other that the court would be "very reluctant[]" to deny production if the document "were really essential to [Burr's] defense." Critically, however, Marshall also observed that the government in this instance was not resisting production on the ground that disclosure of the document would "endanger the public safety."[112] Ultimately, the evidentiary dispute in that case became moot, sparing Marshall the need to take a firm stand with respect to privilege issues. The record of the trial remains significant, however, for Marshall's

[109] 5 U.S. 137, 143.
[110] 5 U.S. at 144.
[111] United States v. Burr, 25 F. Cas. 30 (Cir. Ct. Va. 1807).
[112] 25 F. Cas. at __.

introduction of the notion that confidential government information relevant to "public safety" might not be discoverable or admissible.[113]

Some time would pass before an American court would have occasion to speak directly to the public safety issue that Marshall raised in *Burr*, at least insofar as the record of published opinions indicates. But the absence of on-point caselaw in the U.S. did not entirely inhibit development of legal thought on the issue. Evidence treatises in circulation in the U.S. at that time relied extensively on English precedent – indeed, they frequently *were* English treatises, republished with annotations to American authorities where possible – and through that medium the bar in the U.S. in the early-to-mid 1800s would have been familiar with contemporaneous developments across the Atlantic.

At the turn of the 19th century, these treatises had relatively little to say on the topic of evidentiary privileges relating specifically to government information.[114] This began to change at least by the 1820s, however, in light of the emerging body of precedent in England (and to a lesser extent America, thanks to *Marbury* and *Burr*) concerning the issue. The first American edition of Thomas Starkie's influential evidence law treatise, published in 1826, provides a good example.[115] "There are some instances," Starkie wrote, "where the law excludes particular evidence, not because in its own nature it is suspicious or doubtful, but on grounds

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[113] United States v. Burr, 25 F. Case. 187, 193 (Cir. Ct. Va. 1807). *See also* Gray v. Pentland, 2 Serg. & Rawle 23 (Pa. 1815). *Pentland* was a libel lawsuit arising out of Gray's attempt to persuade Pennsylvania's governor to fire or otherwise take action against Pentland, who was at that time the "prothonotary" of the Court of Common Pleas in Allegheny County. Pentland's claim turned on the existence of a deposition transcript that Gray allegedly had provided to the governor in support of Gray's claim of malfeasance. The governor refused to provide Pentland with the original document, forcing him at trial to rely on a copy. The trial court permitted him to do so, but the Supreme Court of Pennsylvania reversed on the ground that admission of the copy was tantamount to ordering production of the original, something the court was not inclined to do because it might deter persons from providing executive officials with needed information on a confidential basis.

[114] *See, e.g.,* LEONARD MACNALLY, THE RULES OF EVIDENCE ON PLEAS OF THE CROWN (Philadelphia edition) (1811) (chapters XXI – XXII) (discussing attorney-client privilege and related matters, but not governmental privileges).

[115] THOMAS STARKIE, A PRACTICAL TREATISE ON THE LAW OF EVIDENCE AND DIGEST OF PROOFS IN CIVIL AND CRIMINAL PROCEEDINGS (Theron Metcalf, editor of American edition). For reference to Starkie's influence, see Bruce P. Smith, *The Presumption of Guilt and the English Law of Theft, 1750-1850*, 23 L. & HIST. REV. 133, 143 n. 33 (2005) (citing C. J. W. ALLEN, THE LAW OF EVIDENCE IN VICTORIAN ENGLAND (1997), 20–23). The original English edition of Starkie's treatise was published in 1824. *See* ALLEN, *supra*, at 20.

of public policy, and because greater mischief and inconvenience would result from the reception than from the exclusion of such evidence . . . ."[116] These instances, he explained, included spousal privilege, attorney-client privilege, and the privilege against self-incrimination.[117] They also included an additional category, however, "in which particular evidence is excluded [because] disclosure might be prejudicial to the community."[118] Exclusion in that context, Starkie explained, was rooted in "grounds of state policy."[119]

On close inspection, Starkie's "state policy" privilege appears to encompass three distinct lines of English precedent, though he does not clearly draw these distinctions himself. First, Starkie described a series of decisions reflecting what we would recognize today as the "informer's privilege," precluding evidence of communications between informers and government officials in order to encourage such disclosures.[120] Second, Starkie provided numerous examples of what has since become familiar as the "deliberative process privilege."[121] Under the deliberative process privilege, courts provide qualified protection to some government communications in order to facilitate internal discussions and operations.[122] The evidentiary disputes in *Marbury* and *Burr* are best thought of as falling under this heading.[123]

The third constituent category of Starkie's overarching "state policy" privilege involved neither informants nor intra-governmental communications. Instead, it concerned information that the government sought to keep from public disclosure on security grounds, as illustrated in the 1817 English decision *Rex v. Watson*.[124] *Watson* was a high-profile affair, concerning an alleged plot by Dr. James Watson, his son of the same name, and others to attempt the overthrow of the British government through a series of acts that would include an assault on the

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[116] *See* Starkie, *supra* note __, at 103 (§ LVXXVI).
[117] *See* Starkie, *supra* note __, at 103-106 (§§ LVXXVI-LVXXIX). There was no doctor-patient or clergy privilege at that time, as Starkie notes. *See id.* at 105 (§ LVXXVIII).
[118] *See* Starkie, *supra* note __, at 106 (§ LVXXX).
[119] *See* Starkie, *supra* note __, at 106 (§ LVXXX) (notation in margin).
[120] *See id.*
[121] For a thorough discussion of the origins and nature of the "deliberative process privilege," see Russell L. Weaver & James T.R. Jones, *The Deliberative Process Privilege*, 54 Mo. L. Rev. 279 (1989).
[122] *See id.*
[123] The American editor of the volume, Theron Metcalf, cites to *Burr* and *Madison* in a footnote at the end of the "state policy" section. *See* Starkie, *supra* note __, at 106 n.1 (§ LVXXX).
[124] 2 Starkie's C. 148, 171 Eng. Rep. 591 (K.B. 1817).

Tower of London. During the trial, prosecutors introduced into evidence a map of the Tower that had been found in the lodgings of the younger Watson. In response, the defense produced a map of the Tower that had been "purchased without difficulty in the shops in London," and then sought to elicit testimony from a government employee who had long worked in the Tower to the effect that the map was accurate. The court refused to permit that question to be answered, however, reasoning "that it might be attended with public mischief, to allow an officer of the tower to be examined as to the accuracy of such a plan."[125] Watson was not the first reported English case in which otherwise-relevant information was deemed inadmissible in order to preserve the government's security-oriented interest in secrecy,[126] but it does seem to have been the first to draw the attention of the 19th Century treatise writers.

Henry Roscoe's *A Digest of the Law of Evidence in Criminal Cases*, published in the U.S. in 1836 under the editorship of George Sharswood, provides a similar account of a privilege attaching to certain government communications and information.[127] Like Starkie, Roscoe cites *Watson*. In addition, however, Roscoe also cites the opinion of Lord Ellenborough in *Anderson v. Hamilton*[128] as an example of the "matters of state" privilege.[129] *Anderson*, a civil suit for false imprisonment brought against the governor of Heligoland, had raised the

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[125] Rex v. Watson, 171 Eng. Rep. 591, 2 Stark. 116, 148 (1817).

[126] In 1723, in connection with Parliament's consideration of a bill of pains and penalties against Bishop Francis Atterbury on charges of treason, Atterbury sought to examine postal clerks who had opened and reported his allegedly incriminating correspondence and also the cryptographers who had decoded the letters in question, in both instances with the aim of exploring the method by which the incriminating information had been gathered. Both motions were denied by the House of Lords, however, on the express ground that such testimony might be "inconsistent with the public safety." *See* Bishop Atterbury's Trial, 16 How. St. Tr. 323, 495-96 (H.L. 1723). *See also* EVELINE CRUICKSHANKS & HOWARD ERSKINE-HILL, THE ATTERBURY PLOT 208-09 (2004) (describing Atterbury's failed attempt to examine Rev. Edward Willes, one of the cryptographers involved in decoding the allegedly inculpatory letters, regarding the nature of his art, including Willes' response that to answer the question would be "disserviceable to the Government" and useful to England's enemies).

[127] HENRY ROSCOE, A DIGEST OF THE LAW OF EVIDENCE IN CRIMINAL CASES WITH NOTES AND REFERENCES TO AMERICAN DECISIONS AND TO THE ENGLISH COMMON LAW AND ECCLESIASTICAL REPORTS (Sharswood, ed.) (1836).

[128] J.W. Anderson v. Sir W.G. Hamilton, Knt. (discussed in Home v. Bentinck, 2 Brod. & B. 130, 156-57 & n.(b) (1820)).

[129] *Id.* at 148-49. *Watson* also is cited in S. MARCH PHILLIPS AND ANDREW AMOS, A TREATISE ON THE LAW OF EVIDENCE 177 (8th London Ed.) (Boston 1839).

question whether a plaintiff could compel production of correspondence between the governor and the Secretary of State for the Colonial Department. Lord Ellenborough held that he could not, reasoning that "the security of the state made it indispensably necessary, that letters written under the seal of confidence should not be disclosed, and that a breach of the privilege given by the law to such communications would be highly dangerous to the interests of the state."[130] He added that the letters "might be pregnant with a thousand facts of the utmost consequence respecting the state of the government . . . and the suspicion of foreign powers with whom we may be in alliance."[131]

In 1842, Professor Simon Greenleaf of the Harvard Law School confirmed the maturation of American law relating to evidence by publishing *A Treatise on the Law of Evidence*, arguably the first successful volume of this nature to be written from an explicitly American perspective.[132] Following in the footsteps of Starkie and Roscoe, Greenleaf wrote that "[t]here are some kinds of evidence which the law excludes . . . on grounds of public policy; because greater mischief would probably result from requiring or permitting its admission, than from wholly rejecting it."[133] He then listed a number of examples, including what he called "secrets of state."[134] In explaining the content of that privilege, however, Greenleaf did not distinguish the security rationale of cases like *Watson* and *Anderson* from the administrative convenience underlying the deliberative-process privilege seen in cases such as *Burr*.[135] Indeed, Greenleaf did not cite *Watson* at all, and in citing *Anderson* did not draw attention to the security and diplomacy elements of Lord Ellenborough's opinion.

Nonetheless, the security issue played a critical but unspoken role in the next significant development in the emergence of the state secrets privilege. In 1875,[136] the Supreme Court decided *Totten v. United*

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[130] *Anderson*, *supra* note 19.

[131] *Id.* The only American authorities on this issue noted by Sharswood in his annotation to Roscoe's volume were *Marbury*, *Burr*, and *Gray*. *See* Roscoe, *supra* note 18, at 148 n.1.

[132] SIMON GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE (5th ed. 1854).

[133] Greenleaf, *supra* note __, at 309 (§ 236).

[134] Greenleaf was not the first to employ a version of the phrase "state secrets." Just three years earlier, in *Clark v. Field*, 12 Vt. 485 (1839), the Vermont Supreme Court had used the phrase "state secrets" to refer to the privilege that attaches to grand jury proceedings.

[135] Greenleaf, *supra* note 23, at 327 (§ 250).

[136] There were two state court opinions in the early 1870s which later would be cited with some frequency as early examples of the state secrets privilege. *See* Worthington v. Scribner, 109 Mass. 487 (1872); Thompson v. German Valley

States,[137] which concerned an attempt to enforce a contract pursuant to which President Lincoln allegedly had retained William Lloyd to act as a spy for the Union operating in Confederate territory.[138] The Court of Claims had adjudicated the dispute, dividing equally on the question of whether Lincoln had the authority to bind the U.S. in this way. By a unanimous vote, however, the Supreme Court held that the Court of Claims ought not to have heard the case to begin with.[139]

Justice Field explained that "public policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential, and respecting which it will not allow the confidence to be violated."[140] In this respect, the confidentiality inherent in the employer-employee relationship for spies was analogous to – indeed, stronger than – the "confidences of the confessional, or those between husband and wife, or of communications by a client to his counsel for professional

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Railroad Co., 22 N.J. Eq. 111 (Ct. Chancery N.J. 1871). Neither concerned secret information relating to the military or diplomatic activities of the United States government, however. *Worthington* concerned the informant's privilege, while *Thompson* dealt with an attempt to compel a state governor to produce a copy of a bill that he had vetoed.

[137] 92 U.S. 105 (1875).

[138] "Totten" was Enoch Totten, administrator of Lloyd's estate. *See* Totten v. United States, O.T. 1875, No. 167 (index to record) (on file with author).

[139] 92 U.S. at 106. In his reply to Totten's original petition, Assistant Attorney General Thomas Talbot did not assert any affirmative defenses, but instead controverted the allegations that the U.S. owed money to Lloyd and that Lloyd had "borne true faith and allegiance to the Government of the United States, and never voluntarily aided, abetted, or given encouragement to rebellion against the said Government." *Id.* at 2. The Court of Claims found that the agreement had in fact existed (the court did not address the loyalty issue, and was unable to come to agreement on the issue of the President's power to bind the United States to such a contract). *See id.* (Appellant's brief) at 3-4. Totten's brief to the Supreme Court focused largely on that issue of authority, while Solicitor General Phillips's brief in opposition argued that (i) the claim was time barred (on the theory that Lloyd could have made applications for payment from behind enemy lines, "if" he had been truly loyal) and (ii) in any event that "in the matter of expenditures which are *secret*, and thus freed from the checks enjoined by the system of accounts in ordinary cases, there should be a precedent or subsequent sanction by Congress before a *right of suit* exists." *Id.* at 4-5 (italics in original). That is, Phillips argued that Totten's suit was "of a class that necessarily does not warrant a suit against the United States unless it be shown that there is an appropriation for secret service outstanding and applicable." *Id.* at 5.

[140] *Id.* at 107. Note that this particular argument was not presented by the government at any stage in the proceedings, excepting the possibility that it may have been raised at oral argument. *See supra* note __.

advice, or of a patient to his physician for a similar purpose."[141] And just as "suits cannot be maintained which would require a disclosure" of such confidences, so too no suit could be maintained which would require disclosure of a spy's employment by the U.S.[142] A contrary result, Field warned, would run the risk of exposing "the details of dealings with individuals and officers . . . to the serious detriment of the public."[143]

Seen in the context of the foregoing discussion, *Totten* at the time was best understood as a significant extension of the still-evolving concept of a state secrets privilege.[144] First, it followed the British example in *Watson* in recognizing a public-policy justification in American law for precluding public disclosure of information on security-related grounds. Second, and more significantly, *Totten* established the absolute nature of that privilege in at least some contexts, taking the concept to its logical extreme: as the fact and details of an espionage relationship cannot be disclosed, there was no point in proceeding with litigation that would require precisely that.

Notably, the Court in *Totten* did not actually require an assertion of privilege on the part of the Executive as a precondition to its holding that espionage contract suits cannot be maintained; on the contrary, the court appears to have raised the issue on its own initiative. One might conclude from this that the Court took the view that such suits are non-justiciable as a constitutional matter. The Court at no point described its holding in separation-of-powers or other constitutional terms, however. Rather, the Court simply spoke in terms of the detrimental "public policy" ramifications of permitting lawsuits to enforce unacknowledged espionage contracts to proceed, much like the earlier examples of the evolving common law privilege discussed above.

The Supreme Court of Pennsylvania was more forthcoming about the theoretical foundations for the privilege when it confronted the issue in its 1877 decision *Appeal of John F. Hartranft, Governor*. The *Hartranft* litigation arose against the backdrop of the Great Railroad Strike of 1877, which had produced terrible violence between Pennsylvania national guardsmen and strikers in Pittsburgh during the summer of that year. After order was restored, a grand jury in Allegheny County had subpoenaed Governor Hartranft and Pennsylvania National

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[141] *Id.*
[142] *Id.*
[143] *Id.* at 106-07.
[144] The Supreme Court recently has indicated that it views *Totten* as distinct from the state secrets privilege, though there is much reason to question that conclusion. *See infra* at ___-___ (discussing *Tenet v. Doe*, 544 U.S. 1, 8-11 (2005)).

