

SHUTTING THE COURTHOUSE DOORS:  
INVOKING THE STATE SECRETS PRIVILEGE TO THWART  
JUDICIAL REVIEW IN THE AGE OF TERROR

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INTRODUCTION

The war on terror has led to an increased use of the state secrets privilege by the Executive Branch—to dismiss legal challenges to widely publicized and controversial government actions—ostensibly aimed at protecting national security from terrorist threats.<sup>1</sup> Faced with complaints that allege indiscriminate and warrantless surveillance,<sup>2</sup> tortious detention, and torture that flouts domestic and international law,<sup>3</sup> courts have had to reconcile impassioned appeals for private justice with the government’s unyielding insistence on protecting national security. Courts, almost unanimously, have cast their lot with national security, granting considerable deference to government assertions of the state secrets principle. This deference to state secrets shows no signs of abating; indeed, the growing trend is for courts to dismiss these legal challenges pre-discovery,<sup>4</sup> even before the private litigants have had the chance to present actual, non-secret evidence to meet their burden of proof. Although many looked optimistically at President Obama’s inauguration as a chance to break decisively from the Bush Administration’s aggressive application of the state secrets

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<sup>1</sup> See Amanda Frost, *The State Secrets Privilege and Separation of Powers*, 75 *FORDHAM L. REV.* 1931, 1939-40 (2007) (explaining that Bush-era invocations of the state secrets privilege generally sought the blanket dismissal of every case challenging the constitutionality of specific, ongoing government programs, in contrast to more limited applications of the privilege in prior administrations, which merely sought to limit discovery, and rarely sought dismissal of the entire suit outright).

<sup>2</sup> See *infra* Part II.A.

<sup>3</sup> See *infra* Part II.B.

<sup>4</sup> See, e.g., *El-Masri v. United States*, 479 F.3d 296, 302 (4th Cir. 2006).

privilege,<sup>5</sup> the Obama Administration has largely disappointed on the state-secrets front, asserting the privilege with just as much fervor—if not as much regularity<sup>6</sup>—as its predecessor.<sup>7</sup>

Judicial deference to such claims of state secrecy, whether the claims merit privileged treatment, exacts a decisive toll on claimants, permanently shutting the courthouse doors to their claims and interfering with public and private rights.<sup>8</sup> Moreover, courts' adoption of a sweeping view of the state secrets privilege has raised the specter of the government disingenuously invoking state secrets to conceal government misbehavior under the guise of national security.<sup>9</sup> By granting greater deference to assertions of the state secrets privilege, courts share responsibility for eroding judicial review as a meaningful check on Executive Branch excesses. This Article argues for a return to a narrowly tailored state secrets privilege—one that ensures that individuals who allege a credible claim of government wrongdoing retain their due process rights.

Part I briefly sketches the origins of the state secrets privilege in American jurisprudence, paying special attention to the dual authorities—one evidentiary, one constitutional—invoked to support the privilege. Part II considers how the privilege has been asserted in the post-9/11 years, and inquires into whether this use is qualitatively different from its use before the September 11th attacks. Although Part II references the growing scholarship examining the state secrets privilege, it departs from this analysis by examining how the unique circumstances surrounding the war on terror have informed the most

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<sup>5</sup> See Christina E. Wells, *State Secrets and Executive Accountability*, 26 CONST. COMMENT. 625, 627 (2010) (describing the early excitement for the Obama Administration expressed by Bush Administration detractors).

<sup>6</sup> See *New Administration Plays, "I've Got a (State) Secret."* USA TODAY, Apr. 27, 2009; Charlie Savage, *Obama's War on Terror May Resemble Bush's in Some Areas*, N.Y. TIMES, Feb. 18, 2009.

<sup>7</sup> Secrecy Report Card 2010: Indicators of Secrecy in the Federal Government, OpenTheGovernment.Org, [www.openthegovernment.org/otg/SecrecyRC\\_2010.pdf](http://www.openthegovernment.org/otg/SecrecyRC_2010.pdf) (presenting evidence indicating that the Obama Administration invoked the state secrets privilege a mere four times in 2009 as compared to the forty-eight assertions of the privilege during President Bush's two terms).

<sup>8</sup> See generally Carrie Newton Lyons, *The State Secrets Privilege: Expanding Its Scope Through Government Misuse*, 11 LEWIS & CLARK L. REV. 99, 100-01 (2007) (arguing that the combination of the government misapplying the state secrets privilege and courts misconstruing it has seriously impacted private litigants and public rights).

<sup>9</sup> *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1094 (9th Cir. 2010) (en banc) (Hawkins, J., dissenting), *cert. denied*, 131 S. Ct. 2442 (2011).

recent incarnation of the state secrets privilege. Finally, Part III explores potential approaches for reforming the use of the privilege, from enacting legislation to constrain the Executive's invocation of the privilege, to reinforcing judicial review by heightening the courts' standard of review for state-secrets claims.

#### I. BACKGROUND: A BRIEF HISTORY OF THE STATE SECRETS PRIVILEGE, FROM ENGLISH COMMON LAW TO THE COLD WAR

The state secrets privilege has a long history, traceable to two related, but distinct sources: common law evidentiary privileges and constitutional separation of powers. A brief overview of the origins of the privilege provides some context for understanding how the state secrets privilege has evolved over time, and how its recent incarnation under the Bush and Obama Administrations both mirrors and diverges from settled case law and common law precedent.

The Constitution provides sparse guidance about when and how the government may act secretly.<sup>10</sup> Statements surrounding the adoption of the Constitution support the notion that—at least in some circumstances—should secret government action be necessary, the President is best situated to undertake it.<sup>11</sup> Others at the Constitutional Convention expressed distrust at the prospects of *any* government secrecy,<sup>12</sup> aptly foreshadowing the current battle lines between proponents of government secrecy and advocates for openness.<sup>13</sup>

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<sup>10</sup> The only constitutional provision conferring a power of secrecy on a government body or official is Article I, Section 5, Clause 3, which confers the following power upon the Legislative Branch: “Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy.” U.S. CONST. art. 1, § 5, cl.3.

<sup>11</sup> In *The Federalist Papers*, John Jay (who, as a Federalist, was less suspicious of a powerful executive than his Jeffersonian Democrat counterparts), stated:

[It] seldom happens in the negotiation of treaties . . . but that perfect *secrecy* and immediate *dispatch* are sometimes requisite . . . and there doubtless are many [people] who would rely on the secrecy of the President, but who would not confide in that of the Senate, and still less in that of a large popular assembly.

THE FEDERALIST NO. 64, at 390-91 (Clinton Rossiter, ed., 1961).

<sup>12</sup> JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787 433-34 (Norton 1987) (1787) (quoting James Wilson, a Pennsylvania delegate to the Constitutional Convention, arguing that “the people have the right to know what their Agents are doing or have done, and it should not be in the option of the Legislature to conceal their proceedings”).

<sup>13</sup> See, e.g., William G. Weaver & Robert M. Pallitto, *State Secrets and Executive Power*, 120:1 POL. SCI. Q. 85, 88-90 (2005) (describing how the increased use of state secrets during the

These skeptics of government secrecy were eventually overcome, and with the advent of government secrecy, courts fashioned doctrines to justify concealing certain government actions from the public. The state secrets privilege originated in English and early-American common law,<sup>14</sup> where the English jurist Thomas Starkie described a “public policy” and “state policy” evidentiary privilege proscribing disclosure of information that would cause “greater mischief and inconvenience” with its production at trial than its exclusion.<sup>15</sup>

The state secrets privilege appeared, somewhat opaquely, in *Marbury v. Madison*, as Marbury demanded that Secretary of State Levy Lincoln testify regarding the whereabouts of his withheld commissions.<sup>16</sup> Secretary Lincoln refused to testify, and although the Court ultimately sided with Marbury, Chief Justice Marshall indicated that the Secretary would not have been “obliged” to impart information “communicated to him in confidence.”<sup>17</sup> The Court failed to identify precedent requiring this result, but Chief Justice Marshall—riding circuit several years later—provided greater clarity about the nascent state secrets privilege when he presided over Aaron Burr’s treason trial.<sup>18</sup>

In his defense against a charge of treason, Burr sought production of a letter from one of President Jefferson’s generals that allegedly implicated Burr in a treasonous conspiracy.<sup>19</sup> Although the evidentiary privilege dispute ultimately became moot, Marshall’s analysis about whether the government could resist disclosure of the letter outlined the tensions that have shaped the state secrets privilege since its inception.<sup>20</sup> Marshall noted that although it was “certain” that the President possessed some papers for which the court “would not require” production, courts would be “very reluctant[ ]” to deny pro-

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Bush Administration deprived citizen claimants of legal redress, and how this tension between secrecy and openness has a long history in this country).