Guard officials to testify relating to their role in these events. The county court issued attachments against them when they refused to comply, but the Supreme Court of Pennsylvania reversed on (state) constitutional grounds. After observing that the power to issue an attachment against senior executive officials implied a variety of other powers in the judiciary to control the executive branch—itself a proposition fraught with separation-of-powers concerns—the court held that the executive department in any event had *exclusive* "power to judge . . . what of its own doings and communications should or should not be kept secret . . . ."[145]

The first decision that *Hartranft* cited in support of this total-deference obligation was not an American authority, but a British one. *Beatson v. Skene* was an 1860 decision concerning slanderous comments that a civilian official allegedly had made concerning Beatson, who at the time had been the commander of an irregular cavalry unit operating in Turkish territory at the time of the Crimean War. As it happened, Skene's comments were recorded in a letter that came into the custody of the Secretary of State for War, who declined to produce it for the litigation on the ground that "doing so would be injurious to the public service."[146] The court agreed, and went on to add that except in "an extreme case" judges should not even ask to see the documents in question once a claim of this sort has been made, but rather should leave the determination to "the head of the department having custody of the paper . . . ."[147] The court in *Beatson* reasoned that a contrary approach ordinarily would not be possible because, it believed, a judicial inspection "cannot take place in private" and thus necessarily would entail public exposure of the matter in issue.[148] *Hartranft* cited this rationale with approval, apparently not recognizing the availability in American practice of *ex parte, in camera* review.

B. The Emergence of the Modern Privilege

1. An Emerging Focus on Security

By the late 19th century, treatise writers in the U.S. had begun to refer expressly to a "state secrets" privilege. At this stage, however, they were using "state secrets" much as the early writers had referred to a "public interest" privilege: *viz.*, as an umbrella concept integrating cases like *Totten* and *Hartranft* with precedents concerning such matters as the

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[145] *Id.* at *10.
[146] *Beatson*, __ E.R. 1415, 1421.
[147] *Id.* at 1421.
[148] *Id.* at 1421.

informer's privilege and the deliberative-process and government-communications privileges.[149] It was not surprising, in light of this, that courts near the turn of the century frequently referred to "state secrets" when dealing with matters unrelated to national security or foreign relations.[150]

Eventually, the core of a distinctive "state secrets" privilege focused on security-related matters did begin to emerge in the early 20th century. The initial examples involved commercial disputes relating to military hardware. In a handful of cases prior to World War II – one in 1912 involving the designs for armor-piercing projectiles,[151] and two others in the late 1930s involving equipment used in connection with gun sighting[152] – courts invoked the emerging privilege to preclude litigants from obtaining much-needed discovery, with reasoning expressly

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[149] *See, e.g.,* JOHN FRELINGHUYSEN HAGEMAN, PRIVILEGED COMMUNICATIONS AS A BRANCH OF THE LAW OF EVIDENCE 295 (1889) (referring to "Secrets of State" in what might be the first volume treating evidentiary privileges as an independent subject); THE AMERICAN AND ENGLISH ENCYCLOPEDIA OF LAW (John Houston Merrill, ed.) v. 19 (1892) (referring to a privilege for "state secrets").

[150] There were at least three other decisions referencing a "state secrets" privilege during the period between *Hartranft* and the 191 decision in *Firth Sterling*, discussed below, but none involved matters associated with security or foreign relations; each is better viewed as an example of the more generalized public-interest privileges previously discussed. In *District of Columbia v. Bakersmith*, the Court of Appeals of the District of Columbia rejected without discussion the District's attempt to justify the withholding of municipal records relating to maintenance of a culvert on the ground that all government records amount to "secrets of State." 18 App. D.C. 574 (Ct. App. D.C. 1901). Similarly, in *King v. United States*, the Fifth Circuit declined to apply the state secrets privilege to preclude testimony concerning plea agreements a prosecution witness may have made with the government. *See* 112 F. 988, 996 (5th Cir. 1902). Finally, in *In re Grove*, the Third Circuit reversed a contempt finding against a defendant who initially had refused to produce documents relating to the designs for a destroyer being built for the Navy, reasoning that the defendant had acted properly in suggesting that the materials might be protected by the state secrets privilege, even though the Navy ultimately disclaimed such protection. 180 F. 62 (3rd Cir. 1910).

[151] *See* Firth Sterling Steel Co. v. Bethlehem Steel Co., 199 F. 353 (E.D. Pa. 1912) (citing *Totten*).

[152] *See* Pollen v. United States, 85 Ct. Cl. 673 (Ct. Cl. 1937) (concluding that the paucity of decisions addressing the concept of a military secrets privilege merely "confirms the recognition" that such information cannot be disclosed); Pollen v. Ford Instrument Co., 26 F. Supp. 583 (E.D.N.Y. 1939) (citing *Totten* en route to recognizing military secrets privilege asserted by intervenor United States and denying discovery on that basis).

predicated on the harm to national security that might follow from such disclosure.

As several mid-century developments combined to increase the occasions for assertion of the privilege, the security-oriented privilege continued to develop.[153] The onset of World War II in particular was significant, as it brought with it a vast expansion of government activity at home and abroad relating to security and foreign-policy, much of it highly classified. It was inevitable that civil and criminal cases relating to this new security establishment would raise issues concerning the exposure of sensitive information. In the 1944 decision *United States v. Haugen,*[154] for example, a district court was obliged to determine the impact of the state secrets privilege on a criminal prosecution arising indirectly out of the Manhattan Project. Haugen was charged with intentionally defrauding the government by forging meal vouchers for use in a cafeteria serving persons involved in the construction of a Manhattan Project facility. The charge required proof of the contractual relationship between the cafeteria owner and the federal government, but the government refused to disclose to the defendants the contracts themselves. The court agreed that the defendant could not discover them, observing that the "right of the Army to refuse to disclose confidential information, the secrecy of which it deems necessary to national defense, is indisputable."[155] But this rule precluded secondary evidence concerning the contracts as much as it did production of the contracts themselves, the court concluded; as the government therefore lacked evidence regarding an essential element of the charge, the court had no choice but to acquit the defendant after a bench trial.[156]

The enactment of the Federal Tort Claims Act ("FTCA") in the immediate aftermath of the war permitted individuals to sue the government for its alleged tortious conduct, and thereby created new opportunities for the assertion and development of the state secrets

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[153] Writing in 1954, Charles McCormack observed that "[i]n the last half-century in this country and in England, where the activities of government have so multiplied in number and widened in scope, the need of litigants for the disclosure and proof of documents and other information in the possession of government officials has correspondingly increased. When such needs are asserted and opposed, the resultant questions require a delicate and judicious balancing of the public interest in the secrecy of 'classified' official information against the public interest in the protection of the claim of the individual to due process of law in the redress of grievances." CHARLES T. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE 302-3 (1954).

[154] 58 F. Supp. 436 (E.D. Wash. 1944), *aff'd*, 153 F.2d 850 (9th Cir. 1946).

[155] *Id.* at 438.

[156] *See id.*

privilege. Perhaps not surprisingly given the large amount of military activity taking place in those years, FTCA suits frequently arose in connection with accidents involving military ships and vehicles, and in such instances plaintiffs naturally sought to acquire copies of internal investigation reports carried out by the relevant service. The government routinely resisted such requests on the ground that the public interest is better served by keeping post-accident investigations confidential, quite apart from any considerations of military or diplomatic secrets that might be contained in a given report.[157] Occasions did arise, however, in which the emerging state secrets privilege was cited as a separate ground for resisting disclosure of such reports.[158] One such occasion resulted in the Supreme Court's 1953 decision in *United States v. Reynolds*,[159] the seminal but troubled opinion that entrenched the state secrets privilege in its modern form.

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[157] A series of opinions in the 1940s addressed the claim that internal investigative reports carried out by government agencies should be privileged from discovery regardless of their content, a claim that is quite distinct from an argument that a particular report should be withheld because it contains security-sensitive information. *See* Bank Line Ltd. v. United States, 68 F. Supp.587 (S.D.N.Y. 1946) (admiralty libellant sought production of Navy investigative report), *mandamus denied*, 163 F.2d 133 (2d Cir. 1947); *id.*, 76 F. Supp. 801 (S.D.N.Y. 1948) (permitting limited discovery, while acknowledging that a different outcome might have obtained had "military or diplomatic secrets" been involved); O'Neill v. United States, 79 F. Supp. 827 (E.D. Pa. 1948) (imposing sanctions for refusal to disclose FBI investigative report relevant to admiralty action, but denying that the case involves jeopardy to "the military or diplomatic interests of the nation"), *vac'd on appeal on other grounds,* __ F.2d __ (3d Cir.); *Wunderly v. United States*, 8 F.R.D. 356 (E.D. Pa. 1948) (requiring production of statement made by army officer in letter to his superior, while emphasizing that no "military secrets, possibly protected by the scope of common law privilege, are involved"); United States v. Cotton Valley Operators Committee, 9 F.R.D. 719 (W.D. La. 1949) (dismissing civil antitrust enforcement action as sanction for failure to produce FBI investigative report), *aff'd by equally divided court*, 339 U.S. 940 (1950). These cases frequently are cited in connection with the state secrets privilege as it is understood today, but are in fact better understood as examples of an attempt to extend the general "public-interest" privilege described previously to the entire category of accident investigation reports.

[158] *See, e.g.,* Cresmer v. United States, 9 F.R.D. 203, 204 (E.D.N.Y. 1949) (in FTCA suit arising out of crash of Navy plane, district court conducted *ex parte, in camera* review of the accident report to ensure it contained nothing that would "reveal a military secret or subject the United States and its armed forces to any peril by reason of complete revelation" before granting motion to compel production).

[159] 345 U.S. 1.

2. Crystallization of the Privilege in *Reynolds*

Reynolds concerned a trio of Federal Tort Claims Act suits brought by the widows of several men who died in the crash of an Air Force B-29 in Georgia. At the time of the crash, the plane was on a mission to test classified radar equipment, a fact that eventually would prove a significant obstacle to the success of the suits.[160] During discovery, the plaintiffs sought production of, among other things, the report produced in connection with the Air Force's post-accident investigation.[161] The government resisted production, though not initially on state-secret grounds. Instead, the government at first asserted a generalized privilege for internal investigative reports based on the proposition that disclosure of such reports would deter "the free and unhampered self-criticism within the service necessary to obtain maximum efficiency, fix responsibility and maintain proper discipline."[162] Carefully noting the absence of a state secrets claim, the court rejected the government's argument that it needed to shield the report in order to encourage self-criticism and thereby prevent future accidents.[163]

After the district court reached this conclusion, the government reasserted its argument in favor of an investigative-reports privilege, but this time added by way of explanation that disclosure of the report and certain other materials would "seriously hamper[] national security, flying safety, and the development of highly technical and secret military equipment."[164] In short, the government now had invoked the state secrets privilege as an alternative ground for refusing production of the documents. The district court responded by ordering that the documents be produced to it for *ex parte, in camera* inspection "so that the court could determine whether the discovery 'would violate the Government's privilege against disclosure of matters involving the national or public interest.'"[165] The government declined to comply, implicitly adopting the *Hartranft*/*Beatson* position that judges may not second-guess the

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[160] The facts at issue in *Reynolds* are described in considerable detail in FISHER, *supra* note __, at 1-3.
[161] *See* Brauner v. United States, 10 F.R.D. 468, 470 (E.D. Pa. 1950).
[162] *See id.* at 471-72.
[163] *See id.* at 472. A similar fact pattern produced a similar result just a month earlier in Louisiana, in connection with a separate Air Force plane crash. *See* Evans v. United States, 10 F.R.D. 255 (W.D. La. 1950) (ordering government to produce witness statements and other documents despite claim of an investigative-reports privilege).
[164] Reynolds v. United States, 192 F.2d 987, 990 (3rd Cir. 1951).
[165] *Id.* at 990-91.

government's assertion of the state-secrets privilege.[166] By way of sanction, the district court ordered that the question of negligence be resolved in the plaintiffs' favor, and ultimately entered a $225,000 judgment on that basis.[167]

On appeal, the Third Circuit was careful to distinguish the state secrets privilege from the government's original attempt to shield the report on what it described as "housekeeping" grounds, and also to draw a distinction between a generalized assertion of need to withhold information in the "public interest" and a specific assertion that diplomatic or military secrets are in issue.[168] Citing *Totten* and *Firth Sterling*, the Court acknowledged that "[s]tate secrets of a diplomatic or military nature have always been privileged from disclosure in any proceeding . . . ."[169] It did not follow, however, that courts must accept the government's word when the privilege is invoked. Rather, the court held, the assertion of the state secrets privilege "involves a justiciable question, traditionally within the competence of the courts, which is to be determined . . . upon the submission of the documents to the judge for his examination in camera," albeit on an *ex parte* basis.[170]

The Third Circuit's opinion in *Reynolds* thus was significant in several respects. First, it clearly distinguished the "state secrets" privilege relating to military and diplomatic information from the more-generalized "public interest" privileges associated with other forms of sensitive government information, communications, and the like, thus adding a degree of clarity – and justification – that had been noticeably lacking up to that point. Second, in the spirit of *Totten*, it affirmed the absolute nature of the state secrets privilege once properly attached. Third, the court broke new ground by asserting the ultimate authority of the judiciary to review (and thus potentially reject) the executive branch's assertion that diplomatic or military secrets in fact are present. This departed from the approach articulated in *Hartranft*, which had relied on the British precedent of *Beatson*; indeed, the Third Circuit in *Reynolds* expressly rejected the government's invocation of a more recent British precedent following *Beatson*, deriding it as irrelevant in light of the differing roles of American and British judges within their respective constitutional structures.[171]

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[166] *See id.* at 991.
[167] *See id.*; *see also* Fisher, *supra* note __, at 58 (indicating the amount of the judgment).
[168] 192 F.2d at 996.
[169] *Id.*
[170] *Id.* at 997.
[171] *Id.* (rejecting the analogy to *Duncan v. Cammell, Laird & Co.*, [1942] A.C. 624, on separation-of-powers grounds, but also distinguishing the case on the

The Supreme Court eventually reversed and remanded the Third Circuit's decision in *Reynolds*.[172] Its decision to do so is best understood not as a rejection of the principles stated above, however, but rather as a refinement of them.

As an initial matter, Chief Justice Vinson's opinion for the majority articulated a set of formalities that must be satisfied in order for the government even to put the state secrets privilege into play. In particular, "[t]here must be [a] formal claim of privilege, lodged by the head of the department which has control over the matter, after actual personal consideration by that officer."[173] The more interesting aspect of the decision, however, is the majority's discussion of the substantive standard for recognition of the privilege once properly asserted and of the role of the judge in applying that standard.

By and large, these aspects of the holding were consistent with the views articulated by the Third Circuit in the opinion below. For example, Vinson affirmed the absolute nature of the "privilege against revealing military secrets . . . a privilege which is well established in the law of evidence."[174] In the criminal prosecution context, he observed, this might put the government to the choice between asserting the privilege and dropping the charge, but in the civil context matters stood differently.[175] Vinson cited *Totten* for the proposition that when the privilege attaches in a civil case it must be upheld against any claim of need, even to the point of requiring dismissal of a civil suit—even a suit

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ground that the military-sensitivity of the information at issue in that case – involving the submarine *Thetis* – was manifest).

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

[173] *Id.* at 532.

[174] *Id.* at 6-7 (citing *Totten*, *inter alia*).