<sup>14</sup> See generally Robert M. Chesney, *State Secrets and the Limits of National Security Litigation*, 75 GEO. WASH. L. REV. 1249, 1270-81 (2007) (sketching the historical origins of the state secrets privilege from British common law and early-American constitutional law, and asserting that a distinctive state secrets privilege focusing on national security matters did not emerge until the early 20th century).

<sup>15</sup> THOMAS STARKIE, A PRACTICAL TREATISE ON THE LAW OF EVIDENCE AND DIGEST OF PROOFS IN CIVIL AND CRIMINAL PROCEEDINGS § LXXVI (Boston, Wells & Lilly 1826).

<sup>16</sup> See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 143-44 (1803).

<sup>17</sup> *Id.* at 144-45.

<sup>18</sup> See *United States v. Burr*, 25 F. Cas. 30 (C.C.D. Va. 1807).

<sup>19</sup> *Id.* at 32.

<sup>20</sup> See *id.* at 37.

duction if the document “were really essential to [Burr’s] defense.”<sup>21</sup> Marshall also observed that the Jefferson Administration did not resist production on the ground that disclosing the letter would “endanger the public safety.”<sup>22</sup> This observation suggests that *had* the President proffered a colorable “public safety” argument, the Court could not have compelled disclosure. This dicta from *Burr* implies that just as the President has the constitutional duty to act to promote public safety, he similarly has the prerogative, under the Constitution, to withhold information from public view that could compromise public safety.

Two key Supreme Court cases, *Totten v. United States*<sup>23</sup> and *United States v. Reynolds*,<sup>24</sup> are regularly cited as the foundational authorities for the state secrets privilege.<sup>25</sup> These two cases both recognized the Executive’s right to resist disclosing government materials at trial on account of national security, but each traced this right to distinct doctrinal authorities, with *Totten* grounding the state secrets privilege in constitutional separation of powers principles<sup>26</sup> and *Reynolds* citing the common law state secrets evidentiary privilege.<sup>27</sup> Understanding how *Totten* and *Reynolds* formulated the state secrets privilege, and how subsequent decisions relied on these cases to expand the reach of the privilege, will shed light on how it has been asserted most recently to win dismissal for cases challenging wiretapping and extraordinary rendition programs, as well as the targeted assassination of Anwar al-Aulaqi.

#### A. *Totten v. United States: The State Secrets Privilege as Part of the President’s Article II Powers*

*Totten v. United States* concerned an attempt by the estate of a Union soldier to enforce a contract it claimed the soldier had with President Lincoln to spy on Confederate troop positions and

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

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

<sup>23</sup> *Totten v. United States*, 92 U.S. 105 (1876).

<sup>24</sup> *United States v. Reynolds*, 345 U.S. 1 (1953).

<sup>25</sup> See, e.g., *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1077-80 (9th Cir. 2010) (en banc), *cert. denied*, 131 S. Ct. 2442 (2011) (analyzing *Totten* and *Reynolds* as the foundational authorities for exercise of the state secrets privilege).

<sup>26</sup> See *Totten*, 92 U.S. at 106.

<sup>27</sup> See *Reynolds*, 345 U.S. at 7-8.

strongholds during the Civil War.<sup>28</sup> In affirming the lower court's dismissal of the estate's claim, the Court propounded that "public policy" prohibits "any suit" that would "inevitably lead to the disclosure of matters which the law itself regards as confidential."<sup>29</sup> The Court reasoned that the very secrecy of the "secret services" memorialized in the soldier's contract precluded his estate's legal action to enforce the contract.<sup>30</sup>

Although *Totten* tethered its formulation of the state secrets privilege to secret contracts with the government, dicta in the Court's holding opens the door to broader readings of the privilege. First, *Totten* makes clear that the state secrets privilege, if invoked in the right circumstances, is an absolute bar to litigation.<sup>31</sup> The Court stated 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."<sup>32</sup> Rather than operating as an evidentiary rule that excludes secret evidence apart from considering the justiciability of the underlying claim,<sup>33</sup> the *Totten* bar completely forecloses litigation in cases that implicate secret government actions. This suggests, especially to those that support an expansive view of presidential power, that the state secrets privilege is rooted in the structure of the Constitution such that the courts' Article III powers must give way to the Executive's Article II powers when secret government actions are involved.<sup>34</sup> Reinforcing this argument

<sup>28</sup> *Totten*, 92 U.S. at 105-06.

<sup>29</sup> *Id.* at 107.

<sup>30</sup> *Id.* See also *Weinberger v. Catholic Action of Hawaii*, 454 U.S. 139, 145-47 (1981) (applying the *Totten* bar because the subject matter of the case—the storage of nuclear weapons—constituted a state secret).

<sup>31</sup> *Totten*, 92 U.S. at 107. See also *United States v. Reynolds*, 345 U.S. 1, 11 n.26 (1953) (characterizing the *Totten* bar as precluding judicial action when "the very subject matter of the action . . . [is] a matter of state secret").

<sup>32</sup> *Totten*, 92 U.S. at 107.

<sup>33</sup> See *United States v. Reynolds*, 345 U.S. 1, 6 (1953) (stating that the definition of "non-privileged" evidence for purposes of cases implicating national security interests "refers to 'privileges' as that term is understood in the law of evidence").

<sup>34</sup> See Eric A. Posner & Adrian Vermeule, *The Credible Executive*, 74 U. CHI. L. REV. 865, 889-90 (2007) (arguing that courts have no choice but to defer to the "well-motivated" executive's claim of state secrets given the "credibility dilemma" between democratically elected Presidents and judges, whose "life tenure and salary protection" render them "partial[ly] insulat[ed]" from the democratic process). See also *Redacted, Unclassified Brief for Intervenor-Appellee the United States at 12, Mohamed v. Jeppesen Dataplan, Inc.*, 579 F.3d 943 (9th Cir. 2009) (No. 08-15693), *rev'd*, 614 F.3d 1070 (9th Cir.2010) (en banc), *cert. denied*, 131 S. Ct. 2442 (2011) (quoting *El-Masri v. United States*, 479 F.3d 296, 303 (4th Cir. 2006)) (arguing in support of its

is the fact that the *Totten* Court invoked the state secrets privilege sua sponte without requiring the government to formally claim that disclosing the contract would harm the country's security interests.<sup>35</sup> By voluntarily ceding its power of judicial review to the government, the Court implicitly held that the enforceability of the Union soldier's contract was non-justiciable as a constitutional matter.

The Court also defined "secret" evidence broadly, warning that cases involving "secret employments of the government in time of war . . . [and] matters affecting our foreign relations," should not be litigated "where a disclosure of the service might compromise or *embarrass* our government in its public duties, or endanger the person or injure the character of the agent."<sup>36</sup> While courts often limit the *Totten* bar to cases with factual settings that mirror those at issue in *Totten*,<sup>37</sup> this has not stopped the government from urging courts to read *Totten* more expansively.<sup>38</sup>

## B. Reynolds v. United States: *State Secrets as a Common Law Evidentiary Privilege*

In *Reynolds v. United States*, six crewmembers, including four civilians, were killed when their Air Force B-29 aircraft caught fire mid-flight during a mission to test secret electronic equipment.<sup>39</sup> Several of the surviving widows sued to compel the government to produce the Air Force crash report it prepared following the crash.<sup>40</sup> Claiming that it could not disclose the requested material "without

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invocation of state secrets that although the privilege developed under common law, "it performs a function of *constitutional* significance" by safeguarding the President's ability to provide for the national security) (emphasis added).

<sup>35</sup> See *Totten*, 92 U.S. at 106-07.

<sup>36</sup> *Id.* at 106 (emphasis added).

<sup>37</sup> Compare *Tenet v. Doe*, 544 U.S. 1, 8-11 (2005) (dismissing plaintiff's challenge because, like *Totten*, it concerned the existence of a secret espionage relationship with the government and *Totten*'s "core concern" is preventing the disclosure of the alleged spy's relationship with the government), with *Halpern v. United States*, 258 F.2d 36, 44 (2d Cir. 1958) (declining to extend the *Totten* bar to litigation involving the plaintiff-inventor's claim for compensation from the government on the theory that *Totten* "primarily turned" on the "confidential relationship" of the parties and their breach of contract).

<sup>38</sup> See Reply Brief for the United States at 3, *Hepting v. AT&T Corp.*, 439 F. Supp. 2d 974 (N.D. Cal. 2006) (No. 06-17137) (arguing that *Totten* is not limited to cases where the alleged spy brings suit, but that it broadly applies to preclude litigation "whenever success depends upon the existence of an alleged secret espionage relationship with the Government").

<sup>39</sup> *United States v. Reynolds*, 345 U.S. 1, 2-3 (1953).

<sup>40</sup> *Id.*

seriously hampering national security, flying safety, and the development of highly technical and secret military equipment,” the government invoked the state secrets privilege to block disclosure.<sup>41</sup> Both the district court and the Third Circuit Court of Appeals found for the widows and ordered the government to disclose the crash reports.<sup>42</sup> In reversing and upholding the government’s right to preserve the secrecy of the classified crash reports, the Supreme Court stated that there was a “reasonable danger” that disclosure of the accident report would expose secret information concerning military matters and endanger national security.<sup>43</sup>

Locating the state secrets privilege within the common law evidentiary privileges, the *Reynolds* Court traced the lineage of the state secrets privilege back through the *Totten* line of cases to the English common law.<sup>44</sup> The Court articulated three requirements that the government must satisfy to invoke the privilege: (1) there must be a formal claim of privilege (2) lodged by the head of the department that has control of the matter<sup>45</sup> (3) after actual and personal consideration by that department head.<sup>46</sup> Once the government properly invokes the state secrets privilege, the reviewing court must then determine whether there is “a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged.”<sup>47</sup> The Court also suggested that courts may, in certain circumstances, calibrate their level of deference according to the importance of the contested information to the plaintiff’s case.<sup>48</sup> The greater the plaintiff’s need for the evidence, the more scrutiny courts should exercise when the government invokes

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<sup>41</sup> *Id.* at 5.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 10-12. In 2000, the government declassified the Air Force crash studies, and it turned out that they did not contain any secret military information. Editorial, *Shady Secrets*, N.Y. TIMES, Sept. 30, 2010, at A38, available at <http://www.nytimes.com/2010/09/30/opinion/30thu1.html>. The reports did, however, include damaging details about the aircraft’s poor construction, which if disclosed would have embarrassed the government and subjected it to civil liability. *See id.*

<sup>44</sup> *United States v. Reynolds*, 345 U.S. 1, 6 (1953).

<sup>45</sup> *See Al-Quraishi v. Nakhla*, 728 F. Supp. 2d. 702, 733 (D. Md. 2010) (declining to dismiss plaintiff’s claims of torture and abuse against a military contractor on state secrets grounds because the government has not intervened to assert the privilege and the privilege belongs to the “Government alone”).

<sup>46</sup> *Reynolds*, 345 U.S. at 7-8.

<sup>47</sup> *Id.* at 10.

<sup>48</sup> *See id.* at 11.

the privilege.<sup>49</sup> If the plaintiff can instead rely on non-privileged information to support its claim, the court may give more deference to government.<sup>50</sup> While cautioning courts not to abdicate judicial control to the “caprice of executive officers,” *Reynolds* nevertheless conceded that courts must give way to the Executive when the “reasonable danger” standard is met.<sup>51</sup>

The court’s determination about whether disclosing information poses a “reasonable danger” to national security is highly fraught, implicating constitutional questions about how to reconcile the President’s Article II powers with the courts’ power of judicial review. Easier state secrets cases involve challenges whose very subject matter is a state secret. When the Executive establishes that the information at issue in the case is a state secret, the absolute protections of the privilege automatically adhere.<sup>52</sup> However, when legal challenges center on a government program that is publicly known and whose existence has been confirmed by high-level agency officials, the *Totten* bright-line bar falters, and courts are left to demarcate the scope of the privilege with less precision.<sup>53</sup> In these more ambiguous cases, post-9/11 courts have generally deferred to the Executive, expanding the state secrets privilege to dismiss actions involving non-secret information that is “so infused with state secrets that the risk of disclosing them is both apparent and inevitable.”<sup>54</sup> These courts have been influenced by judicial doctrines like the “mosaic” theory, which proclaims that information not directly concerned with national security may nevertheless be pieced together with other parts of the “mosaic”

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<sup>49</sup> *Id.*

<sup>50</sup> *See id.* (“Here, necessity was greatly minimized by an available alternative, which might have given respondents the evidence to make out their case without forcing a showdown on the claim of privilege.”).

<sup>51</sup> *See Chesney, supra* note 14, at 1287-88 (arguing that *Reynolds* misapplied its own “reasonable danger” test by erroneously asking whether there was a reasonable danger that the reports contained the allegedly harmful information when it should have inquired into whether that content would pose a reasonable danger to national security).

<sup>52</sup> *See, e.g., Tenet v. Doe*, 544 U.S. 1, 8-10 (2005) (“*Reynolds* therefore cannot plausibly be read to have replaced the categorical *Totten* bar with the balancing of the state secrets evidentiary privilege in the distinct class of cases that depend upon clandestine spy relationships.”); *Totten v. United States*, 92 U.S. 105, 107 (1875) (“It may be stated as a general principle, that public policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential.”).

<sup>53</sup> *See Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1089 (9th Cir. 2010) (en banc), *cert. denied*, 131 S. Ct. 2442 (2011).

<sup>54</sup> *See id.*

to give a different picture that justifies the secrecy.<sup>55</sup> This potential convergence between the *Reynolds* privilege and the *Totten* bar is the real battleground for the state secrets privilege going forward,<sup>56</sup> and Part II explores how courts have treated state secrets claims in cases where the dimensions of the privilege are less than clear.

Before turning to how the state secrets privilege has been applied in cases arising from war-on-terror policies, it is worth noting how the specific historical context surrounding *Reynolds* influenced the Court's reasoning. The post WWII years saw a pronounced acceleration in the "military industrial complex." Rapid militarization and growing preoccupation with Communism and all out nuclear warfare led many to argue that the President should have greater freedom to act independently in response to emerging threats.<sup>57</sup> The *Reynolds* decision nods in this direction, as the Court contextualized its "reasonable danger" test by noting that the country's "vigorous preparation for national defense" justified deference to the Executive's assertion of state secrets.<sup>58</sup> The *Reynolds* Court implied that so long as the President is taking steps to prepare for national security exigencies, courts should review any claims arising from such executive actions with deference.<sup>59</sup>

However, what makes this reasoning particularly controversial is how the *Reynolds* Court applied the state secrets doctrine to the facts in the case. Unlike the Third Circuit, which also emphasized the need for judicial deference in cases implicating "secrets of a diplomatic or military nature,"<sup>60</sup> the Supreme Court *did not* review the government records *ex parte* and *in camera* before determining that their release

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<sup>55</sup> See *Halkin v. Helms*, 598 F.2d 1, 8 (D.C. Cir. 1978) (explaining that even "seemingly innocuous" information is privileged if it is part of a classified "mosaic" that "can be analyzed and fitted into place to reveal with startling clarity how the unseen whole must operate").

<sup>56</sup> See *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1, 53 (D.D.C. 2010) (dismissing the American Civil Liberties Union and Center for Constitutional Rights' challenge to the Obama Administration's targeted killing of Anwar al-Aulaqi on procedural grounds, but stating that the *Reynolds* privilege and the *Totten* bar "converge[d]" in the case); *but see Jeppesen Dataplan*, 614 F.3d at 1087 n.12 (expressing disapproval of conflating the *Totten* bar with the *Reynolds* privilege).

<sup>57</sup> See GARRY WILLS, *BOMB POWER* 1 (2010) (arguing that the intense secrecy that shrouded the development of the atomic bomb enabled the President to exploit his sole and unconstrained authority over uses of the bomb to promote "an anxiety of continuing crisis, so that society [is] pervasively militarized").

<sup>58</sup> See *United States v. Reynolds*, 345 U.S. 1, 10 (1953).

<sup>59</sup> See *id.*

<sup>60</sup> *Reynolds v. United States*, 192 F.2d 987, 996 (3d Cir. 1951).

would harm national security.<sup>61</sup> At least in small measure responding to prevailing unease about the Cold War, the Supreme Court simply trusted the government's argument that the potential damage to national security posed by disclosing the classified Air Force crash reports was too great to risk exposure through in camera and ex parte review.<sup>62</sup> This represents a sharp departure from the reasoning of the Third Circuit, which sensibly stated that the Executive's state secrets claim should not automatically command judicial deference.<sup>63</sup> The national security gloss to the *Reynolds* decision is unmistakable, and its subtle influence on the Court's decision-making anticipates how courts have been similarly susceptible to Executive strong-arming in the aftermath of the September 11th attacks.

## II. APPLYING THE STATE SECRETS PRIVILEGE POST-9/11: HOW THE BUSH AND OBAMA ADMINISTRATIONS HAVE INVOKED STATE SECRETS TO THWART JUDICIAL REVIEW OF NSA WIRETAPPING, EXTRAORDINARY RENDITION, AND TARGETED ASSASSINATIONS

This Part examines how the Bush and Obama Administrations have invoked the state secrets privilege to preempt legal challenges to the constitutionality of many of the Executive's war-on-terror programs. Specifically, both the Bush and Obama Administrations have asserted the state secrets doctrine to dismiss challenges to both the National Security Agency's (NSA) terrorist surveillance program (TSP) and the extraordinary rendition program. Most recently, the Obama Justice Department asserted the privilege in a suit challenging

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<sup>61</sup> See *Reynolds*, 345 U.S. at 10 (“[W]e will not go so far as to say that the court may automatically require a complete disclosure to the judge before the claim of privilege will be accepted in any case.”).