[175] *See id.* at 11-12. Four years later, in *Jencks v. United States*, the Court cited this aspect of *Reynolds* en route to holding that the "burden is the Government's, not to be shifted to the trial judge, to decide whether the public prejudice of allowing the crime to go unpunished is greater than that attendant upon the possible disclosure of state secrets and other confidential information in the Government's possession." 353 U.S. 657, 672 (1957). *See also* United States v. Moussaoui, 382 F.3d 453, 475-76 (4th Cir. 2004) (noting in context of criminal prosecution that even under CIPA, "the Executive's interest in protecting classified information does not overcome a defendant's right to present his case"); United States v. Paracha, No. 03-cr-1197, 2006 WL 12768 (S.D.N.Y. Jan. 3, 2006) (same).

against the government itself— that depends on production of the privileged information.[176]

Vinson also agreed with the Third Circuit that "[j]udicial control over the evidence in a case cannot be abdicated to the caprice of executive officers."[177] But whereas the Third Circuit had implied that it might always be appropriate for the court to test the executive's claim through an *ex parte, in camera* assessment of the disputed information, Vinson required greater caution. Judges should not automatically engage in an *in camera, ex parte* review, he wrote, because it sometimes will be possible in light of attendant circumstances to determine without actually examining the contested information "that there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interests of national security, should not be divulged."[178]

This formulation only slightly modifies the Third Circuit's approach. It amounts to a description of the substantive standard governing privilege claims, interwoven with a relatively-neutral description of the circumstances in which the judge might decline to conduct an actual review of the documents or other source of information at issue in the course of applying that standard. As to the former, Vinson clarified that judges should use a "reasonable danger" standard in assessing whether the information in question could be produced in the litigation without harm to national security. As to the latter, Vinson cautioned that it sometimes will be obvious from context alone that the information qualifies under that standard and therefore that there is no sense in running the marginal risks associated with an *in camera*, *ex parte* review.

But this formulation left open several questions. First, how deferential should a judge be in determining whether information rises to the "reasonable danger" level? Later in the opinion, Vinson explained that the degree of scrutiny should be calibrated with reference to a litigant's need for the information: "Where there is a strong showing of

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[176] *See Reynolds* at 11 n. 26 (stating that the suit in *Totten* "was dismissed on the pleadings without ever reaching the question of evidence, since it was so obvious that the action should never prevail over the privilege").
[177] *Id.* at 9-10. In that respect, *Reynolds* rebuffs the view expressed by then-Attorney General Robert Jackson in an opinion letter in April 1941 in which he described a generalized privilege pursuant to which both Congress and the courts must defer to executive determinations that disclosure of sensitive information would not be in the public's interest. *See* Att. Gen. Robert Jackson, "Position of the Executive Department Regarding Investigative Reports," 40 U.S. Op. Atty. Gen. 45, Apr. 30, 1941.
[178] *Id.* at 10.

necessity, the claim of privilege should not be lightly accepted . . . ."[179] Conversely, where there was little apparent need – and Vinson thought there was little need in *Reynolds* insofar as the plaintiffs could get the information they sought via depositions instead – the judge should be deferential indeed, and the claim of privilege "will have to prevail."[180]

The second open question arose out of the distinction between whether particular information is sufficiently sensitive to warrant protection and whether such information actually is present in the document or other information source at issue. Herein lies the great flaw of the *Reynolds* holding, relating to the Court's application of its test to the facts at hand in that case. Vinson began his analysis by establishing the relatively uncontroversial proposition that national security might reasonably be expected to suffer should there be public disclosure of information relating to the classified equipment that had been on board the B-29 at the time of its crash. It did not automatically follow, however, that the Air Force's crash investigation report actually contained such information. Nonetheless, Vinson concluded that "there was a *reasonable danger* that the accident investigation report would contain references to the secret electronic equipment which was the primary concern of the mission."[181]

Notice that here Vinson is using "reasonable danger" not as the measure of whether the information (concerning the classified equipment) could be disclosed without harming national security, but instead as the measure of whether such information was likely to be discussed in the crash investigation report. In short, Vinson employed the forgiving "reasonable danger" standard not just as a measure of how security-sensitive the information in issue must be to merit protection, but also as a measure of whether there is any point in having the judge look at the document in question in deciding whether such important information actually is present.

Such an approach makes little sense. There are sound arguments for employing a "reasonable danger" test when it comes to the task of deciding whether the information itself warrants protection: judges in general cannot be expected to have the requisite expertise, experience, and knowledge necessary to make a fine-grained decision regarding the national security implications of disclosure, and in any event it at least arguably is desirable to err on the side of caution when dealing with military and diplomatic secrets. But these considerations have no

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[179] *Id* at 11.
[180] *Id*.
[181] *Id.* (emphasis added).

application when it comes to deciding whether a given document or other source actually references such sensitive information; judges are perfectly capable of making that determination, and thus should be permitted to do so except where the surrounding circumstances make it perfectly obvious that such sensitive information is present, as with a request for production of weapon-design information. Rather than asking whether there is a "reasonable danger" that such information might be present, then, the standard for precluding *in camera, ex parte* review ought to be more akin to a "clear and convincing" standard. Even in that circumstance, moreover, courts should be reluctant to forego *in camera, ex parte* review if the context suggests the possibility that any sensitive information that might actually be present nonetheless could be redacted.

Reynolds itself plainly demonstrates the folly of using a reasonable-likelihood standard for determining whether security-sensitive information might be present. It is now known that the investigative report at issue in that case did not actually contain information about the classified equipment that had been aboard the doomed flight, which may explain why the state secrets privilege had not been invoked until after the district judge proved uninterested in the argument for a general investigative-reports privilege.[182] Had the Supreme Court permitted the district judge to conduct an *in camera, ex parte* review, therefore, it presumably would have discovered this fact. The point is not that the court should have been permitted to second-guess the government's assertion that the nature of the radar equipment had to be kept secret, but rather that the court should have ensured that the report really did discuss the nature of that equipment (and, further, that it did so in a manner not reasonably capable of redaction).

Fortunately, courts following in the wake of *Reynolds* seem largely to have avoided this fundamental error.[183] It remained to be seen, however, whether the privilege would begin to be invoked more frequently, whether it might result in dismissals more often (rather than in mere discovery limitations), and whether its theoretical foundations would become clearer.

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[182] *See* Fisher, *supra* note __, at 166-67.

[183] *See* Appendix, *infra* (indicating whether courts adjudicating assertions of the privilege have reviewed *ex parte, in camera* information in the course of resolving such claims).

C. State Secrets in the Immediate Post-*Reynolds* Era

A handful of state secrets decisions came down in the years immediately following *Reynolds*,[184] each adding in small ways to the development and consolidation of the privilege.[185] The most notable of these was the Second Circuit's 1958 decision in *Halpern v. United States*,[186] which dealt with a claim by an inventor who sought compensation for the government's decision to issue an order of secrecy

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[184] Writing just after Reynolds in 1954, Charles McCormick in his influential treatise acknowledged the aspect of *Reynolds* generally supporting the involvement of judges in testing the executive's claim of the state secrets privilege – describing it as consistent with the "preponderance of view among the lower federal courts and among the writers" – but was conspicuously silent regarding Vinson's use of the "reasonable danger" standard to limit the circumstances in which *in camera, ex parte* review is permitted. McCormick, *supra* note __, at 308-09. Similarly, in the 1961 edition of John Henry Wigmore's classic treatise Evidence in Trials at Common Law, John McNaughton is non-committal on the issue of the judge's role. On one hand, McNaughton wrote that "[a] court which abdicates its inherent function of determining the facts upon which the admissibility of evidence depends will furnish to bureaucratic officials too ample opportunities for abusing the privilege. The lawful limits of the privilege are extensible beyond any control if its applicability is left to the determination of the very official whose interest it may be to shield a wrongdoing under the privilege. Both principle and policy demand that the determination of the privilege shall be for the court." JOHN HENRY WIGMORE, 8 EVIDENCE IN TRIALS AT COMMON LAW § 2379 (McNaughton, ed.) (1961). On the other hand, McNaughton went on to note that the "showing" required of the government in support of its claim of state secrets "need be slight and the technique of having the judge peruse the material in camera . . . may not be available." *Id.* McNaughton cited *Reynolds* for this proposition, but without comment.

[185] *Petrowicz v. Holland*, for example, considered whether the privilege could be invoked by the government against a non-citizen in the context of a suit for injunctive relief from an order of deportation. Petrowicz, it appears, was being deported at least in part on grounds of association with the Communist Party, and sought to obtain the statements certain witnesses had provided to government agents concerning that allegation. The government resisted, citing *Reynolds*, but the court concluded that if the statements did indeed constitute state secrets – it would conduct an *ex parte, in camera* review to make that determination – the government would be obliged either to waive its privilege or cease its efforts to deport Petrowicz. *See* 142 F. Supp. 369, 370-73 (E.D. Pa. 1956). *See also* Tucker v. United States, 118 F. Supp. 371 (Ct. Cl. 1954) (dismissing compensation claim brought by alleged covert agent, on *Totten* grounds); Republic of China v. Nat'l Union Fire Ins. Co., 142 F. Supp. 551 (D. Mary. 1956) (upholding privilege assertion as to diplomatic communications); Snyder v. United States, 20 F.R.D. 7 (E.D.N.Y. 1956) (requiring *ex parte, in camera* production of accident report to test state secret claim).

[186] 258 F.2d 36 (2d Cir. 1958).

precluding him from commercially exploiting certain patents with military applications, as provided in the Invention Secrecy Act of 1951.[187]

Halpern sued after the government declined to grant compensation under the Act, and the government responded in part by asserting that the suit could not go forward in light of the state secrets privilege.[188] The Second Circuit concluded, however, that when Congress created a framework for litigation of compensation decisions relating to secrecy orders under the Act, it necessarily anticipated the use of information that otherwise would be protected by the state secrets privilege.[189] So long as measures could be taken to "protect[] the overriding interest of national security during the course of a trial," therefore, evidence would not be withheld and the case could proceed.[190] In this case, where the plaintiff did not require production of any secret information he did not already possess, holding the entire trial *in camera* was thought to suffice to address the government's concerns.[191]

The court in *Halpern* specifically distinguished *Reynolds* and *Totten* on the ground that in this instance Congress had enacted "a specific enabling statute contemplating the trial of actions that by their very nature concern security information," and also on the ground that Halpern "is not seeking to obtain secret information which he does not possess."[192] Put another way, the state secrets at issue would be shared with no one who did not already have access to them, aside from the judge who would preside over the *in camera* trial. *Halpern* thus suggests that Congress has the power to permit trials for claims that depend in part on privileged information, at least so long as the litigant does not require access to classified information beyond what he or she can establish through their own knowledge and through non-privileged discovery. To that extent, the privilege may be overcome by legislation in some circumstances.

Following *Halpern*, nine years would pass before the privilege again became the subject of a published opinion. When the topic did finally arise again, it concerned a fact pattern and interpretive issues that would reappear frequently in the coming years.

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[187] 35 U.S.C. §§ 181-88. It appears that the patents had to do with radar-evasion technology. *See* 258 F.2d at 38.
[188] *See* 258 F.2d at 37-38.
[189] *See id.* at 43.
[190] *Id.*
[191] *See id.* at 43-45.
[192] *Id.* at 44.

In 1967, the Supreme Court of Nevada in *Elson v. Bowen* considered whether it had the power to issue a writ of prohibition barring a trial judge from compelling federal agents to plead, testify, and produce document concerning allegations that they were involved in installing warrantless wiretaps in Las Vegas hotel rooms.[193] The government argued that the writ was necessary in order to vindicate the Attorney General's assertion of the state secrets privilege, explaining that pleading and discovery would "reveal F.B.I. tactical secrets."[194] The Nevada Supreme Court agreed with the trial court's determination that the privilege did not apply in this context, however, emphasizing two factors. First, the program no longer was secret because details concerning it had been leaked to and published in the *New York Times*, *Life*, and other newspapers and magazine, and also because FBI agents previously had testified in other cases concerning the particular surveillance there in issue. Second, the court asserted that the "government should not be allowed to use the claims of executive privilege . . . as a shield of immunity for the unlawful conduct of its representatives."[195] *Elson* thus suggested two significant limitations on the privilege, in addition to the potential legislative override identified in *Halpern*: (i) the privilege loses its force once the information at stake became public, and (ii) the privilege is categorically inapplicable in cases in which the government stands accused of unconstitutional conduct. One of these limitations would survive, but not both.

D. The Privilege Reaches Maturity

In the first two decades after *Reynolds*, published opinions dealing with the state secrets privilege remained relatively rare.[196] That changed, however, in 1973. From that point onward, as documented in the Appendix to this article,[197] decisions touching on the privilege have been far more frequent.

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[193] 436 P. 2d 12 (Nev. 1967).
[194] *Id.* at 15-16.
[195] *Id.* at 16.
[196] The only other decision from this period, besides those already cited, is *Heine v. Raus*, 399 F.2d 785 (4th Cir. 1968) (sustaining a state secrets objection to answering some but not all deposition questions, in connection with slander suit involving defendant's alleged relationship with the CIA).
[197] The Appendix identifies all published opinion addressing actual assertions of the state secrets privilege during the years from 1954 though 2006. It does not include pre-*Reynolds* decisions because, as discussed in the text above, the privilege had not coalesced sufficiently prior to 1953. It should be noted that the Appendix includes a number of decisions that have not been included in prior compilations. My list also excludes some opinions that others have counted, based on a close reading leading to the judgment that the opinion does not

The causes for this shift are difficult to identify with any certainty. At least some of the expansion no doubt reflects a general increase in the number of lawsuits being filed during this period. It also surely is significant that in the early 1970s, there was a vigorous debate in Congress with respect to whether the newly-proposed Federal Rules of Evidence should include a state secrets provision.[198] Though Congress ultimately chose not to codify any privileges at all—leaving the status quo, including *Reynolds*, in place[199]—the debate inevitably increased awareness of the state secrets privilege.

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actually adjudicate a state secrets claim. *Cf. supra* note __ (identifying cases such as *Bank Line* that involve "public interest" rather than "state secret" claims).

[198] In brief, the original 1971 draft of proposed Rule 509 ("Military and State Secrets") would have recognized a privilege for information the release of which would pose a "reasonable likelihood" of harm to "the national defense or the international relations of the United States." 51 F.R.D. 315. At the urging of Deputy Attorney General Kleindienst and Senator McClellan, that proposal was revised also to include protection for "official information," meaning "information within the custody or control of a department or agency of the government the disclosure of which is shown to be contrary to the public interest" and which satisfied certain additional criteria. __ F.R.D. __. This addition prompted sharp criticism, though it is important to note that the essence of the criticism was the attempt to expand beyond the scope of the state secrets privilege as it had been formulated in *Reynolds*, not to attack the privilege itself. *See, e.g.,* Hearings on Proposed Rules of Evidence Before the Special Subcomm. on Reform of Federal Criminal Laws of the House Comm. on the Judiciary, 93d Cong., 1st Sess. 181-85 (1973). *Cf. id.* at 184 (contending that mere "international relations," as distinct from "national defense," was not part of the existing privilege).

[199] Some commentators have suggested that the decision not to enact proposed Rule 509 reflects a rejection of some or all of the concepts contained within it. *See, e.g.,* FISHER, *supra* note __, at __. The House, Senate, and Conference Committee Reports do not support that conclusion, however, as they do not speak specifically of Rule 509 at all, but instead refer to the fact that the entire set of individual privilege provisions proved controversial to the extent that they "modifi[ed] or restrict[ed]" existing rules. Notes of Committee on Judiciary, Senate Report No. 93-1277. Put another way, the manifest intent of Congress in opting to adopt what became Rule 501 – stating that the common law approach to privilege continues to apply – was to preserve the status quo, meaning that *Reynolds, Totten*, and their progeny continued to control with respect to the state secrets privilege even if one assumes that Congress had the power to require otherwise. There were, to be sure, objections to Rule 509 raised by participants in Congressional hearings. *See, e.g.,* Statement of Charles R. Halpern & George T. Frampton, Jr., on behalf of the Washington Council of Lawyers, Hearings on Proposed Rules of Evidence before the Special Subcommittee on Reform of Federal Criminal Laws of the Committee on the Judiciary of the House of Representatives, 93rd Cong., 1st Sess., Feb. 8. 1973, pp. 181-85. But insofar as

At the same time, this period saw numerous other developments that combined to increase the range of circumstances in which the government might wish to assert the privilege. In the early 1970s there were repeated revelations of possible misconduct within the United States by agencies within the Intelligence Community, several of which involved warrantless surveillance undertaken in the name of national security. These revelations, moreover, came in the wake of statutory and constitutional developments that paved the way for aggrieved parties to respond with litigation. With the enactment of statutory penalties for unlawful surveillance and the Supreme Court's recognition of a private right of action for constitutional violations in *Bivens v. Six Unknown Named Agents*,[200] the conditions were particularly ripe for disputes regarding the state secrets privilege.[201]

Not all of the 1970s cases were so dramatic, of course. Decisions such as *Pan Am. World Airways v. Aetna Cas. & Sur. Co.*, in which a district court precluded discovery of documents concerning intelligence on a foreign terrorist organization in connection with a post-hijacking insurance dispute, were decidedly run-of-the-mill.[202] But the surveillance cases of that era provided numerous opportunities to consider the nature and scope of the privilege in highly-sensitive contexts.