<sup>62</sup> See *id.*

It may be possible to satisfy the court . . . that there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged. When this is the case, the occasion for privilege is appropriate, and the court should not jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence, even by the judge alone, in chambers.

*Id.*

<sup>63</sup> *Reynolds*, 192 F.2d at 997 (stating that whether the privilege has been properly invoked “involves a justiciable question, traditionally within the competence of the courts, which is to be determined . . . upon the submission of the documents in question to the judge for his examination in camera,” albeit on an ex parte basis).

its widely-acknowledged, and publicly-debated, targeted killing order for the American-born Yemeni cleric Anwar al-Aulaqi.<sup>64</sup> Although the District Court for the District of Columbia dismissed the suit on procedural grounds and did not reach the state secrets question,<sup>65</sup> it is instructive to examine the court's dicta regarding the privilege and how the Obama Administration borrowed prevailing state secrets theories to support its claim of privilege. A close analysis of how courts have treated these state secrets claims, juxtaposed to how the government has framed its state secrets claims, shows courts ratifying an expanding view of the privilege to decide war-on-terror claims. This analysis also suggests potential approaches for reforming how and when the privilege is used.

A. *No Harm, No Judicial Review: State Secrets and the Terrorist Surveillance Wiretapping Program*

Revelations in late 2005 and early 2006 about the TSP—a secret terrorist surveillance wiretapping program operated by the NSA without judicial supervision,<sup>66</sup> whose existence the Bush Administration later confirmed<sup>67</sup>—triggered numerous lawsuits against telecommunications providers for violations of subscribers' constitutional and statutory rights.<sup>68</sup> These lawsuits were not the first legal challenges to government wiretapping, nor were they the first time the government had invoked state secrets to thwart judicial inquiry of wiretapping challenges.<sup>69</sup> Rather than revisit that history, this Article instead focuses only on post-9/11 circuit court decisions to consider the extent

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<sup>64</sup> Al-Aulaqi v. Obama, 727 F. Supp. 2d 1, 12 (D.D.C. 2010).

<sup>65</sup> *Id.* at 35.

<sup>66</sup> James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005, available at <http://www.nytimes.com/2005/12/16/politics/16program.html?pagewanted=print>; Leslie Cauley, *NSA Has Massive Database of Americans' Phone Calls*, USA TODAY, May 11, 2006, available at [http://www.usatoday.com/news/washington/2006-05-10-nsa\\_x.htm](http://www.usatoday.com/news/washington/2006-05-10-nsa_x.htm).

<sup>67</sup> President's Radio Address, Dec. 17, 2005, available at <http://georgewbush-whitehouse.archives.gov/news/releases/2005/12/20051217.html> (last visited Aug. 15, 2012) (confirming N.Y. Times reports regarding the NSA wireless surveillance program).

<sup>68</sup> *See, e.g.*, Hepting v. AT&T, 439 F. Supp. 2d 974, 978-79 (N.D. Cal. 2006) (summarizing the constitutional and statutory challenges to AT&T's interception of plaintiff's communications).

<sup>69</sup> *See, e.g.*, Ellsberg v. Mitchell, 709 F.2d 51, 59 (D.C. Cir. 1983) (affirming that state secrets precluded disclosure of the government's wiretapping of defendants in the "Pentagon Papers" prosecution because there was a "reasonable danger" that revealing the information could expose the nation's intelligence-gathering methods and disrupt its foreign relations);

to which courts have acquiesced to government assertions of the state secrets privilege. While circuit courts have tended to recognize state secrets claims in these cases, it is significant that many of these decisions actually reversed district court decisions that had rejected the state secrets claims.

Perhaps the most thorough treatment of whether the state secrets privilege precludes judicial review of the terrorist surveillance program occurred in *Hepting v. AT&T Corp.*, where the plaintiffs argued that AT&T's alleged warrantless wiretapping of its communications violated their First and Fourth Amendment rights.<sup>70</sup> The Bush Administration intervened, moving for dismissal on state secrets grounds.<sup>71</sup> After reviewing the purportedly secret evidence in camera,<sup>72</sup> the District Court for the Northern District of California denied the government's motion to dismiss, ruling that discovery should commence because the state secrets claim was inapplicable in light of the government's repeated admissions about the existence of the program.<sup>73</sup> The district court's thoughtful opinion offers a framework for review of state secrets claims in the war-on-terror context.

The district court's threshold inquiry in resolving the state secrets claim was determining whether the NSA surveillance program that gave rise to the suit actually qualified as a "secret."<sup>74</sup> Because the government had disclosed the existence of the program and AT&T admitted to assisting the government in classified matters when asked, the court concluded that state secrets did not foreclose discovery.<sup>75</sup> While the state secrets privilege did not support pre-discovery dismissal of the case, the court found that there was sufficient ambiguity about the extent of AT&T's involvement in the program, and the contents of any communication records surveyed, so as to permit AT&T to not disclose the extent of its participation in the TSP.<sup>76</sup> The court

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Halkin v. Helms, 690 F.2d 977, 990-91 (D.C. Cir. 1982) (upholding dismissal of plaintiff's challenge to NSA wiretapping on state secrets grounds).

<sup>70</sup> *Hepting*, 439 F. Supp. 2d at 978-79.

<sup>71</sup> *Id.* at 979.

<sup>72</sup> For an in camera review, the court inspects evidence out of the view of the fact-finder, making a preliminary ruling as to its admissibility. If, after conducting an in camera review, the court determines that the document is not subject to any evidentiary privilege operating to shield it from discovery, it will admit the evidence for the fact-finder's review.

<sup>73</sup> *Id.* at 992-93.

<sup>74</sup> *Id.* at 986.

<sup>75</sup> *Id.* at 992.

<sup>76</sup> *Hepting v. AT&T*, 439 F. Supp. 2d 974, 996-97 (N.D. Cal. 2006).

made clear, however, that if information about AT&T's role in supporting the TSP became public during the course of the litigation, the government could no longer invoke state secrets to resist disclosing this information.<sup>77</sup>

After rejecting the government's motion to dismiss on state secrets grounds, the court reiterated its constitutional duty to exercise judicial review:

But it is important to note that even the state secrets privilege has its limits. While the court recognizes and respects the [E]xecutive's constitutional duty to protect the nation from threats, the court also takes seriously its constitutional duty to adjudicate the disputes that come before it. To defer to a blanket assertion of secrecy here would be to abdicate that duty, *particularly because the very subject matter of this litigation has been so publicly aired*. The compromise between liberty and security remains a difficult one. But dismissing this case at the outset would sacrifice liberty for no apparent enhancement of security.<sup>78</sup>

This is a revealing statement by the court. While forcefully asserting its authority to decide the complicated constitutional questions at issue in this case, the court implied that this duty is not absolute, and that the balance between liberty and security may tilt toward security under different facts. Of particular importance, especially with regard to how the government has applied the state secrets privilege to subvert judicial review in the war-on-terror context, is the weight the court conferred to the public airing of the wiretapping program.<sup>79</sup> The court was reluctant to defer to the government's claim of secrecy in this case because the government's own public statements about the existence of the program directly contradicted its state secrets claim.<sup>80</sup> Acknowledging the extensive media coverage of the program, the court insisted that the only relevant public disclosures about the contested government program, at least with respect to measuring a claim

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<sup>77</sup> *Id.* at 997-98. It is worth noting that the court does not appear to distinguish between deliberate or accidental disclosures about the dimensions of the surveillance program – *any* disclosures, including accidental disclosures, that confirm or deny the existence of the program will moot a state secrets claim. *Id.*

<sup>78</sup> *Id.* at 995 (emphasis added) (citation omitted).

<sup>79</sup> *See id.*

<sup>80</sup> *See id.* at 994.

of government secrecy, are public statements by the government and its implicated private accomplices.<sup>81</sup>

The court reasonably concluded that the government cannot simultaneously admit that a program exists *and* that its existence is secret.<sup>82</sup> Under the court's reasoning, official public confirmation that a program exists limits the government's ability to assert the state secrets privilege to block discovery on the program. This reasoning could influence how courts adjudicate state secrets claims with respect to other post-9/11 government programs.<sup>83</sup> It could also have an even broader impact in light of the proliferation of new media sources and a renewed appetite for government openness, all of which will apply pressure on the government to come clean about its clandestine national security programs. Official public admissions about once-secret programs will undercut those programs' secrecy, and if the *Hepting* analysis is any indication, prevent the government from invoking the state secrets privilege to shield those programs from judicial scrutiny.<sup>84</sup>

The government did not go quietly in *Hepting*, asserting that the case was "tailor-made" for applying the state secrets privilege.<sup>85</sup> The government's most creative argument was to draw a false distinction between the terrorist surveillance program it had publicly acknowledged and a separate, "indiscriminate dragnet" program it claims the plaintiff described in his brief and whose existence it repeatedly disavowed.<sup>86</sup> The government's language exposes the disingenuousness of its argument: "Whether AT&T is involved in *either* the TSP *or* the

<sup>81</sup> *Id.* at 990-91.