The first of these decisions, *Black v. Sheraton Corp.*,[203] demonstrated the lingering uncertainty regarding whether the state secrets privilege, understood as a privilege relating to national security and foreign affairs, stood apart from other "public interest" privileges belonging to the government, including in particular the deliberative-process privilege. According to the court in *Black,* all such privileges are constitutionally-based in that they are grounded in separation-of-powers concerns, but, *contra Reynolds*, they are "not absolute."[204] More

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these objections were directed at the existing state secrets privilege (some objections were directed at proposed *expansions* of the privilege, including in particular an attempt to bring "official information" within its ambit), the action Congress ultimately took does not suggest that these objections were heeded. *See id.*

[200] 403 U.S. 388 (1971).

[201] In addition to increased opportunities for national security litigation, it surely is relevant as well that assertions by Congress of authority in security- and foreign-relations-related matters during this period accentuated the interest of executive branch officials in theories and doctrines that tended to preserve Article II authority.

[202] *See* 368 F. Supp. 1098 (S.D.N.Y. 1973).

[203] 371 F. Supp. 97 (D.D.C. 1974).

[204] *Id.* at 100.

significantly, perhaps, *Black* followed *Elson* (the Las Vegas hotel surveillance case) in concluding that "evidence which concerns the government's illegal acts are not privileged" at all, and therefore that the government had an obligation to produce the FBI's classified investigative file on the plaintiff in that case.[205]

Some aspects of *Black* would fare better than others in subsequent cases. On one hand, its conclusion that the state secrets privilege derives from separation of powers considerations received considerable support just six months later when the Supreme Court issued *United States v. Nixon*.[206] *Nixon* was not, of course, a state secrets privilege case. Rather, it involved the President's attempt to avoid production to the Watergate special prosecutor of tapes and transcripts of conversations among the president and his advisors, on the ground of general executive privilege. Nixon argued initially for the proposition that the separation of powers precluded judicial review of his privilege claim, a proposition that the Court easily rejected (thus reinforcing the conclusion in *Reynolds* that all assertions of privilege at the very least are justiciable).[207] Nixon next argued, and the court agreed, that the president's need for confidentiality with advisors warranted recognition that executive privilege is a constitutionally-based privilege.[208] It did not follow, however, that all such intra-executive communications were beyond discovery. "*Absent a claim of need to protect military, diplomatic, or sensitive national security secrets*,"[209] the Court explained, executive privilege is not absolute and thus may in appropriate circumstances give way to the "legitimate needs of the judicial process."[210] The reference at least arguably was *dicta*, but the point was clear enough. The state secrets privilege – understood as encompassing military, diplomatic, and other information impacting national security – was now understood as a species of executive privilege derived from constitutional considerations, one distinguished by the fact that it does not necessarily give way even in the face of legitimate competing considerations.

On the other hand, the illegality exception enunciated both in *Black* and *Elson* – *i.e.*, the proposition that the privilege cannot be

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[205] *Id.* 101-02. Note that it is not entirely clear in *Black* that Attorney General Richardson asserted the state secrets privilege in particular, as opposed to a more general claim of executive privilege. *See also* United States v. Ahmad, 499 F.2d 851, 855 (3d Cir. 1974) (same).
[206] 418 U.S. 683 (1974).
[207] *See id.* at 703-5.
[208] *See id.* at 705-6.
[209] *Id.* at 706 (italics added).
[210] *Id.* at 707.

invoked in response to allegations of unlawful government conduct – did not fare well in the subsequent warrantless surveillance cases. There were several district and circuit court opinions subsequent to *Black* and *Elson* that adjudicated state secrets claims in the face of civil suits alleging illegal surveillance or intelligence-gathering activity in the U.S.[211] None followed those decisions in recognizing an illegality exception to the privilege. On the contrary, by sustaining the government's assertion of the privilege notwithstanding allegations of illegal activity (or, in some instances, recognizing that the government might be able to assert the privilege upon satisfaction of the formalities required by *Reynolds*), these decisions implicitly rejected such an exception.

The most significant problem that the government faced in using the state secrets privilege to obtain dismissal of the 1970s surveillance suits was not the proposed illegality exception, but instead the inconvenient fact that at least some of the supposedly secret information in issue had in fact become public through leaks, investigations, and other sources. Even that obstacle, however, was overcome in some circumstances. The D.C. Circuit's decision in *Halkin v. Helms* illustrates.

Halkin involved a suit brought by 27 individuals and organizations against the NSA, CIA, DIA, FBI, Secret Service, and three telecommunications companies asserting constitutional and statutory violations arising out of warrantless surveillance activities.[212] The government had moved to dismiss the complaint on the ground that pleading in response to it "would reveal important military and state secrets respecting the capabilities of the NSA for the collection and analysis of foreign intelligence."[213] After reviewing both an open and a classified affidavit from the Secretary of Defense explaining the government's grounds for asserting the privilege, the district court had dismissed the complaint insofar as one NSA program was concerned, but had refused to do so as to the NSA's "SHAMROCK" program

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[211] *See* Kinoy v. Mitchell,67 F.R.D. 1 (S.D.N.Y. 1975) (resolution of privilege claim postponed pending government compliance with the *Reynolds* formalities); Jabara v. Kelley, 75 F.R.D. 475 (E.D. Mich. 1977) (sustaining privilege as to some but not all information); Halkin v. Helms, 598 F.2d 1 (D.C. Cir. 1978) (sustaining privilege and dismissing complaint); Spock v. United States, 464 F.Supp. 510 (S.D.N.Y. 1978) (sustaining privilege but recognizing that some information already was in the public domain); ACLU v. Brown, 609 F.2d 277 (7th Cir. 1979) (sustaining privilege); ACLU v. Brown, 619 F.2d 1170 (7th Cir. 1980) (en banc) (remanding to district court for consideration of whether *in camera* review would be appropriate).

[212] 598 F.2d 1 (D.C. Cir. 1978) (*Halkin I*).

[213] *Id.* at 3-4.

(involving the surveillance of international telegram traffic), reasoning that there had been sufficient public disclosures concerning that program to vitiate the privilege as to it.[214]

Siding entirely with the government, the D.C. Circuit affirmed the dismissal of the former claim, and reversed the determination that SHAMROCK no longer triggered state-secrets protection. On the latter point, the court's essential argument was that whatever else may be known about SHAMROCK, the particular targets of the operation had not yet been disclosed.[215] The court noted that such information would provide much insight, including the particular channels subject to surveillance, the communications likely to have been surveilled, who might be considered a target of interest, and – citing the "mosaic" theory of intelligence analysis[216] – a range of other possible inferences.[217] The fact that the plaintiffs contended that the underlying conduct was itself unlawful did not enter into the analysis at all. Accordingly, the panel reversed the district court's holding as to SHAMROCK, and remanded for dismissal.[218]

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[214] *See id.* at 5.
[215] *See id.* at 8-9.
[216] For a thorough discussion of the mosaic theory across a range of contexts in which it arises, see Christine Wells, *CIA v. Sims: Mosaic Theory and Government Attitude*, 58 ADMIN. L. REV. (forthcoming 2006).
[217] *See Halkin I*, 587 F.2d at 8-9.
[218] *Id.* at 11. In this respect, *Halkin I* illustrates the relationship between *Totten* and *Reynolds*; in some instances, a claim simply cannot proceed in light of the state secrets privilege, either because the privilege causes the plaintiff to lack necessary evidence or because even pleading in response to the complaint requires exposure of protected information. *Cf.* Tenet v. Doe, 554 U.S. 1 (2005) (describing *Totten* as a "categorical . . . bar" distinct from the state secrets privilege as recognized in *Reynolds*). Notably, where application of the privilege will have such dire consequences, *Reynolds* clearly requires the maximum degree of judicial inquiry into the claim that state secrets are in fact in issue, and thus we see the court in *Halkin I* clearly affirming the propriety of *ex parte*, *in camera* consideration of the government's explanation.

With only a few arguable exceptions,[219] subsequent state secrets privilege rulings in the pre-9/11 era did not differ much from this reasoning, though the variations among fact patterns – particularly regarding the extent to which (i) the purported secret in fact become public and (ii) the government official invoking the privilege had complied with the *Reynolds* formalities – did result in some variation among outcomes.[220]

After only eight opinions considering assertions of the privilege were published in the period from 1954 through the end of 1972, there were 63 such published opinions in the period from 1973 through the end of the year 2000.[221] Of these 63 opinions, 29 sought the dismissal of

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[219] The government's invocation of the privilege was rejected outright by the Court of International Trade in a pair of cases arising out of industry attempts to trigger anti-dumping duties on steel imports from certain states. *See* Republic Steel Corp. v. United States, 538 F. Supp. 422 (C.I.T. 1982), *vac'd sub nom.* U.S. v. Republic Steel Corp., 4 I.T.R.D. 1324 (Fed.Cir. Nov 19, 1982) (No. 82-34); United States Steel Corp. v. United States, 578 F. Supp. 409 (C.I.T. 1983). In both cases, the petitioners sought production of diplomatic correspondence and related documents involving communications between U.S. and foreign officials, with the government resisting production under the foreign-relations prong of the privilege. Apparently construing the privilege to extend only to such matters insofar as they either intersect directly with national security concerns or "extremely sensitive question[s]" such as "recognition of Communist China," the court rejected the privilege. *See Republic Steel*, 538 F. Supp. at 422.

[220] A review of other published opinions dealing with the privilege between 1975 and 1980 conveys a sense. *See, e.g.,* Kinoy v. Mitchell, 67 F.R.D. 1 (S.D.N.Y. 1975) (delaying decision in warrantless surveillance suit pending compliance with the *Reynolds* formalities); Spock v. United States, 464 F. Supp. 510 (S.D.N.Y. 1978) (recognizing applicability of privilege to wiretapping suit, but finding that the facts as to plaintiff already were public); Clift v. United States, 597 F.2d 826 (2d Cir. 1979) (concluding that dismissal was not yet appropriate in patent dispute involving encryption); United States v. Felt, 491 F. Supp. 179 (D.D.C. 1979) (sustaining privilege as to all but two documents in connection with criminal defendant's request for information concerning their contacts with foreign powers); ACLU v. Brown, 619 F.2d 1170 (7th Cir. 1979) (en banc) (requiring district court to conduct *in camera* review of classified materials sought by plaintiffs in suit concerning domestic military intelligence activities); United States v. Felt, 502 F. Supp. 74 (D.D.C. 1980) (imposing advance notice requirement before defendants attempt to elicit certain testimony in order to preserve government's option to raise a state secrets objection); Farnsworth Cannon, Inc. v. Grimes, 635 F.2d 268 (4th Cir. 1980) (en banc) (requiring dismissal of complaint relating to Navy procurement contract); Sigler v. LeVan, 485 F. Supp. 185 (D. Mary. 1980) (dismissing claim based on privileged documents relating to counterintelligence practices, but otherwise permitting claim to proceed).

[221] *See* Appendix, *infra.*

some or all claims asserted by a plaintiff either against the government or a third party, and 34 instead merely sought relief from discovery.[222] In both contexts, the government prevailed more often than not; 24 of the 29 dismissal motions were granted, as were 22 of the 34 discovery motions.[223] Charts 1, 2, and 3 below provides a year by year breakdown of this data for the entire period from 1954 through the end of 2000:

[222] *See id.* The government typically moves in the alternative for dismissal or for summary judgment.
[223] *See id.*

Chart 1 –Published Opinions in State Secret Cases (1954-2000)

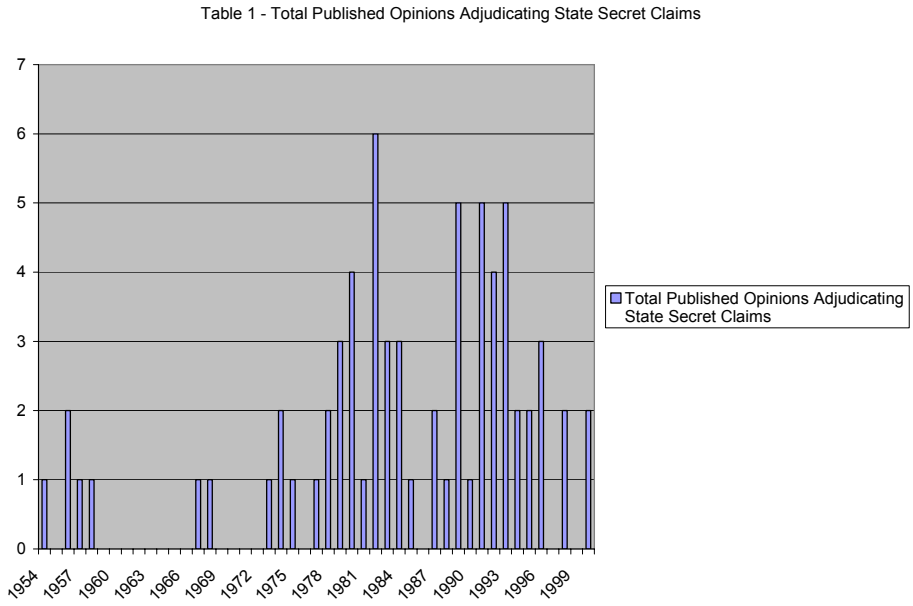


Chart 2 – Results in State Secrets Cases Seeking Dismissal (1954-2000)

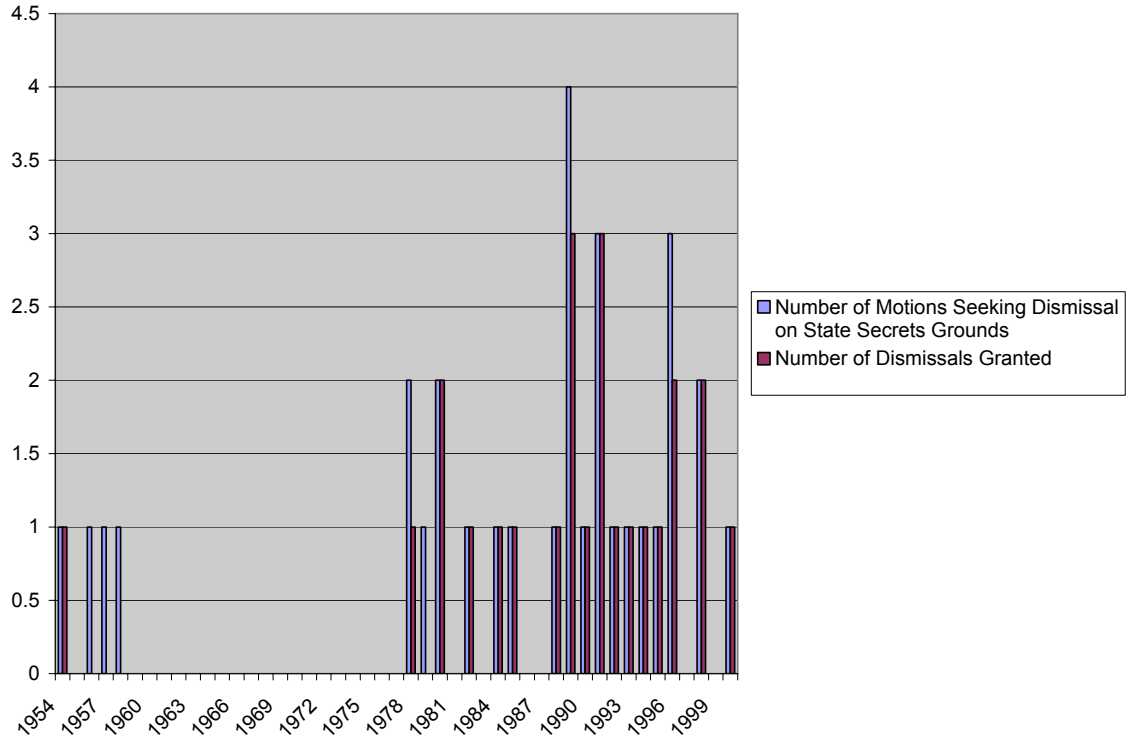
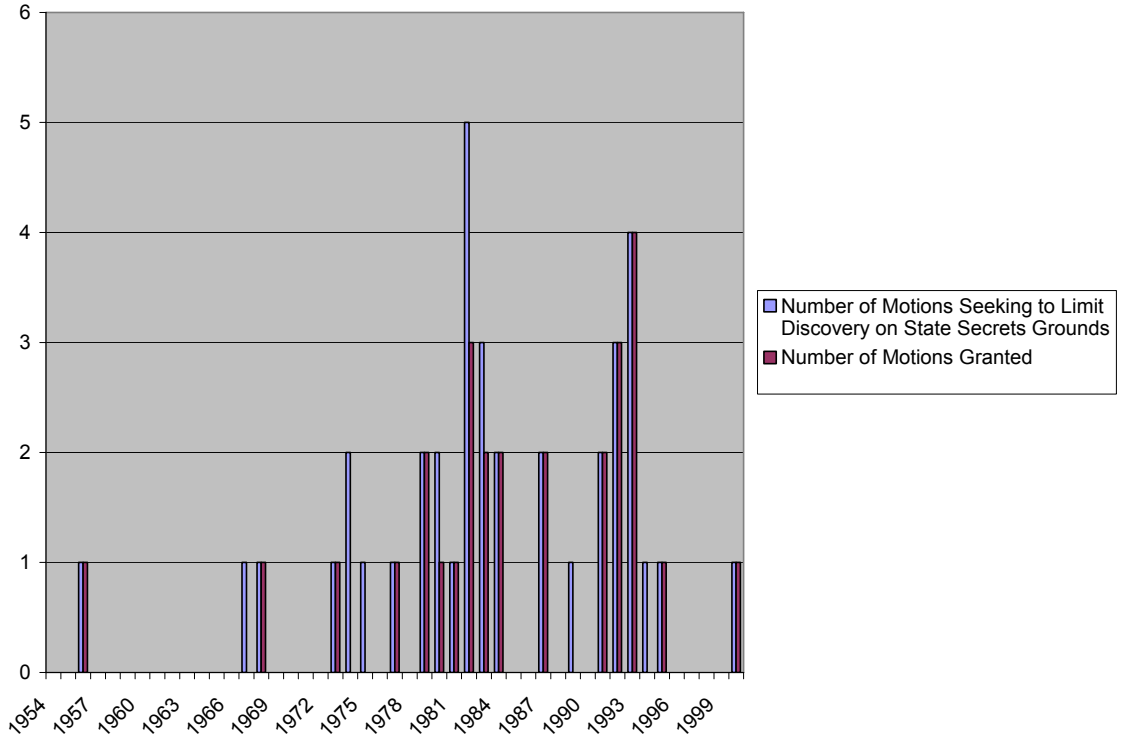


Chart 3 – Results in State Secrets Cases Seeking to Limit Discovery (1954-2000)



E. State Secrets and the Post-9/11 Era

Counterterrorism policies and practices by their very nature tend to entail secrecy. In significant part, this reflects the fact that effective counterterrorism depends above all on the effective collection, analysis, and distribution of intelligence. When the 9/11 attacks ushered in the current era of strategic prioritization of counterterrorism, it thus was inevitable that government secrecy would become a more significant issue in the overall national security debate. And when the particular methods of pursuing this strategic priority in the wake of 9/11 came to include such covert measures as extraordinary rendition and warrantless surveillance, it also was inevitable that the state secrets privilege would become particularly prominent, just as it had been in the 1970s in connection with an earlier cycle of warrantless surveillance activities. And thus the question arises: has the Bush Administration used the privilege differently – either in qualitative or quantitative terms – than its predecessors?

A number of observers claim that it has, in both respects. The leading account in this regard is an article published in *Political Science Quarterly* in 2005 by William Weaver and Robert Pallitto of the University of Texas – El Paso.[224] In "State Secrets and Executive Power," Weaver and Pallitto begin with the proposition that "executive branch officials over the last several decades have been emboldened to assert secrecy privileges because of judicial timidity and because of congressional ineffectiveness in reviewing the myriad of substantive secrecy claims invoked by presidents and their department heads."[225] Insofar as this statement refers to the state secrets privilege in particular, it is not entirely inconsistent with the data described above, though it does not account for alternative explanations for the apparently increased number of times the privilege has been asserted (*e.g.,* the increase in the number of lawsuits implicating classified information). In any event, according to Weaver and Pallitto, the trend toward invoking the state secrets privilege has taken a turn for the worse in recent years because of what they describe as "the impulse of the Bush administration to expand the use of the [state secrets] privilege to prevent scrutiny and information gathering by Congress, the judiciary, and the public."[226] Weaver and Pallitto conclude "that Bush administration lawyers are using the

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[224] Weaver & Pallitto, *supra* note __.

[225] *Id.* at 86. Weaver and Pallitto assert that the "rather clear beginning point for the increased use of the privilege occurred in the administration of President Jimmy Carter," during which time "[t]here were more reported cases . . . than all reported cases from previous presidential history." *Id.* While the collection of cases reported in the appendix to this article suggests that the Carter-era privilege assertions do not in fact outnumber prior assertions—Weaver and Pallitto attributed a total of nine privilege assertions to the Carter Administration, while the appendix indicates eleven reported opinions adjudicating the privilege between 1954 and 1975—there does seem to be merit in the view that assertions of the privilege accelerated in the mid- to late-1970s. One must be cautious with these numbers, however, as any assessment based exclusively on published opinions by definition fails to account for the potentially numerous relevant decisions that went unpublished, not to mention the cases that resulted in published decisions on other grounds that obviated the need for the court to adjudicate a state secrets-related motion that actually been made. *See id.* 101. *See* Ahmed Taha, *Data and Selection Bias: A Case Study*, 75 U.M.K.C. L. Rev. 171, 173-74 (2006) (describing selection and other biases that distort the empirical picture presented by published judicial opinions)**.** The reality is that we simply do not know, and have no way of finding out, just how frequently the privilege may have been asserted during any particular period.

[226] Weaver & Pallitto, *supra* note __, at 111. *Cf.* at 89 (claiming, with reference both to the privilege and to related issues such as the national-security exemption to FOIA, that "litigation-related requests for classified documents . . . have reached new heights in the current Bush administration, where even routine requests for information by Congress and the courts are refused or stonewalled").

privilege with offhanded abandon"[227] in at least some cases, while simultaneously "show[ing] a tendency . . . to expand the privilege to cover a wide variety of contexts."[228]

The available data does suggest that the privilege has continued to play an important role during the Bush Administration, but it does not support the conclusion that the Bush Administration employs the privilege with greater frequency than prior administrations or in unprecedented substantive contexts.

1. The Problem of Assessing Frequency

Consider first the question of frequency. As Weaver and Pallitto observe, the government does not maintain a master list of the occasions on which the state secrets privilege has been invoked.[229] Accordingly, the only way to assemble quantitative data on the subject is to combine the examples that can be identified from a search of published opinions with whatever additional examples can be unearthed revealing assertions of the privilege in cases that did not result in a published opinion. Given the difficulty of assembling a reliably complete set of unpublished examples, this is a decidedly unstable basis for making quantitative claims.[230]

Even if it were possible to identify all cases in which the privilege had been asserted, moreover, difficult questions of political attribution arise. Particularly with respect to cases identified by virtue of a circuit court opinion published in the first year or two of a presidential administration, it may well be the case that the original invocation of the privilege occurred under the prior administration. One can argue for attribution to either or both administrations in that circumstance, but in any event one presumably should be at least as interested in the date of the original invocation of the privilege as in the date of any published opinions that may subsequently result. Accordingly, one would have to comb through the district court docket in each relevant case to identify

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[227] *Id.* at 109.
[228] *Id.* at 107. *See also* Fuchs, *supra* note __, at 134-35 (relying on Weaver and Pallitto's data); OpenTheGovernment.org, "Secrecy Report Card 2006: Indicators of Secrecy in the Federal Government," at 7 (same). *Cf.* Gardner, *supra* note __, at 583-85 (asserting, in 1994, that "an alarming phenomenon has developed" over the "past twenty years," with the executive branch invoking the privilege "much more frequently" and in an increasing variety of substantive contexts).
[229] *See* Weaver & Pallitto, *supra* note __, at __.
[230] *See* Taha, *supra* note __ at 713-14.

the "origin" date for the initial assertion of the privilege in order to have a firm basis for attributing that assertion to a given administration.

Finally, and most significantly, even if it were possible to assemble an accurate and complete collection of all invocations of the privilege, year-to-year comparisons have little value unless one assumes that the government is presented each year with the same number of occasions on which it might assert the privilege. Of course, that is not the case. Just as the general volume of litigation varies over time, so too do the occasions for invocation of the privilege. Some years will see more litigation implicating classified information than others, as recent experience with the NSA's warrantless surveillance program amply demonstrates. It makes little sense to compare the rate of assertions of the privilege in such a year to an earlier year in which few or no such occasions arose.

Taken together, these considerations establish that there is little point in asking whether the privilege has been asserted at an unusually high rate in any given year. Even if one is willing to set aside all of these concerns and ask that question nonetheless, moreover, there are still problems with the claim that the Bush Administration has relied on the privilege with greater frequency than have past administrations.

Table 1 below describes on a per-decade basis the number of published opinions adjudicating assertions of the privilege, beginning in the 1970s and continuing up to 2006. The numbers tells us little, for all the reasons noted above. But let us assume that someone wants to consider them notwithstanding those difficulties. Do they indicate a pattern of increased reliance on the privilege in recent years?

Table 1 – Published Opinions in State Secrets Cases by Decade[231]

Decade	Number of Opinions
1961-70	2
1971-80	14
1981-90	23
1991-00	26
2001-06	19

[231] *See* Appendix, *infra*.

The numbers do suggest substantial increases in the rate of published opinions adjudicating assertions of the privilege during both the 1970s and 1980s. The number grew slightly in the 1990s, with an average of 2.6 opinions per year. Carrying that same rate forward for the six year period between 2001 and 2006, one would expect to see between fifteen and sixteen opinions. Instead, there have been nineteen thusfar. The marginally higher number at best provides lukewarm support for the proposition that the Bush Administration has relied on the privilege significantly more often than its predecessors.

For all of these reasons discussed above, the quantitative debate is best set aside entirely on the ground that it presents a largely-unanswerable question. The more significant and appropriate question is whether the state secrets privilege has expanded in recent years in *substantive* terms.

2. Has the Privilege Evolved in Substantive Terms?

The question of substantive expansion can be understood in at least three ways, all of which require consideration. Has the scope of the privilege changed in terms of the information that it protects? Has the analytical framework for privilege claims been modified so as to increase judicial deference to the executive branch? Has the nature of the relief sought in connection with privilege assertions changed so as to provide greater benefits to the government? The record of published opinions, whatever its other limitations, does provide a useful window onto these three issues.

a. The Nature of the Information Protected

The first issue is whether the privilege in recent years has been used to protect information of a type not previously thought to be within its scope. A comparison of recent assertions of the privilege to earlier examples suggests that it has not.

Published opinions during the Bush Administration can be grouped into three broad categories with respect to the nature of the information in issue. The first and least controversial of these groups involves efforts to protect technical information. There have been at least four cases in the post-9/11 era in which the government invoked the state secrets privilege to prevent disclosure of technical information relating to national security, including information relating to missile

defense,[232] stealth technology,[233] data-mining,[234] and devices for linking to underwater cables.[235] Such efforts are in keeping with the aims of state secret cases dating back at least as far as the 1912 case involving specifications for armor-piercing projectiles[236] – indeed, *Reynolds* itself was justified in these terms – and represent what most would agree to be the core of the information that the privilege properly should protect.

The second general category concerns the internal activities of agencies and departments involved in national defense and intelligence, including the military, the FBI, the CIA, and other components of the Intelligence Community. Under this heading one finds both employment and contractual disputes, and also matters pertaining to facilities management. There are, for example, cases in which the information to be protected involves whether particular individuals do or do not have covert employment or other relationships with the government. There have been at least three such cases in the post-9/11 era, ranging from what appears to have been a swindle carried out by a man who convinced a lender that he had a relationship to the CIA,[237] to an employment discrimination suit at the CIA that would require proof of the status and duties of other employees,[238] to an attempt by defectors to establish an obligation on the part of the CIA to provide them with certain benefits.[239] The last of these cases – *Tenet v. Doe* – was particularly significant in that it clarified that unacknowledged espionage relationships cannot form

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[232] *See* United States ex rel. Schwartz v. TRW, Inc., 211 F.R.D. 388 (C.D. Cal. 2002) (holding that government failed to comply with the *Reynolds* formalities, but leaving option to renew privilege claim in opposition to discovery request).
[233] *See* McDonnell Douglas Corp. v. United States, 323 F.3d 1006 (Fed. Cir. 2003) (holding that state secrets privilege precluded contractor from asserting a "superior knowledge" defense in contract dispute relating to stealth technology).
[234] *See* DTM Research, LLC v. AT&T Corp., 245 F.3d 327 (4th Cir. 2001) (quashing subpoena seeking information about government's data-mining technology).
[235] *See* Crater Corp. v. Lucent Tech., Inc., 423 F.3d 1260 (Fed. Cir. 2005) (granting protective order against discovery of facts relating to manufacture and use of underwater coupling device).
[236] *See Firth Sterling*, *supra* note 142. *See also, e.g.,* Bareford v. General Dynamics Corp., 973 F.2d 1138 (5th Cir. 1992) (affirming dismissal of complaint relating to missile defense system), *vac'd on other grounds by en banc court*; Bentzlin v. Hughes Aircraft Corp., 833 F. Supp. 1486 (C.D. Cal. 1993) (dismissing complaint relating to missile specifications and rules of engagement); Zuckerbraun v. General Dynamics Corp., 935 F.2d 544 (2d Cir. 1991) (affirming dismissal of suit relating to missile defense).
[237] *See* Monarch Ass. v. United States, 244 F.3d 1356 (Fed. Cir. 2001) (sustaining privilege but not immediately requiring dismissal).
[238] *See* Sterling v. Tenet, 416 F.3d 338 (4th Cir. 2005) (dismissing complaint).
[239] *See* Tenet v. Doe, 554 U.S. 1 (2005) (dismissing complaint).

the basis of litigation regardless of whether the state secrets standard (*i.e.*, a reasonable risk that disclosure would harm national security) has been met.[240] That wrinkle aside, however, this cluster of "internal activities" cases broke no new ground in comparison to earlier eras.[241]

The other cluster of internal-activities cases can be described as attempts to protect information describing security-sensitive internal policies and procedures. Under this heading, one finds a pair of decisions arising out of a whistleblower's claims of security breaches at the FBI,[242] a defamation action arising out of a counterintelligence investigation,[243] a whistleblower suit relating to possible toxic contamination at a classified Air Force facility,[244] and a suit alleging religious discrimination as the motive for a counterintelligence investigation.[245] In each case, the complaint was dismissed in recognition that the suit could not proceed in the absence of information within the scope of the privilege. Again, this was not a break with past practices.[246]

The third category, and no doubt the most controversial, concerns information about externally-directed activities undertaken in the name of national defense or intelligence. Under this heading, the government has sought to preclude challenges to two categories of covert activity aimed at collecting intelligence relating to the war on terrorism:

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[240] *See id.* at 8-9. For a discussion of *Tenet*, see A. John Radsan, *Second-Guessing the Spymasters with a Judicial Role in Espionage Deals*, 91 Iowa L. Rev. 1259 (2006).