<sup>82</sup> See *Hepting v. AT&T*, 439 F. Supp. 2d 974, 994 (N.D. Cal. 2006) ("Because of the public disclosures by the government . . . the court cannot conclude that merely maintaining this action creates a 'reasonable danger' of harming national security.").

<sup>83</sup> See Reply Memorandum for Plaintiff at 45-46, *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1 (D.D.C. 2010) (No. 10-1469) (arguing that it is untenable for the government to invoke state secrets when the government itself was responsible for using "an apparently coordinated media strategy" to publicize its plans to target and kill al-Aulaqi).

<sup>84</sup> See *Halkin v. Helms*, 598 F.2d 1, 10 (D.C. Cir 1978) (rejecting government's claim of state secrets because congressional investigations had revealed so much information that any disclosures during discovery would pose no threat to the NSA mission); *but see El-Masri v. Tenet*, 437 F. Supp. 2d 530, 538 (E.D. Va. 2006) (rejecting plaintiff's argument that the government's generalized public admissions of the rendition program invalidated its assertion of the state secrets privilege).

<sup>85</sup> Reply Brief for the United States at 4, *Hepting v. AT&T Corp.*, 439 F. Supp. 2d 974 (N.D. Cal. 2006) (No. 06-17137).

<sup>86</sup> See *id.* at 5-6.

broader activities alleged by the plaintiffs is a state secret that neither the Government nor AT&T can confirm or deny.”<sup>87</sup> The government’s repeated admissions that the TSP exists undermined its argument that it can neither confirm nor deny the program.

There have been several other challenges to the NSA’s wiretapping program, with the government—either as a defendant or an intervenor—asserting the state secrets privilege to block discovery and seek dismissal of the claim.<sup>88</sup> One of the recurring questions in cases challenging the TSP is whether the plaintiff can cite a sufficiently concrete and particularized injury-in-fact to survive the standing inquiry.<sup>89</sup> The fact that the government operated the TSP in secret, without alerting any of its targets about either the program or their being subject to surveillance, imposes a high burden on any party claiming harm from the government surveillance. Absent an unlikely government admission that it spied on an individual plaintiff or subjected a particular class of individuals to telecommunication surveillance, many of the plaintiffs are left to proffer a good faith, hypothetical harm.

In *ACLU v. NSA*, for example, the government argued that the ACLU and its co-plaintiffs could not establish standing or a prima facie case for any of its claims without disclosing state secrets.<sup>90</sup> While the trial court’s *ex parte* and *in camera* review of the contested materials convinced it that the state secrets privilege would preclude disclosure of these materials in open court proceedings,<sup>91</sup> the court was persuaded that the ACLU established a prima facie case based on the government’s public admissions that the TSP exists, that it operates without warrants, and that it targets communications by parties similarly situated to the plaintiffs.<sup>92</sup> The court also rejected the govern-

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<sup>87</sup> *See id.* (emphasis added).

<sup>88</sup> *See, e.g.,* *Terkel v. AT&T Corp.*, 441 F. Supp. 2d 899, 901 (N.D. Ill. 2006) (dismissing plaintiffs’ constitutional claims against AT&T on state secrets grounds, distinguishing this case from *Hepting* on the grounds that this case concerned disputed allegations that AT&T turned records over to the government, while *Hepting* involved the undisputed allegation that AT&T intercepted the *contents* of the plaintiff’s communications).

<sup>89</sup> *See id.* at 917-20 (“By successfully invoking the state secrets privilege, the government has foreclosed discovery that would allow the plaintiffs to attempt to establish that they are suffering ongoing harm or will suffer harm in the future.”).

<sup>90</sup> *ACLU v. NSA*, 438 F. Supp. 2d 754, 764 (E.D. Mich. 2006), *vacated*, 493 F.3d 644 (6th Cir. 2007).

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 765.

ment's argument that it could not effectively litigate the case without revealing state secrets.<sup>93</sup> It pointed out that the Bush Administration had not needed confidential information to repeatedly assure the public about the TSP's legality, and that the Executive's oft-cited constitutional and statutory authorities for operating the TSP would likewise be available to support its defense in *ACLU*.<sup>94</sup> Reminiscent of *Hepting*, the court concluded that public statements by the government contradicted its claims of secrecy, and could be cited to support a legally cognizable injury.<sup>95</sup> Based on its findings, the trial court in *ACLU* granted summary judgment to the plaintiffs and imposed a permanent injunction on the operation of the TSP.<sup>96</sup>

On appeal, the Sixth Circuit Court of Appeals vacated the district court's order, concluding that the plaintiffs lacked standing.<sup>97</sup> Because the plaintiffs could not prove that the NSA intercepted any of their communications without warrants, they could not substantiate an injury-in-fact and meet the constitutional test for standing.<sup>98</sup> Where *Hepting* could be read as offering a cautious optimism about the extent to which individuals can overcome the state secrets privilege to challenge publicly acknowledged government programs, the Sixth Circuit's decision in *ACLU* tempers this optimism. While the government cannot invoke the state secrets doctrine to deny the existence of a program it has already recognized, it may nevertheless freely invoke the privilege to preclude any judicial inquiry into the program beyond what the government has already acknowledged.

B. *Conflating Reynolds Balancing with the Totten Bar: Expanding the Scope of the State Secrets Privilege in Legal Challenges to Extraordinary Rendition*

The Bush and Obama Administrations have also invoked the state secrets privilege to preclude judicial scrutiny of the controversial extraordinary rendition program. Although the program first gained

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<sup>93</sup> *Id.* at 765-66.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 764-65

<sup>96</sup> *ACLU v. NSA*, 438 F. Supp. 2d 754, 782 (E.D. Mich. 2006), *vacated*, 493 F.3d 644 (6th Cir. 2007).

<sup>97</sup> *ACLU v. NSA*, 493 F.3d 644, 648 (6th Cir. 2007).

<sup>98</sup> *Id.* at 653-657.

momentum during the Clinton Administration,<sup>99</sup> it grew exponentially after the September 11th attacks and during the Bush years.<sup>100</sup> Under the extraordinary rendition program, the U.S. government allied with foreign governments—some with dismal human rights records—to arrange for the detention and interrogation of terror suspects in the host countries, which were beyond the reach of federal and international law.<sup>101</sup> These arrangements essentially amounted to an outsourcing of torture. Terror suspects were rounded up in secret and whisked away to so-called “black sites” where some combination of U.S. intelligence, private contractors, and foreign government personnel interrogated them about their involvement in terrorism.<sup>102</sup> What began as a program aimed at a discrete class of suspects exploded over time into a massive enterprise targeting a diffuse and ill-defined group of “illegal enemy combatants.”<sup>103</sup> Central to the brutal efficiency of the rendition program has been the complicity of private contractors and airline companies like Boeing and its subsidiary, Jeppesen International Trip Planning, that have participated in rendering captured suspects to black sites all across the world.<sup>104</sup> As with the challenges to the wiretapping program, plaintiffs have brought claims against both the government, for sanctioning the program, and against the private contractors that assisted the government in carrying out the

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<sup>99</sup> See Frontline, *Extraordinary Rendition: Rendition Timeline, Part I*, available at [http://www.pbs.org/frontlineworld/stories/rendition701/timeline/timeline\\_1.html#](http://www.pbs.org/frontlineworld/stories/rendition701/timeline/timeline_1.html#) (describing the covert program of “extraordinary” rendition implemented by the Clinton Administration to capture and transfer suspected terrorists to foreign countries to detain them and seize documents in their possession).

<sup>100</sup> See Fact Sheet: Extraordinary Rendition, American Civil Liberties Union (Dec. 6, 2005) <http://www.aclu.org/national-security/fact-sheet-extraordinary-rendition> (last visited July 29, 2012).

<sup>101</sup> See *id.*

<sup>102</sup> Jane Mayer, *Outsourcing Torture*, THE NEW YORKER, Feb. 14, 2005, at 106 (revealing the Bush Administration’s previously-covert rendition program by describing the brutal details of the illegal rendition of Maher Arar, a Syrian-born, Canadian-nationalized engineer, to Syria, where he endured months of torture).