[241] See, in addition to *Totten*, such cases as Maxwell v. First Nat'l Bank of Maryland, 143 F.R.D. 590 (D. Mary. 1992) (granting protective order relating to defendant's alleged relationship with CIA).

[242] *See* Edmonds v. U.S. Dep't of Justice, 323 F. Supp.2d 65 (D.D.C. 2004) (dismissing complaint); Burnett v. Al Baraka Inv. & Dev. Corp., 323 F. Supp.2d 82 (D.D.C. 2004) (quashing deposition subpoena).

[243] *See* Trulock v. Lee, 55 Fed. Appx. 472 (4th Cir. 2003) (affirming dismissal of complaint).

[244] *See* Darby v. U.S. Dep't of Def., 74 Fed. Appx. 813 (9th Cir. 2003) (affirming dismissal of complaint).

[245] *See* Tenenbaum v. Simonini, 372 F.3d 776 (6th Cir. 2004) (affirming dismissal of complaint).

[246] *See, e.g.,* Kasza v. Browner, 133 F.3d 1159 (9th Cir. 1998) (affirming dismissal of complaint relating to alleged environmental problems at classified military facility); Tilden v. Tenet, 140 F. Supp.2d 623 (E.D. Va. 2000) (dismissing complaint relating to classified CIA procedures and personnel); Weston v. Lockheed Missiles & Space Co., 881 F.2d 814 (9th Cir. 1989) (noting decision below dismissing complaint relating to Defense Department guidelines relating to security clearances); Bowles v. United States, 950 F.2d 154 (4th Cir. 1991) (dismissing complaint relating to State Department vehicle usage policies).

warrantless surveillance[247] and extraordinary rendition.[248] Both have been the subject of some leaks and some degree of official confirmation, and as a result both are topics of intense political debate and public interest. Separate and apart from the question of whether these leaks and confirmations suffice to vitiate any privilege that might otherwise have attached to them, however, it is relatively clear that attempts to assert the privilege to shield the details of intelligence collection programs – including, almost by definition, programs that allegedly violate individual rights – are by no means unprecedented. On the contrary, the warrantless surveillance issue in particular was the subject of extensive privilege litigation during the 1970s and early 1980s, resulting in no less than nine published opinions.[249] The current rendition cases, moreover, are not the first occasions on which courts have been asked to apply the privilege in order to protect information relating to cooperation foreign states may have given to the U.S. intelligence community.[250] Whatever else may be said of these sensitive cases, the nature of their subject-matter does not support the conclusion that the Bush Administration is breaking new ground with the state secrets privilege.

b. The Nature of Judicial Review

In addition to the possibility that recent assertions of the privilege differ as to the nature of the information sought to be protected, there also is the possibility that the government is advancing – and the courts accepting – new procedures for making the privilege determination or that it is seeking unprecedented forms of relief. On close inspection this turns out not to be the case.

A review of the government's state secrets motion in *Hepting .v AT&T Corp.*, a warrantless surveillance case, provides a useful way to approach the question of whether the government is advocating a new or

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[247] *See supra* note __.
[248] *See El-Masri*, 2006 WL 1391390; *Arar*, 414 F. Supp.2d 250.
[249] *See Black*, 371 F. Supp. 97; *Ahmad*, 499 F.2d 851; *Kinoy*, 67 F.R.D. 1; *Halkin I*, 598 F.2d 1; *Spock*, 464 F. Supp. 510; *Felt I*, 491 F. Supp. 179; *Salisbury*, 690 F.2d 966; *Halkin II*, 690 F.2d 977; Ellsberg v. Mitchell, 709 F.2d 51 (D.C. Cir. 1983) (sustaining privilege as to some but not all of the information in issue).
[250] *See Felt I*, 491 F. Supp. 179 (sustaining privilege as to documents reflecting defendants' overseas activities, though requiring limited production nonetheless in light of government's decision to prosecute); Pan Am World Air. v. Aetna Cas. & Sur. Co., 368 F. Supp. 1098 (S.D.N.Y. 1973) (precluding discovery of CIA information relating to foreign terrorist organization).

different approach to the process of reviewing state secret claims.[251] The government's brief begins by describing the *Reynolds* prerequisites for any invocation of the privilege: "There must be a formal claim of privilege, lodged by the head of the department which has control over the matter, after actual personal consideration by the officer."[252] The brief goes on to assert that courts must provide great deference to the government's claim, deciding only whether the procedural requirements have been complied with and, if so, whether there is a "reasonable danger" that disclosure of the information at issue will harm national security.[253] "The court may consider the necessity of the information to the case only in connection with assessing the sufficiency of the Government's showing that there is a reasonable danger that disclosure of the information at issue would harm national security," the government argued, meaning that the degree of judicial scrutiny should increase with the litigant's need (but not that the privilege if properly asserted can be overcome).[254] The government also noted that *Reynolds* can be read as discouraging even *in camera, ex parte* review by the judge of the factual predicate for the privilege claim, but properly goes on to acknowledge that "[n]onetheless, the submission of classified declarations for *in camera, ex parte* review is 'unexceptional' in cases where the state secrets privilege is involved."[255] In short, nothing in this formulation appears to suggest a process that varies in any significant way from that employed in other post-*Reynolds* cases.

c. The Nature of the Relief Requested

Some have suggested that in recent years the government has sought to employ the privilege to obtain a different form of relief – dismissal of a complaint rather than just exemption from discovery – in comparison to years past.[256] Drawing once more on the record of published opinions, with full appreciation for the limits inherent in that approach, Table 2 below describes the rate at which the government has moved for dismissal of complaints based on the state secrets privilege,

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[251] Hepting v. AT&T, No. 06-cv-672 (N.D. Cal.) (May 13, 2006) Memorandum of the United States in Support of State Secrets Privilege and Motion to Dismiss or, in the Alternative, for Summary Judgment, at 8 ("Hepting Motion");
[252] *Id.* at 8 (quoting *Reynolds*, 345 U.S. at 7-8) (internal quotation marks omitted).
[253] *See id.* at 9-10.
[254] *Id.* at 10.
[255] *Id.* at 11.
[256] *See, e.g.,* Shayana Kadidal, "The State Secrets Privilege and Executive Misconduct," JURIST Forum, May 30, 2006, available at http://jurist.law.pitt.edu/forumy/2006/05/state-secrets-privilege-and-executive.php.

and the rate at which such motions have been granted, on a per-decade basis beginning in the 1970s.

Table 2 – Dismissal Motions in State Secret Cases (1971-2006)

Decade	Motions	Grants
1971-80	5	3
1981-90	9	8
1991-00	13	12
2001-06	15	10

Whatever the implications of this data for the *quantitative* inquiry disparaged above, its implications are clear for the *qualitative* question of whether the government in recent years has begun to seek unprecedented forms of relief under the privilege. The government has been seeking outright dismissal of complaints on state secret grounds for quite some time, and has done so with considerable regularity – and usually with success – at least since the 1970s.

F. Lessons Learned

What lessons may be learned from the foregoing discussion? Perhaps most significantly, the survey of the origin and evolution of the state secrets privilege suggests as a descriptive matter that the current pattern of implementation of the state secrets privilege does not depart significantly from its past usage. The privilege unquestionably produces harsh results from the perspective of the litigants against whom it is invoked, but that harshness has been with us for some time now and cannot be laid entirely at the doorstep of the current administration. So long as courts recognize a capacity in the government to preclude the discovery or use at trial of security-sensitive evidence, the reality under the modern doctrine is that some suits – including some entirely valid claims – will be dismissed.

To say that the privilege has long been with us and has long been harsh is not to say, however, that it is desirable to continue with the status quo. The modern privilege zealously protects the legitimate government interests identified earlier with respect to the benefits of secrecy. Given the degree of deference inherent in the "reasonable danger" standard mandated by *Reynolds*, however, there is some reason to be concerned that the privilege is overinclusive in its results, perhaps significantly so. At the same time, the use of the privilege to obtain dismissals of suits alleging government misconduct or unconstitutional behavior (as opposed to, say, breach of contract suits between government contractors) raises special concerns relating to democratic

accountability and the rule of law. Bearing all of this in mind, it is fair to ask whether Congress has the power to alter the current framework for analysis of privilege claims, and if so, what sort of reform might be desirable.

IV. WHAT MIGHT CONGRESS DO?

It is important to acknowledge at the outset that there is little current prospect of Congress enacting legislation to modify the state secrets privilege in any significant way. Should it at some point consider doing so, however, questions will arise as to which aspects of the privilege might be changed and which changes might be desirable in order to improve the balance the privilege attempts to strike among the legitimate interests of litigants, the government, and the public.

The question of which aspects of the privilege *can* be changed is complicated by the possibility that the privilege is best viewed not as a run-of-the-mill common law doctrine, but instead one that is compelled at least in part by constitutional considerations. The privilege did emerge in traditional common law fashion, of course, as described in detail in the preceding section. Even in its early, pre-consolidation stages, however, there were indications that judges were drawing on separation-of-powers considerations in developing the rule.[257] More to the point, when the Supreme Court in *Nixon* recognized the constitutional foundations of executive privilege, it explicitly linked the privilege to "military, diplomatic, or sensitive national security secrets" and excepted such circumstances from its holding that executive privilege otherwise is merely qualified rather than absolute.[258] At the very least, then, *Nixon* confirms that the state secrets privilege is at some level an artifact of Article II and the separation-of-powers.[259]

The constitutional core of the state secrets privilege is best understood as a consequence of functional considerations associated with the particular advantages—and responsibilities—of the executive branch

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[257] *See supra* Part III.A.__ (discussing the role of *Marbury* and *Burr* in the privilege's formative period).
[258] 418 U.S. at 706.
[259] *See id.* at 711 (suggesting that executive privilege "is constitutionally based" to the extent that the President's interest in confidentiality "relates to the effective discharge of a President's powers"). *Cf. Tenet*, 544 U.S. at 11 (Stevens, *J.*, concurring, joined by Ginsburg, *J.*) (conspicuously describing *Totten* as a "federal common-law rule" and stating that Congress thus "can modify" that rule if it wishes to do so).

vis-a-vis national defense and foreign relations.[260] Plainly, however, this constitutional core does not account for the full scope of the privilege as it has come to be understood. Not every bit of information relating to national defense and diplomacy may be withheld by the executive branch from Congress in its investigative mode, for example, though the line between that which it may and that which it may not is notoriously disputed. More to the point, the history of the privilege itself is punctuated by occasional examples of legislation that courts have construed to override the privilege to some extent in order to facilitate litigation on certain topics, including security-sensitive patents[261] and challenges to anti-dumping tariff decisions.[262] It might be best, then, to conceive of the state secrets privilege as having a potentially-inalterable constitutional core surrounded by a revisable common-law shell developed over the decades out of respect for the prudential considerations that arise when the government's interests come into tension with the personal interests of litigants and the public's interest in effective government and democratic accountability.

Drawing the line between the core and the shell would not be an easy task, of course, but the important point is that in theory there is at least some room for legislative modification of the privilege. Assuming that this is correct, in any event, this analysis suggests that Congress could legislate different rules for resolving state secrets privilege claims in at least some instances. Should it do so? And if this is desirable, what might it do?

The case for reform is strongest with respect to suits alleging unconstitutional conduct on the part of the government. Such suits presumably present the most compelling set of offsetting concerns in terms of the public's interest in democratic accountability and enforcement of the rule of law. Thinking along these lines no doubt informed the non-deferential (though ultimately uninfluential) approaches taken in *Black* and *Elsen*, the cases discussed above in which courts declined to countenance assertions of the privilege in the face of allegations of unlawful government conduct. No court since the early 1970s has shown interest in following that path, but one need not go so

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[260] For a discussion of these qualities, see Eric Posner and Cass Sunstein, *Chevronizing Foreign Relations Law*, YALE L. J. (forthcoming 2007).

[261] *See Halpern*, 258 F.2d 36 (under the Invention Secrecy Act, permitting use of classified information already in the hands of a litigant, subject to special procedural protections including the striking of a jury demand in favor of a sealed, in camera trial).

[262] *See United States Steel Corp.*, 578 F. Supp. 409 (under the statutory regime for challenging decision not to adopt compensatory tariffs, requiring disclosure of diplomatic communications).

far as did the courts in *Black* and *Elsen* in order to strike a different and possibly more desirable balance.

If Congress wishes to ameliorate the impact of the state secrets privilege in the special category of government misconduct suits, there are at least two alternatives available. The first option involves a change designed to increase the discretion of the judge to disagree with the executive branch's assertion that national security or diplomatic interests warrant exclusion of evidence (or dismissal of a complaint). Specifically, Congress might replace the "reasonable danger" standard established in *Reynolds* with a less-deferential test, thus giving greater weight to the role of the judiciary as an institutional check on the executive branch. But enhancing a judge's freedom to second-guess executive branch assertions of national security or diplomatic dangers is not the same thing as enhancing the capacity of judges to render such assessments accurately. It would remain the case that judges as an institutional matter are nowhere nearly as well-situated as executive branch officials to account for and balance the range of considerations that should inform assessments of such dangers, a factor that counsels against pursuing this option.

The alternative reform option takes a different approach, one that does not call for judges to second-guess the judgments of executive branch officials with respect to security and diplomatic considerations. Assume for the sake of argument that the government is involved in patently unconstitutional conduct the public revelation of which almost certainly would cause significant diplomatic repercussions and damage to national defense through the exposure of sensitive sources and methods (possibly even risking the death of some individuals). In that case, even under a heightened standard of review a judge would have little choice but to agree with the executive's assertion of the privilege and on that basis dismiss the complaint – and rightly so, given that the only current alternative would be to reject the privilege in order to permit the suit to go forward notwithstanding the potential harm. Particularly given the significance of allegations of unconstitutional government conduct, would it not be wise to consider whether a third alternative should be made available between the polar opposites of public disclosure and dismissal?

Some have argued that in this circumstance the government should be obliged to choose between permitting the suit to go forward or else having judgment rendered for the plaintiff, rather than simply receiving the benefit of having the complaint dismissed.[263] This

[263] *See* Fisher, *supra* note __.

approach has the virtue of forcing the government rather than the individual to internalize the costs of maintaining government secrecy. It has a vice as well, however, as the lack of a merits inquiry might encourage a multiplicity of suits not all of which would be warranted. Insofar as litigants sought non-monetary relief along the lines of injunctions against the further conduct of certain government policies, moreover, the government-pays solution is both impractical and undesirable.

A related but more appealing alternative would be for Congress to take steps to permit suits implicating state secrets to proceed on an *in camera* basis in some circumstances. Borrowing from the approach exemplified in the Invention Secrecy Act as interpreted by the Second Circuit in *Halpern*, for example, Congress might authorize judges who would otherwise be obliged to dismiss a suit on privilege grounds instead to transfer the action to a classified judicial forum for further proceedings. Such a forum – modeled on or perhaps even consisting of the Foreign Intelligence Surveillance Court ("FISC") – at a minimum would entail Article III judges hearing matters *in camera* on a permanently sealed, bench-trial basis.[264]

In the FISC, of course, the warrant application process is not adversarial; only the government participates. This reform proposal contemplates a sliding scale of potential adversarial participation that includes resort to *ex parte* litigation if necessary. In circumstances in which the plaintiff already possesses the sensitive information, as in *Halpern*, there would be no obstacle to permitting the plaintiff to be involved (assuming representation by counsel capable of obtaining the requisite clearances). When the plaintiff does not have the information already, however, the judge might be given the authority to appoint a guardian for the plaintiff's interests from among a cadre of, for example, federal public defenders with the requisite clearances. Though far from ideal as an example of the adversarial system (among other problems, the guardian would lack the ability to share classified information with the plaintiff and thus be less able than otherwise to fully respond to it) even this procedurally-stilted approach would be preferable to outright dismissal of a potentially meritorious claim involving government misconduct.

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[264] This raises a question about jury rights. One might address the Seventh Amendment concern by pointing out that these suits otherwise might not be heard at all – still less by a jury – in light of the state secrets privilege.

This solution is far from ideal from the perspective of any of the stakeholders in the debate over the state secrets privilege. But it does illustrate that there are alternatives to the status quo that could be considered, and it is my hope that the suggestion will stimulate further discussion of the issue.

Absent such reforms – and perhaps even with them – the prospects for lawsuits challenging the legality of sensitive intelligence-collection programs such as rendition and warrantless surveillance are relatively dim. The state secrets privilege as it currently stands strikes a balance among security, justice for individual litigants, and democratic accountability that is tilted sharply in favor of security, tolerating almost no risk to that value despite the costs to the competing concerns. This is understandable and appropriate in at least some contexts, but where the legality of government conduct is itself in issue, it may be appropriate to explore other solutions to the secrecy dilemma.

APPENDIX
Published Opinions Adjudicating Assertions of the State Secrets Privilege after *Reynolds*, 1954-2006[265]

[265] In the course of compiling this data set, I encountered numerous examples of opinions whose claim to inclusion was marginal. As a rule of thumb, I did not include any opinion that merely referenced the existence of the privilege but did not explicitly adjudicate its applicability. Additionally, I categorically excluded opinions addressing the national security exceptions to the Freedom of Information Act (on the theory that the FOIA privilege and the state secrets privilege are not coextensive, though plainly they have much in common) and also those arising out of criminal prosecutions implicating the Classified Information Procedures Act. These considerations led me to exclude a number of opinions that had been included in prior collections, such as that contained in J. Steven Gardner, *The State Secret Privilege Invoked in Civil Litigation: A Proposal for Statutory Relief*, 29 Wake Forest L. Rev. 567, 584 n. 171 (1994), but I believe the end result is a more pertinent set of opinions. For a sampling of marginally-related opinions excluded on various grounds, see, *e.g.*, *Weinberger v. Catholic Action of Hawaii/Peace Education Project*, 454 U.S. 139, 146-47 (1981) (noting in passing that *Reynolds* and *Totten* preclude litigation that would lead to the disclosure of certain confidential information, and observing that the plaintiffs' attempt in that case to compel the Navy to provide an environmental impact statement related to the possible positioning of nuclear weapons in Hawaii raised similar concerns); *Wilkinson v. Fed. Bur. of Inv.*, 922 F.2d 555, 558-59 (9th Cir. 1991) (referring to assertion of state secrets privilege but not adjudicating the claim); *Patterson v. Fed. Bur. of Inv.,* 893 F.2d 595, 600 (3rd Cir. 1990) (noting superfluous assertion of the state secrets privilege in FOIA litigation, though not recognizing the assertion as superfluous); *United States v. Sarkissian*, 841 F.2d 959, 966 (9th Cir. 1988) (referring ambiguously to the state secrets privilege in the CIPA context); *United States v. Zettl*, 835 F.2d 1059, 1065-66 (4th Cir. 1987) (holding that the government should have opportunity to assert the state secrets privilege, but not adjudicating a privilege claim); *Hobson v. Wilson*, 737 F.2d 1, 63 n.181 (D.C. Cir. 1984) (affirming without discussion the trial court's unspecified "rulings on informer and state secrets privilege" grounds); *Loral Corp. v. McDonnell Douglas Corp.*, 558 F.2d 1130, 1132-33 (2d Cir. 1977) (observing that U.S. government accommodated security clearance needs for litigation between military contractors, but that government's unwillingness to extend clearance to jurors required resort to a bench trial); *Robinson v. City of Philadelphia*, 233 F.R.D. 169, 171 (E.D. Pa. 2005) (referring without elaboration to an assertion of the state secrets privilege, among others, in context with no apparent connection to subjects that might implicate that privilege); *American-Arab Anti-Discrimination Committee v. Reno*, 883 F. Supp. 1365, 1376-77 & n. 11 (C.D. Cal. 1995) (noting that the state secrets privilege had not been asserted in that case, but inaccurately citing the doctrine as a basis for judicial reliance upon information presented on an *ex parte, in camera* basis); *Westmoreland v. CBS, Inc.*, 584 F.Supp. 1206, 1208-10 (D.D.C. 1984) (referencing state secrets in conjunction with broader assertion of executive privilege, but declining to "parse" that larger concept in order to rule on the matter); *Ganadera Industrial, S.A. v. Block*, 556 F. Supp. 354, 356 n.3 (D.D.C. 1982) (noting defendant's invocation of the state secrets privilege with respect to certain documents at an earlier stage in this administrative procedure action, but not adjudicating any privilege issues); *United States v. Feeney*, 501 F. Supp. 1337, 1346-47 (D. Col. 1980) (referencing the *Reynolds* procedures in the course of a long discussion of the various privilege issues that arise when Justice Department employees decline to provide information absent Attorney General authorization).

	Title	Court	Year of Decision	Govt. Role	Nature of information	Format of information	Relief Requested	*In Camera* Review?	Disposition of Claim	Disposition of Case
1	*Tucker v. United States*	Ct. Cl.	1954	Defendant	Military / Intelligence (plaintiff's employment as covert operative for military intelligence)	Facts relating to plaintiff's employment as covert operative for military intelligence	Dismiss complaint	No	*Totten* found applicable	Complaint dismissed
2	*Petrowicz v. Holland*	E.D. Pa.	1956	Defendant	Intelligence	Written witness statements	Dismiss complaint	Yes	Continued	Continued
3	*Republic of China v. Nat'l Union Fire Ins. Co. of Pitt.*	D. Mary.	1956	Libellant (admiralty plaintiff)	Diplomatic communicat'n	Memoranda of conversations	Deny motion to dismiss for failure to produce documents	No	Privilege sustained	Proceed w/out the requested information
4	*Halpern v. United States*	S.D.N.Y.	1957	Defendant	Military (radar evasion technology)	Patent application and related documents	Dismiss complaint	Unclear	Premature to assert privilege	Complaint dismissed on other grounds
5	*Halpern v. United States*	2nd Cir.	1958	Defendant	Military (radar evasion technology)	Patent application and related documents	Dismiss complaint	Not needed	Rejected on ground that Congress waived privilege in special statutory scheme	Trial to proceed on *in camera* basis, though not *ex parte*
6	*Elson v. Bowen*	S. Ct. Nev.	1967	Defendant / Petitioner	Intelligence (FBI warrantless surveillance)	Testimony from FBI agent concerning warrantless surveillance activity	Petition for writ of prohibition overturning trial court order to answer questions	Yes	Privilege denied.	Continue - witness must testify.
7	*Heine v. Raus*	4th Cir.	1968	Third Party	Intelligence (details of defendant's relationship with CIA)	Deposition testimony	Limit questions asked at deposition	Yes, though not clear how extensive	Privilege sustained as to some questions	Continued
8	*Pan Am. World Airways v. Aetna Cas. & Sur. Co.*	S.D.N.Y.	1973	Third Party	Intelligence (CIA information relating to PFLP)	Documents	Preclude discovery	No	Privilege sustained	Continued
9	*Black v. Sheraton Corp. of Am.*	D.D.C.	1974	Defendant	Intelligence (warrantless surveillance of	FBI files	Preclude discovery	No	Unclear if U.S. meant to invoke state secrets, but court	Continued, with facts deemed

					plaintiff for political purposes)				construes state secrets privilege as part of the constitutional executive privilege, and rejects it here (after a balancing analysis)	established against government
10	*United States v. Ahmad*	3rd Cir.	1974	Defendant	Intelligence (FBI warrantless surveillance)	FBI files	Maintain protective order from earlier criminal case, precluding discovery of additional acts of tapping	n/a	continued (but dicta describes *Reynolds* as a balancing test rather than absolute privilege)	continued
11	*Kinoy v. Mitchell*	S.D.N.Y.	1975	Defendant	Intelligence[266] (warrantless surveillance)	Written records	Deny motion to compel production	Offered by gov't, but declined by court	Decision delayed pending compliance by gov't with the *Reynolds* formalities	Continued
12	*Jabara v. Kelley* 75 F.R.D. 475[267]	E.D. Mich.	1977	Defendant	Intelligence	Warrantless surveillance	Deny discovery	Yes	Privilege sustained as to some but not all information	Continued
13	*Halkin v. Helms*	D.C. Cir.	1978	Defendant	Intelligence (NSA warrantless surveillance)	Responsive pleading	Dismiss complaint	Yes	Privilege sustained	Complaint dismissed
14	*Spock v. United States*	S.D.N.Y.	1978	Defendant	Intelligence (NSA warrantless surveillance)	Information relating to surveillance program and plaintiff	Dismiss complaint	Yes	Privilege sustained, but information already in public domain	Continued
15	*Clift v. United States*	2d Cir.	1979	Defendant	Intelligence (cryptographic encoding patent dispute)	Facts relating to cryptographic encoding patent dispute	Deny discovery and dismiss complaint	No	Unclear – privilege not properly asserted, yet acknowledged	Continued (dismissal inappropriate at this stage)
16	*United States v. Felt*	D.D.C.	1979	Prosecution	Intelligence / Foreign Relations (information	Documents reflecting contacts between the	Deny discovery	Yes	Privilege sustained, but court nonetheless ordered production of two documents out of	Continued

[266] The court in *Kinoy* concluded that the state secrets privilege concerns only information relating "to the national defense or the international relations of the United States," categories that in its view excluded "domestic intelligence investigations." 67 F.R.D. 1, 10.

[267] Later in the same litigation, the Sixth Circuit spoke indirectly but approvingly of the district court's disposition of the state secrets issue in that case. *See* 691 F.2d 272, 274-75 & nn. 3, 5 (6th Cir. 1982)

					relating to contacts between Weathermen and foreign powers)	Weathermen and foreign powers			respect for criminal defendants' rights.	
17	*ACLU v. Brown*	7th Cir.	1979	Defendant	Intelligence (domestic military intelligence activity)	Interrogatory responses and documents	Relief from discovery	Yes	Privilege sustained	Continued
18	*ACLU v. Brown*	7th Cir. en banc	1980	Defendant	Intelligence (domestic military intelligence activity)	Interrogatory responses and documents	Relief from discovery	To be determined	District court is directed to consider whether plaintiffs' need is such as to warrant review	Continued
19	*United States v. Felt*	D.D.C.	1980	Prosecution	Intelligence (foreign intelligence surveillance)	Facts relating to foreign intelligence surveillance	Imposition of an advance-notice requirement before defendants can elicit certain testimony	Classified affidavit	Privilege sustained	Continued subject to notice requirement
20	*Farnsworth Cannon, Inc. v. Grimes*	4th Cir. (en banc)	1980	Defendant	Military (Navy procurement contract)	Documents	Dismiss complaint	unclear	Privilege sustained	Complaint dismissed
21	*Sigler v. LeVan*	D. Mary.	1980	Defendant	Military / Intelligence (counter-intelligence practices and relationships)	Documents and also facts relating to decedent's relationships	Dismiss complaint	Yes as to an affidavit, but not as to documents themselves	Privilege sustained as to documents; but not properly asserted as to relationships	Claim based on documents dismissed; gov't invited to reassert privilege as to relationships
22	*Zenith Radio Corp. v. United States*	Ct. Int'l Tr.	1981	Defendant	Unclear	Unclear	Relief from discovery	Yes as to some	Privilege sustained	Approving withholding of

	1 C.I.T. 325							documents		documents
23	*Attorney General v. The Irish People, Inc.*[268]	D.C. Cir.	1982	Plaintiff	Foreign Relations (U.K.-U.S. comm's)	Documents	Deny discovery but permit civil enforcement action to proceed anyway	Yes (unclear if affidavit or documents themselves)	Privilege sustained	Continued for consideration of means short of dismissal by which action can continue without documents
24	*Salisbury v. United States*	D.C. Cir.	1982	Defendant	Intelligence (NSA surveillance of plaintiff reporter)	Facts relating to surveillance of plaintiff (including the fact thereof)	Dismiss complaint	Yes	Privilege sustained	Complaint dismissed
25	*Halkin v. Helms*	D.C. Cir.	1982	Defendant	Intelligence (CIA surveillance activity)	Interrogatory responses and documents	Deny motion to compel	Only of the classified affidavit of Director Turner	Privilege sustained without further inquiry	Complaint dismissed
26	*Nat'l Lawyers Guild v. Attorney General*	S.D.N.Y.	1982	Defendant	Intelligence / Foreign Relations (FBI intelligence activities)	FBI Documents	Preclude discovery	Potentially yes, but to be determined	Continued	Continued
27	*Ceramica Regiomontana, S.A. v. United States* 4 C. I. T. 168	Ct. Int'l Trade	1982	Defendant	Diplomatic	Communi-cations from Mexican government	Preclude discovery	Yes	Privilege sustained	Continued
28	*Republic Steel Corp. v. United States*	Ct. Int'l Trade	1982	Defendant	Diplomatic exchange: U.S-Romanian discussions	Cables from Commerce Dep't to U.S. Embassy	Motion for protective order removing cables from administrative record of antidumping petition	Yes	Privilege denied	Continued
29	*United States Steel Corp. v. United States*	Ct. Int'l Trade	1983	Defendant	Diplomatic exchange: U.S.-Brazil & US-World Bank discussions	Documents	Motion for protective order removing cables from administrative	Yes	Privilege denied	Continued

[268] The opinion below in this action, *Attorney General v. The Irish People, Inc.*, does not directly engage the propriety of the government's invocation of the privilege in that case, other than to note that the government cannot simultaneously withhold documents on the basis of the privilege while moving forward as the plaintiff against the defendant newspaper. *See* 502 F. Supp. 63, 66-67.

							record of antidumping petition			
30	*Ellsberg v. Mitchell*	D.C. Cir.	1983	Defendant	Intelligence (warrantless surveillance)	Information detailing the surveillance in issue	Deny motion to compel and dismiss complaint	Yes	Privilege sustained as to some but not all information	Continued
31	*AT&T v. United States*	Cl. Ct.	1983	Defendant	Intelligence (cryptographic encoding patent dispute)	Facts relating to cryptographic encoding patent dispute	Preclude discovery	No (except for a classified affidavit)	Privilege sustained	Proceedings stayed until the information becomes available
32	*Molerio v. FBI*	D.C. Cir.	1984	Defendant	Intelligence	The FBI's reasons for refusing to hire plaintiff	Dismiss the complaint	Yes	Privilege sustained	Dismissal for lack of evidence affirmed
33	*Northrop Corp. v. McDonnell Douglas Corp.*	D.C. Cir.	1984	Third party	Military / Foreign Relations	Documents from DoD, State, Air Force, and Navy	Quash subpoena	No (court specifically concludes not required)	Privilege sustained as to DoD, but State failed to follow *Reynolds* formalities	Quashed as to DoD but not State (for now)
34	*Star-Kist Foods, Inc. v. United States* 600 F. Supp. 212	Ct. Int'l Trade	1984	Defendant	Diplomatic	Cables and internal memos relating to countervailing duty determination	Deny discovery	Yes	Privilege sustained (in duty challenges, Congress by statute empowers CIT to compel production, but CIT declined to do so here)	Discovery denied
35	*Fitzgerald v. Penthouse Int'l, Ltd.*	4th Cir.	1985	Intervenor	Military (details of marine animal research)	Facts relating to Navy's marine animal research	Dismiss the complaint	Yes (extent unclear)	Privilege sustained	Complaint dismissed
36	*Foster v. United States* 12 Cl. Ct. 492	U.S. Cl. Ct.	1987	Defendant	Intelligence	Facts relating to U.S. use of a patent subjected by CIA to Invention Secrecy Act order	Deny discovery	Classified affidavit and unspecified documents	Privilege sustained	Discovery denied
37	*Xerox Corp. v. United States* 12 Cl. Ct. 93	U.S. Cl. Ct.	1987	Defendant	Diplomatic	Letter from UK revenue official to IRS official	Deny discovery	No	Privilege sustained	Discovery denied
38	*Guong v. United States*	Fed. Cir.	1988	Defendant	Military/ Intelligence	Fact that plaintiff was retained by CIA to conduct espionage in	Dismiss the complaint	Yes	Privilege sustained	Complaint dismissed