<sup>103</sup> *Id.*

<sup>104</sup> See Jane Mayer, *The CIA’s Travel Agent*, THE NEW YORKER, Oct. 30, 2006, at 34 (exposing the Bush Administration’s use of private airline contractors like Boeing and its subsidiary Jeppesen International Trip Planning to carry out its extraordinary rendition of terror suspects); see also UNITED NATIONS HUMAN RIGHTS COUNCIL, REPORT ON THE WORKING GROUP ON THE USE OF MERCENARIES AS A MEANS OF VIOLATING HUMAN RIGHTS AND IMPEDING THE EXERCISE OF THE RIGHT OF PEOPLES TO SELF-DETERMINATION ¶ 22 (2010) available at [http://ap.ohchr.org/documents/sdpage\\_e.aspx?b=10&se=105&t=9](http://ap.ohchr.org/documents/sdpage_e.aspx?b=10&se=105&t=9) (surveying the pernicious and substantial role played by private military and security industry contractors in assisting the U.S. government in carrying out military operations associated with the war on terror).

program.<sup>105</sup> Also similar to the TSP cases, plaintiffs have had little success persuading courts to reject government claims of state secrets and to permit litigation to go forward, even under in camera proceedings.<sup>106</sup> The general trend has been for courts to dismiss these rendition challenges pre-discovery, effectively denying the plaintiffs any legal redress.<sup>107</sup>

Three challenges to the extraordinary rendition program have reached the circuit courts: *Arar v. Ashcroft* in the Second Circuit Court of Appeals,<sup>108</sup> *El-Masri v. United States* in the Fourth Circuit Court of Appeals,<sup>109</sup> and *Mohamed v. Jeppesen Dataplan, Inc.* in the Ninth Circuit Court of Appeals.<sup>110</sup> The respective circuit courts resolved each case in favor of the government, although the Second Circuit did not reach the state secrets question in *Arar*.<sup>111</sup> Where courts have tended to dismiss TSP cases by finding that plaintiffs have not alleged a sufficiently concrete injury,<sup>112</sup> courts reviewing rendition cases have not used standing deficiencies as a basis for dismissal.<sup>113</sup> Rather, the latter challenges have espoused a more malleable version of the state secrets privilege that precludes judicial review of *any* rendition challenge that happens to implicate privileged information.<sup>114</sup> Courts have concluded that when that subsidiary privileged information is sufficiently “central” to the litigation, dismissal is the only option.<sup>115</sup> This formulation grants the Executive a virtual blank check

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<sup>105</sup> See, e.g., *Mohamed v. Jeppesen Dataplan, Inc.*, 539 F. Supp. 2d 1128, 1129 (N.D.Cal. 2008), *aff'd*, 614 F.3d 1070 (9th Cir. 2010) (en banc), *cert. denied*, 131 S. Ct. 2442 (2011) (bringing suit against private corporation that participated in transporting the plaintiffs as part of the government’s rendition program).

<sup>106</sup> See, e.g., *id.* at 1135-36.

<sup>107</sup> See, e.g., *id.*

<sup>108</sup> *Arar v. Ashcroft*, 585 F.3d 559 (2d Cir. 2009).

<sup>109</sup> *El-Masri v. United States*, 479 F.3d 296 (4th Cir. 2007).

<sup>110</sup> *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070 (9th Cir. 2010) (en banc), *cert. denied*, 131 S. Ct. 2442 (2011).

<sup>111</sup> *Arar*, 585 F.3d at 563-64, 574 (holding that it was unnecessary to reach the state secrets question because “special factors,” including “diplomacy, foreign policy and the security of the nation” counseled “hesitation” and judicial deference to the Executive’s implementation of the rendition program).

<sup>112</sup> See *ACLU v. NSA*, 493 F.3d 644, 648 (6th Cir. 2007).

<sup>113</sup> Indeed, faced with plaintiffs alleging the kind of appalling physical harms detailed by Maher Arar, Khaled El-Masri, and Binyam Mohamed in their respective complaints, courts would be hard-pressed to dismiss challenges for plaintiffs’ failure to allege a sufficiently concrete injury-in-fact.

<sup>114</sup> See *El-Masri*, 479 F.3d at 307-08.

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

to assert the state secrets privilege, and by abandoning any meaningful limiting principle, it effectively guarantees judicial deference any time the government asserts the privilege. While the Ninth Circuit disapproved of this approach in *Jeppesen Dataplan*,<sup>116</sup> this more expansive view of the scope of the state secrets privilege could nevertheless inform the development of the privilege in future cases.

In the *El Masri* case, Khaled El-Masri, a German national of Lebanese descent, was allegedly abducted on December 31, 2003 at the behest of the CIA on suspicion of having ties to terrorist organizations.<sup>117</sup> Over the next five months, El-Masri was interrogated in secret sites in Albania and Afghanistan, and his complaint describes in harrowing detail how he was beaten, drugged, and ceaselessly interrogated for the duration of his detention.<sup>118</sup> The details of his treatment are consistent with findings from investigations into the CIA's rendition program.<sup>119</sup> El-Masri brought claims against both George Tenet, the Director of the CIA, and the private contractors responsible for his rendition.<sup>120</sup> The government moved for dismissal on state secrets grounds, and the district court promptly dismissed the case.<sup>121</sup> El-Masri appealed, conceding that although state secrets could have some role in the proceedings, the district court's "conclusor[y]" acceptance of the government's state secrets claim was improper because the case could proceed without exposing state secrets.<sup>122</sup> The Fourth Circuit was unconvinced, and affirmed the district court's dismissal of the case.<sup>123</sup> In so doing, the court articulated a vast expansion to the state secrets privilege, merging the common law privilege of *Reynolds* and the narrowly applied, fact-specific bar from *Totten*

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<sup>116</sup> See *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1087 n.12 (9th Cir. 2010) (en banc), *cert. denied*, 131 S. Ct. 2442 (2011).

<sup>117</sup> *El-Masri*, 479 F.3d at 300.

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

<sup>119</sup> See DICK MARTY, EUR. COMM. ON LEGAL AFFAIRS AND HUMAN RIGHTS, ALLEGED SECRET DETENTIONS AND UNLAWFUL INTER-STATE TRANSFERS INVOLVING COUNCIL OF EUROPE MEMBER STATES ¶ 102 (2006), available at [assembly.coe.int/committeedocs/2006/20060606\\_ejdoc162006partii-final.pdf](http://assembly.coe.int/committeedocs/2006/20060606_ejdoc162006partii-final.pdf).

<sup>120</sup> *Id.* at 299.

<sup>121</sup> *Id.* at 299-300 (citing *El-Masri v. Tenet*, 437 F. Supp. 2d 530, 537 (E.D.Va 2006)).

<sup>122</sup> Reply Brief for Plaintiff-Appellant at 10, *El-Masri v. United States*, 479 F.3d 296 (4th Cir. 2007) (No. 06-1667) 2007 WL 2571681.

<sup>123</sup> *El-Masri v. United States*, 479 F.3d 296, 313 (4th Cir. 2007).

into a morphed version of the state secrets privilege that took on “constitutional significance.”<sup>124</sup>

The court stated that the state secrets privilege is governed by two distinct standards: (1) evidence where there is a “reasonable danger” that disclosure will expose military secrets—that is, *Reynolds* balancing—and (2) cases where privileged information will be “so central” to the litigation that any attempt to proceed will threaten that information’s disclosure.<sup>125</sup> Although the court ostensibly couched its second standard in prior decisional law, this represented a sharp divergence from settled case law because the court effectively conflated *Reynolds* with *Totten*.<sup>126</sup> While the “reasonable danger” test articulated in *Reynolds* is susceptible to manipulation and abuse,<sup>127</sup> it still requires courts to engage in a balancing test before accepting the government’s invocation of the state secrets privilege. By conflating *Reynolds* with *Totten*, the Fourth Circuit neutered judicial review by denying the reviewing court even *Reynolds*’s modest balancing exercise.

Applying this broad reading of the privilege to the facts in *El-Masri*, the Fourth Circuit dismissed the challenge with little hesitation.<sup>128</sup> Although El-Masri plausibly argued that the critical facts of the case—the CIA’s rendition program targeting terrorism suspects and the tactics it employed—were so widely discussed that litigation concerning them would not harm national security,<sup>129</sup> the court flatly rejected this conception of the state secrets privilege.<sup>130</sup> The Fourth Circuit stated:

The controlling inquiry is not whether the general subject matter of an action can be described without resort to state secrets. Rather, we must ascertain whether an action can be *litigated* without threatening the disclosure of such state secrets. Thus, for purposes of the state

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<sup>124</sup> *El-Masri*, 479 F.3d at 303 (“Although the state secrets privilege was developed at common law, it performs a function of constitutional significance, because it allows the executive branch to protect information whose secrecy is necessary to its military and foreign-affairs responsibilities.”).

<sup>125</sup> *Id.* at 307-08.

<sup>126</sup> *See id.*

<sup>127</sup> *See supra* Part I.B.

<sup>128</sup> *See El-Masri*, 479 F.3d at 314.