						North Vietnam				
39	*In re United States*	D.C. Cir.	1989	Defendant	Intelligence	Facts as to FBI's connection to plaintiff's decedent	Dismiss the complaint	Yes	Remanded for consideration of privilege issues on an item-by-item basis	Continued
40	*Weston v. Lockheed Missiles & Space Co.*	9th Cir.	1989	Defendant	Intelligence (Defense Dep't guidelines possibly precluding homosexual employees of defense contractors from obtaining clearance)	Defense Dep't documents	Dismiss the complaint	Yes	Privilege sustained	Complaint dismissed (9th Circuit's decision does not agree or disagree with the merits)
41	*Hudson River Sloop Clearwater, Inc. v. Dep't of Navy* 1989 WL 50794	E.D.N.Y.	1989	Defendant	Military	Location of nuclear weapons	Dismiss portion of the complaint	No	Privilege sustained	Relevant portion of the complaint dismissed
42	*Nejad v. United States* 724 F. Supp. 753	C.D.Cal.	1989	Defendant	Military	AEGIS weapon system technology; rules of engagement; operational orders for Navy ship	Dismiss complaint	No	Privilege sustained	Complaint dismissed
43	*Greenpeace, U.S.A. v. Mosbacher* 1989 WL 15854	D.D.C.	1989	Defendant	Unclear	Possibly related to diplomacy associated with US-Iceland whaling agreement	Deny discovery	Court decides to review the underlying documents	Continued	Continued
44	*Zuckerbraun v. General Dynamics Corp*	D. Conn.	1990	Intervenor	Military (specifications and procedures for Navy missile-defense system)	Facts relating to Navy missile-defense system	Dismiss the complaint	No (clear from unclassified affidavit that privilege applied)	Privilege sustained	Complaint dismissed
45	*Zuckerbraun v. General Dynamics Corp.*	2d Cir.	1991	Intervenor	Military (specifications and procedures for Navy missile-	Facts relating to Navy missile-defense system	Dismiss the complaint	No (clear from unclassified affidavit that	Privilege sustained	Complaint dismissed

					defense system)			privilege applied)		
46	*Bowles v. United States*	4th Cir.	1991	Defendant	Unclear (relating to State Dep't policies regarding use of embassy vehicles in Oman)	Facts relating to State Dep't policies regarding use of embassy vehicles in Oman	Dismiss the complaint	Yes	Privilege sustained	Complaint dismissed
47	*In re Under Seal*	4th Cir.	1991	Third-party (statement of interest)	Intelligence (commercial dispute among private contractors arising out of unspecified gov't "project")	Facts relating to unspecified gov't project relating to national security	Deny motion to compel discovery	Yes	Privilege sustained	Complaint dismissed on subsequent summary judgment motion for lack of evidence
48	*Clift v. United States (related to 1979 opinion of the same name)*	D. Conn.	1991	Defendant	Intelligence (cryptographic encoding patent dispute)	Facts relating to cryptographic encoding patent dispute	Dismiss complaint	No (except for a classified affidavit)	Privilege sustained	Complaint dismissed
49	*N.S.N. Int'l Industry v. E.I. DuPont De Nemours & Co, Inc.* 140 F.R.D. 275	S.D.N.Y.	1991	Intervenor	Military	Information relating to DARPA contract and armor technology	Deny discovery	No	Privilege sustained	Discovery denied
50	*United States v. Koreh* 144 F.R.D. 218	D. N.J.	1992	Denaturali-zation proceeding	Intelligence	Intelligence sources	Deny document discovery	Classified declaration	Privilege sustained	Discovery denied; gov't required to stipulate to certain facts in order to proceed
51	*Maxwell v. First Nat'l Bank of Maryland*	D. Mary.	1992	Intervenor	Intelligence	Facts as to defendant's relationship with CIA	Motion for protective order	Yes	Privilege sustained	Continued
52	*Bareford v. General Dynamics Corp.*	5th Cir. (other aspects vac'd on petition for en banc)	1992	Intervenor	Military (missile defense system used by Navy frigate)	Facts relating to missile-defense system used by Navy frigate	Dismiss complaint	Yes as to classified affidavit and report, but not as to all documents	Privilege sustained	Complaint dismissed

53	*Hyundai Merchant Marine, S.D. v. United States* 1992 WL 168281	S.D.N.Y.	1992	Defendant	Unclear	14 documents relating to plaintiff's claim of negligent nautical maps	Deny discovery	Yes as to classified affidavits and the documents	Privilege sustained	Discovery denied
54	*Maxwell v. First Nat'l Bank of Maryland* 998 F.2d 1009, 1993 WL 264547	4th Cir.	1993	Intervenor	Intelligence	Facts as to defendant's relationship with CIA	Motion for protective order	Yes	Privilege sustained	Continued
55	*Bentzlin v. Hughes Aircraft Co.*	C.D.Cal.	1993	Intervenor	Military (Maverick missile specifications; A-10 tactics; Gulf War rules of engagement)	Facts relating to Maverick missile specifications; A-10 tactics; Gulf War rules of engagement	Dismiss complaint	No	Privilege sustained	Complaint dismissed
56	*In re United States* 1 F.3d 1251	Fed. Cir.	1993	Defendant	Military	Facts relating to stealth aircraft technology	Mandamus reversing disclosure orders issued by Court of Federal Claims	Classified affidavit	Privilege sustained	Mandamus granted ordering Court of Federal Claims to vacate disclosure orders
57	*In re Smyth* 826 F. Supp. 316	N.D. Cal.	1993	UK seeking extradition	Military / Intelligence	Northern Ireland investigative materials	Deny discovery	Attempted review of materials, but UK denied access	Privilege sustained as to two documents, not as to others	Continued, with rebuttable presumption against UK on certain issues
58	*McDonnell Douglas Corp. v. United States* 29 Fed. Cl. 791	Ct. Fed. Cl.	1993	Defendant	Military	Stealth aircraft technology	Deny discovery	Classified affidavit	Privilege sustained	Continue to determine if suit should be dismissed
59	*Yang v. Reno*	M.D. Pa.	1994	Habeas defendant	Internal gov't deliberations	Substance of discussions in interagency process regarding alien smuggling and China	Motion for protective order	No	Government failed to comply with *Reynolds* formalities for assertion of privilege	Continued with option to move again
60	*Black v. United States* 900 F. Supp. 1129	D. Minn.	1994	Defendant	Intelligence	Facts as to alleged wrongdoer's relationship to government agencies	Dismiss the complaint	Classified affidavit	Privilege sustained	Complaint dismissed

61	*Black v. United States*	8th Cir.	1995	Defendant	Intelligence	Facts as to alleged wrongdoers' relationship to government agencies	Dismiss the complaint	Classified affidavit	Privilege sustained	Complaint dismissed
62	*Frost v. Perry*	D. Nev.	1995	Defendant	Military (name of the operating facility in issue)	Name of the operating facility in issue in the case	Deny motion to compel	Classified affidavit only	Privilege sustained	Motion to compel denied
63	*Frost v. Perry*	D. Nev.	1996	Defendant	Military	Facts related to classified military activities in Nevada	Dismiss the complaint	Yes	Privilege sustained	Complaint dismissed
64	*McDonnell Douglas Corp. v. United States* 37 Fed. Cl. 270	Ct. Fed. Claims	1996	Defendant	Military	Facts relating to stealth technology	Dismiss the complaint	Classified affidavit	Privilege sustained	Complaint dismissed, though plaintiff awarded costs plus interest
65	*Monarch Assurance P.L.C. v. United States* 36 Fed. Cl. 324	Ct. Fed. Claims	1996	Defendant	Intelligence	CIA employment	Dismiss the complaint	Classified affidavit	Privilege sustained	Continued to give plaintiff chance to prove case through non-privileged evidence
66	*Monarch Assurance P.L.C. v. United States* 42 Fed. Cl. 258	Ct. Fed. Claims	1998	Defendant	Intelligence	CIA employment	Dismiss the complaint	Classified affidavit	Privilege sustained	Complaint dismissed
67	*Kasza v. Browner*	9th Cir.	1998	Defendant	Military	Facts related to classified military activities in Nevada	Dismiss the complaint	Yes	Privilege sustained	Complaint dismissed
68	*Linder v. Calero-Portocarrero* 183 F.R.D. 314	D.D.C.	1998	Defendant	Intelligence	Identity of intelligence source indicated in a diplomatic cable that otherwise was provided in full to the plaintiffs	Deny discovery	No	Privilege sustained	Discovery denied
69	*Tilden v. Tenet*	E.D. Va.	2000	Defendant	Intelligence	Facts relating to CIA	Dismiss the complaint	Yes	Privilege sustained	Complaint dismissed

						procedures and covert personnel				
70	*Barlow v. United States* 2000 WL 1141087	Ct. Fed. Claims	2000	Defendant	Intelligence	NSA, CIA, and DIA documents relating to Pakistan's nuclear arms program	Motion for protective order	Classified and unclassified affidavits, but not the documents themselves	Privilege sustained	Discovery denied
71	*Monarch Assurance v. United States*	Fed. Cir.	2001	Defendant	Intelligence	Facts relating to whether individual worked for CIA	Dismiss the complaint	Yes	Privilege sustained	Continued (with possibility of summary judgment)
72	*DTM Research, LLC v. AT&T Corp.*	4th Cir.	2001	Intervenor	Intelligence (data mining technology)	Facts relating to U.S. gov't's data-mining technology	Quash subpoenas to U.S.	Unclear	Privilege sustained	Continued (deemed not necessary to defendant)
73	*United States ex rel. Schwartz v. TRW, Inc.*	C.D. Cal.	2002	Subpoena recipient (Qui Tam)	Military	Documents relating to missile defense program	Deny discovery request	No	Government failed to comply with *Reynolds* formalities for assertion of privilege	Continued with option to move again
74	*McDonnell Douglas Corp. v. United States*	Fed. Cir.	2003	Defendant	Military	Facts relating to stealth technology	Strike "superior knowledge" defense	Yes	Privilege sustained	Defense struck
75	*Trulock v. Lee*	4th Cir.	2003	Defendant	Intelligence	Facts relating to CIA employees, procedures, and investigation into Chinese espionage	Dismiss the complaint	Yes	Privilege sustained	Complaint dismissed
76	*Darby v. U.S. Dep't of Defense*	9th Cir.	2003	Defendant	Unclear	Unclear	Dismiss the complaint	Unclear	Privilege sustained	Complaint dismissed
77	*Tenenbaum v. Simonini*	6th Cir.	2004	Defendant	Unclear	Unclear	Dismiss the complaint	Yes	Privilege sustained	Complaint dismissed
78	*Edmonds v. U.S. Dep't of Justice*	D.D.C.	2004	Defendant	Intelligence / Foreign relations	Facts relating to intelligence-collection and foreign relations	Dismiss the complaint	Yes	Privilege sustained	Complaint dismissed
79	*Burnett v. Al Baraka Inv. & Dev. Corp.*	D.D.C.	2004	Third Party	Intelligence/ Foreign Relations	Request to depose Sibel Edmonds	Quash subpoena	Yes	Privilege sustained	Subpoena quashed
80	*Tenet v. Doe*	S. Ct.	2005	Defendant	Intelligence	Facts relating	Dismiss the	No	*Totten* described as a	Complaint

						to alleged espionage relationship	complaint		"categorical bar" distinct from the "state secrets evidentiary privilege"	dismissed
81	*Sterling v. Tenet*	4th Cir.	2005	Defendant	Intelligence	Facts relating to CIA's employment actions as to plaintiff	Dismiss the complaint	Yes, but only to a limited extent	Privilege sustained	Complaint dismissed
82	*Crater Corp. v. Lucent Technologies, Inc.*	Fed. Cir.	2005 (according to a 2001 decision in same case, the district court first granted the gov't's privilege claim in 2000 or earlier)	Intervenor	Intelligence	Facts relating to manufacture or use of underwater "coupling" device	Motion for protective order limiting discovery	Yes	Privilege sustained	Continued with possibility of dismissal if necessary
83	*Schwartz v. Raytheon Co.* 150 Fed. Appx. 627	9th Cir.	2005	Intervenor	Military	Unclear, but related to performance of defense contract	Dismiss the complaint	Unclear	Privilege sustained	Complaint dismissed
84	*Arar v. Ashcroft*	E.D.N.Y.	2006	Defendant	Intelligence / Foreign Relations	Facts relating to removal of plaintiff and subsequent interrogation	Dismiss the complaint	moot	moot	Complaint dismissed on ground that *Bivens* has a national-security exception
85	*El-Masri v. Tenet*	E.D. Va.	2006	Defendant	Intelligence / Military / Foreign Relations	Facts relating to extraordinary rendition	Dismiss the complaint	Yes	Privilege sustained	Complaint dismissed
86	*Hepting v. AT&T Corp.*	N.D. Cal.	2006	Intervenor	Intelligence / Military	Facts relating to warrantless surveillance	Dismiss the complaint	Yes	continued	Continued
87	*Hepting v. AT&T Corp.*	N.D. Cal.	2006	Intervenor	Intelligence / Military	Facts relating to warrantless surveillance	Dismiss the complaint	Yes	Privilege inapplicable to general subject-matter of the suit as it is no longer secret; might arise later as to specific evidence	Continued

88	*Terkel v. AT&T Corp.*	N.D. Ill.	2006	Intervenor	Intelligence / Military	Facts relating to warrantless surveillance	Dismiss the complaint	Yes	Privilege sustained	Complaint dismissed
89	*ACLU v. NSA*	E.D. Mich.	2006	Defendant	Intelligence / Military	Facts relating to warrantless surveillance	Dismiss the complaint	Yes	Privilege denied on ground that it no longer is secret	Continued

CERTIFICATION OF COMPLIANCE PURSUANT TO FED. R. APP. P. 32(a)(7)(C) AND CIRCUIT RULE 32-1 FOR CASE NOS. 06-17132 AND 06-17137

I certify, pursuant to Fed. R. App. P. 32(a)(7)(C) and Circuit Rule 32-1, that the foregoing brief is proportionately spaced, has a typeface of 14 points, and contains 3,245 words.

Dated: March 16, 2007.

Adam H. Charnes

CERTIFICATE OF FILING AND SERVICE

I hereby certify that the original and fifteen (15) copies of the foregoing Brief of Amicus Curiae Professor Robert M. Chesney in Support of Reversal were this day filed with the Clerk of the United States Court of Appeals for the Ninth Circuit by Federal Express next-day delivery service. I also certify that two (2) copies of the foregoing Brief of Amicus Curiae Professor Robert M. Chesney in Support of Reversal were this day served by first-class United States mail upon the following:

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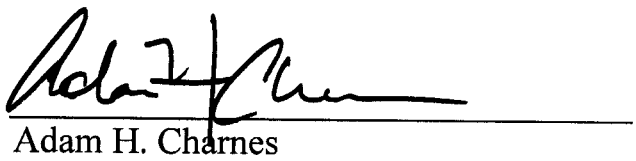

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