<sup>129</sup> Reply Brief for Plaintiff-Appellant at 5-7, *El-Masri*, 479 F.3d 296 (2007) (No. 06-1667), 2007 WL 2571681.

<sup>130</sup> *See El-Masri*, 479 F.3d at 308.

secrets analysis, the “central facts” and “very subject matter” of an action are those facts that are essential to prosecuting the action or defending against it.<sup>131</sup>

This reasoning signals a shift away from *Reynolds* and *Totten*. The court instructed future courts to look not at the subject matter of the action when evaluating a state secrets claim, but to instead turn to the Executive’s characterization of the litigation and defer to its judgment about whether the case could, even obliquely, implicate a state secret.<sup>132</sup> Although the Federal Rules of Civil Procedure require the plaintiff to frame the subject matter of the suit in his complaint,<sup>133</sup> the court upset these principles by empowering the government to shape the dimensions of the litigation. This greatly diminishes judicial supervision over state secrets claims by letting the government and not the plaintiff decide what issues will be litigated.<sup>134</sup> Although *El-Masri* drew convincing parallels to the reasoning from TSP cases to support his contention that litigating his challenge to the rendition program would not expose state secrets,<sup>135</sup> the court dismissed his argument and his case.<sup>136</sup>

*El-Masri* marks the apex of the Executive’s power to invoke the state secrets privilege to preclude judicial review. The Ninth Circuit recently decided *Jeppesen Dataplan*—another rendition case filed by the ACLU on behalf of rendition victims<sup>137</sup>—and the parallels and divergences between this case and *El-Masri* suggest an entrenching of the *El-Masri* view of the state secrets privilege, albeit with some modifications.

Like *El-Masri*, the five plaintiffs in *Jeppesen Dataplan* were detained, interrogated, and allegedly tortured pursuant to the CIA’s rendition program.<sup>138</sup> *Jeppesen Dataplan*, a U.S.-based corporation, played a major role in facilitating the rendition of the plaintiffs, pro-

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

<sup>132</sup> *See id.*

<sup>133</sup> *See* FED. R. CIV. P. 12(b)(6) (allowing defendants to move for dismissal when plaintiffs fail to “state a claim upon which relief can be granted” in their complaint).

<sup>134</sup> *See El-Masri*, 479 F.3d at 308.

<sup>135</sup> Reply Brief for Plaintiff-Appellant at 5-7, *El-Masri*, 479 F.3d 296 (2007) (No. 06-1667), 2007 WL 2571681.

<sup>136</sup> *El-Masri*, 479 F.3d. at 314.

<sup>137</sup> *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1073-75 (9th Cir. 2010) (en banc), *cert. denied*, 131 S. Ct. 2442 (2011).

<sup>138</sup> *Id.*

viding flight planning and logistical support services to the aircraft and crew on all of the alleged “torture flights.”<sup>139</sup> The ACLU filed suit against Jeppesen on behalf of Binyam Mohamed and the four other rendition victims, and the Bush Administration intervened to move for dismissal on state secrets grounds.<sup>140</sup> The district court granted the government’s motion to dismiss, finding that the state secrets privilege applied “inasmuch as the case involve[d] ‘allegations’ about the conduct of the CIA.”<sup>141</sup> Rejecting *El-Masri*’s holding that the “subject matter” of an action is the same as the “facts necessary to litigate the case” for purposes of deciding a state secrets claim,<sup>142</sup> the district court still dismissed the ACLU’s claim on the grounds that allegations of covert CIA operations in concert with foreign governments are “clearly . . . subject matter which is a state secret.”<sup>143</sup>

On appeal, a three-judge panel in the Ninth Circuit reversed, holding that the district court erred in dismissing the case on state secrets grounds.<sup>144</sup> The court evaluated the government’s state secrets claim with respect to the *Totten* bar and *Reynolds* balancing.<sup>145</sup> The panel concluded that *Totten* “ha[d] no bearing” because it stands for the narrow proposition that the state secrets privilege recognizes an absolute ban on any suit predicated on a secret agreement between the plaintiffs and the government.<sup>146</sup> Because the plaintiffs were seeking compensation from Jeppesen for tortious detention—not unpaid espionage services—the categorical *Totten* bar did not control and the district court therefore should not have dismissed the case.<sup>147</sup> In applying the *Reynolds* balancing test, the panel stated that *Reynolds*, in contrast to the “winner-take-all” *Totten* rule,<sup>148</sup> establishes that the state secrets privilege is an evidentiary privilege that excludes evi-

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<sup>139</sup> *Id.* at 1075. See also Mayer, *supra* note 104 (quoting a Jeppesen Dataplan employee as saying, “We do all of the extraordinary rendition flights – you know, the torture flights. Let’s face it, some of these flights end up that way.”).

<sup>140</sup> Mohamed v. Jeppesen Dataplan, Inc., 539 F. Supp. 2d 1128, 1130 (N.D.Cal. 2008), *aff’d*, 614 F.3d 1070 (9th Cir. 2010) (en banc), *cert. denied*, 131 S. Ct. 2442 (2011).

<sup>141</sup> *Id.* at 1334-36.

<sup>142</sup> *Id.* at 1135.

<sup>143</sup> *Id.* at 1136.

<sup>144</sup> Mohamed v. Jeppesen Dataplan, Inc., 579 F.3d 943, 949 (9th Cir. 2009), *rev’d en banc*, 614 F.3d 1070 (9th Cir. 2010), *cert. denied*, 131 S. Ct. 2442 (2011).

<sup>145</sup> *Id.* at 953-58.

<sup>146</sup> *Id.* at 953-54.

<sup>147</sup> *Id.*

<sup>148</sup> *Id.* at 955.

dence, not information.<sup>149</sup> As such, it was improper for the district court to accept the government's contention that classified information about the rendition program qualifies for treatment as "secret" evidence within the parameters of the *Reynolds* privilege, at least during the pleadings stage when actual evidence had not yet been presented.<sup>150</sup>

The Obama Administration appealed the panel's decision, and the Ninth Circuit sitting en banc reversed the prior decision of the three-judge panel, and affirmed the decision of the district court.<sup>151</sup> Although the Obama Administration abolished the rendition program in January 2009,<sup>152</sup> it has remained steadfast in its assertion that challenges to the rendition program implicate state secrets and should thus be dismissed.<sup>153</sup> In its appeal before the full en banc panel, the government argued that the basis of the plaintiffs' claim was Jeppesen's alleged agreement with the CIA to assist in conducting clandestine activities.<sup>154</sup> For plaintiffs to prevail with their allegations and for Jeppesen to mount a defense, both sides had to prove that this alleged agreement between Jeppesen and the CIA existed. The Obama Administration argued that establishing the existence of a secret agreement between the government and a private party falls within the state secrets privilege as established in *Totten* and elaborated on in *El-Masri*.<sup>155</sup> Arguing in the alternative, the government then claimed that *Reynolds* permitted the government to invoke state secrets prior to discovery, and that the three-judge panel erred in construing *Reynolds* so narrowly and dismissing the case without applying *Reynolds* balancing.<sup>156</sup>

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<sup>149</sup> *Id.* at 957.

<sup>150</sup> *Mohamed v. Jeppesen Dataplan, Inc.*, 579 F.3d 943, 958-59 (9th Cir. 2009), *rev'd en banc*, 614 F.3d 1070 (9th Cir. 2010), *cert. denied*, 131 S. Ct. 2442 (2011).

<sup>151</sup> *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070 (9th Cir. 2010) (en banc), *cert. denied*, 131 S. Ct. 2442 (2011).

<sup>152</sup> Exec. Order No. 13,491, 74 Fed. Reg. 4893 (Jan. 22, 2009) (prohibiting "violence to life and person" and "outrages upon personal dignity . . . whenever such individuals are in the custody or under the effective control of an officer, employee, or other agent of the United States Government or detained within a facility owned, operated, or controlled by a department or agency of the United States").

<sup>153</sup> See Redacted, Unclassified Brief for United States on Rehearing En Banc, *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070 (9th Cir. 2010) (en banc) (No. 18-15693), 2009 WL 6635974, at \*20.

<sup>154</sup> *Id.*

<sup>155</sup> *Id.* at \*22-24.

<sup>156</sup> *Id.* at \*31.

Although the Ninth Circuit ultimately agreed with the Obama Administration, the logic of the three-judge panel's prior decision seemed to persuade the court to keep the *Totten* and *Reynolds* lines of cases separate.<sup>157</sup> The opinion of the three-judge panel stated, "The structural elements in the Constitution, including the principles of separation of powers and judicial review, therefore strongly favor a narrow construction of the blunt *Totten* doctrine and a broad construction of the more precise *Reynolds* privilege."<sup>158</sup> While the court did not mention *El-Masri*, its forceful call, for construing the state secrets privilege narrowly,<sup>159</sup> can be read as a rebuke to the Fourth Circuit's conflation of the *Reynolds* and *Totten* rules. The Ninth Circuit's three-judge panel recognized that the "blunt *Totten* doctrine" undermines separation of powers and judicial review, and explicitly prescribed *Totten* and *Reynolds* as either-or doctrines, such that one should not be treated interchangeably with the other.<sup>160</sup>

Despite reaching the same outcome as the Fourth Circuit in *El-Masri*, the Ninth Circuit, sitting en banc, explicitly distinguished its reasoning from its sister court's reasoning.<sup>161</sup> The en banc panel noted its "disapprov[al]" of the Fourth Circuit conflating the *Totten* bar's "very subject matter" inquiry with the *Reynolds* privilege.<sup>162</sup> The Ninth Circuit emphatically "adhere[d]" to the doctrinal distinction between *Totten* and *Reynolds*, but also stated that even when a case falls outside *Totten*, a *Reynolds* analysis might still establish that the case cannot be litigated "without presenting either a certainty or an unacceptable risk of revealing state secrets."<sup>163</sup> Notwithstanding its insistence that pre-discovery dismissal on state-secret grounds "should be a rare case,"<sup>164</sup> and that it was more faithful to the *Totten* and *Reynolds* precedents than the *El-Masri* court had been, the Ninth Circuit's interpretation of state secrets in *Jeppesen Dataplan* added momentum to the growing trend to construe the privilege broadly.

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<sup>157</sup> See *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1087 n.12 (9th Cir. 2010) (en banc), *cert. denied*, 131 S. Ct. 2442 (2011).

<sup>158</sup> *Mohamed v. Jeppesen Dataplan, Inc.*, 579 F.3d 943, 956 (9th Cir. 2009), *rev'd en banc*, 614 F.3d 1070 (9th Cir. 2010), *cert. denied*, 131 S. Ct. 2442 (2011).

<sup>159</sup> See *id.*

<sup>160</sup> See *id.*

<sup>161</sup> See *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1087 n.12 (9th Cir. 2010), *cert. denied*, 131 S. Ct. 2442 (2011).

<sup>162</sup> *Id.* (citing *Al-Haramain Islamic Found. v. Bush*, 507 F.3d 1190, 1201 (9th Cir. 2007)).

<sup>163</sup> *Id.* (citing *Tenet v. Doe*, 544 U.S. 1, 9 (2005)).

<sup>164</sup> *Id.* at 1092.

Because widespread uncertainty still existed as to the proper balance between vigorous judicial review and deference to the Executive,<sup>165</sup> the ACLU filed a certiorari petition to the Supreme Court on December 7, 2010, where it asked the Court to clarify conflicting case law about whether the government can invoke the state secrets privilege at the pleading stage to preclude discovery.<sup>166</sup> Sifting through the conflicting case law, the ACLU argued that it was improper for courts to dismiss a case at pleadings on account of state secrets because courts cannot make “predictive judgments” in a “nascent litigation” about what evidence will be relevant and necessary to the parties’ claims and defenses when the parties have not submitted actual evidence.<sup>167</sup> Despite the substantial due process questions at stake with respect to the propriety of dismissing a case at the pleadings stage based on a claim of state secrets, the Supreme Court denied the plaintiff’s certiorari petition.<sup>168</sup>

By leaving the Ninth Circuit’s decision undisturbed, the Supreme Court missed an opportunity to examine how the state secrets privilege should apply in the war-on-terror context. Circuit courts have regularly conflated *Reynolds* balancing and the *Totten* bar,<sup>169</sup> which has effectively transformed state secrets from a narrowly applicable evidentiary privilege into a robust, quasi-constitutional executive privilege that exacts a severe toll on private litigants seeking their day in court. The *Jeppesen Dataplan* certiorari petition provided the Court with a propitious set of facts by which it could have disentangled this jurisprudence and restored some balance between individual due process and national security. For the sake of ensuring that the government does not disingenuously assert the privilege to conceal its own misbehavior under the guise of national security,<sup>170</sup> courts—with or without Supreme Court prodding—should decline to dismiss cases pre-discovery on account of state secrets.

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<sup>165</sup> *Id.* at 1091-92.

<sup>166</sup> Petition for Writ of Certiorari at 26, *Mohamed v. Jeppesen Dataplan, Inc.*, 131 S. Ct. 2442 (2011) (No. 10-778).

<sup>167</sup> *Id.* at 26-28.

<sup>168</sup> *Jeppesen Dataplan*, 614 F.3d at 1070, *cert. denied*, 131 S. Ct. 2442 (2011) (No. 10-778).

<sup>169</sup> *See, e.g.*, *El-Masri v. United States*, 479 F.3d 296, 307-08 (4th Cir. 2007).

<sup>170</sup> *Id.* at 1094 (Hawkins, J., dissenting).

C. *A New Frontier: The Obama Administration's Invocation of State Secrets to Prevent Judicial Oversight of Its Plan to Target and Kill Anwar al-Aulaqi*

The American-born Yemeni cleric Anwar al-Aulaqi was perhaps the most notorious member of the Obama Administration's controversial "targeted killing" list,<sup>171</sup> a classified but widely-known-to-exist list of alleged terrorists identified by intelligence agencies for targeted killing by U.S. forces and the government's growing arsenal of unmanned drones.<sup>172</sup> As a propagandist of the Al Qaeda in the Arabian Peninsula (AQAP), al-Aulaqi's incendiary statements and alleged involvement in recently foiled terrorist plots<sup>173</sup> led the Obama Administration to conclude that he posed such a sufficient threat to U.S. security to justify the unprecedented step of targeting him for capture or killing.<sup>174</sup> Despite outcries from across the political spec-

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<sup>171</sup> See Scott Shane, *U.S. Approves Targeted Killing of American Cleric*, N.Y. TIMES, Apr. 6, 2010, available at <http://www.nytimes.com/2010/04/07/world/middleeast/07yemen.html>; Editorial, *Justify the "Hit list"*, L.A. TIMES, Oct. 12, 2010, available at <http://articles.latimes.com/2010/oct/12/opinion/la-ed-awlaki-20101012>; David S. Cloud, *CIA Drones have broader list of targets*, L.A. TIMES, May 5, 2010, available at <http://articles.latimes.com/2010/may/05/world/la-fg-drone-targets-20100506> (describing the government's secret "kill lists").

<sup>172</sup> See Frontline, *Inside the CIA's "Kill List"*, PBS, Sept. 6, 2011, available at <http://www.pbs.org/wgbh/pages/frontline/iraq-war-on-terror/topsecretamerica/inside-the-cias-kill-list/> (describing how U.S. intelligence agencies identify individuals for targeted killings and how the government has relied on pilot-less drones to carry out these killings).

<sup>173</sup> See Ariane de Vogue & Jason Ryan, *Court Hears Challenge to U.S. Right to Kill al Qaeda Leader*, ABCNews.com, Nov. 8, 2010, available at <http://abcnews.go.com/Politics/aclu-challenges-obama-administrations-targeted-assassination-anwar-al/story?id=12086644> (noting that al-Aulaqi was a member of al Qaeda in the Arabian Peninsula and has been linked to the attempted bombing of Northwest Airlines Flight 253 on Christmas day 2009, the shootings at Fort Hood in Texas by Army Maj. Nidal Hasan, and the recent seizure of bomb making materials in the cargo of two planes).

<sup>174</sup> The Obama Administration has asserted that the targeted killing of individuals like Anwar al-Aulaqi is consistent with the country's international legal obligations and domestic constitutional law. See Harold Hongju Koh, Legal Advisor, U.S. Dep't of State, Annual Meeting of the American Society of International Law (Mar. 25, 2010), available at <http://www.state.gov/s/l/releases/remarks/139119.htm>. Administration officials have put forward several justifications for targeting individuals. *Id.* They have argued that targeting individuals is appropriate because it narrows the focus when force is employed, thereby avoiding broader harm to civilian casualties. *Id.* They have rejected the claim that the use of legal force against specific individuals amounts to unlawful extrajudicial killing by citing the broad mandate of authority conferred by the AUMF and the fact that international law does not require a state engaged in the lawful use of force to provide targets with legal process before using such force. *Id.* They have also denied that targeting killings conflict with domestic law, noting that "the precision targeting of specific high-level belligerent leaders when acting in self-defense or during an armed conflict is not unlawful, and hence does not constitute 'assassination.'" *Id.*

trum that targeting a U.S. citizen for assassination without first charging him and convicting him of a crime amounted to an unconscionable violation of due process rights,<sup>175</sup> the Obama Administration continued undeterred in its search for al-Aulaqi. This pursuit ended on September 30, 2011, when an American drone strike in Yemen killed al-Aulaqi and several others, including an American citizen of Pakistani origin that had edited Al Qaeda's online jihadist magazine.<sup>176</sup>

Prior to al-Aulaqi's killing, his father, Nasser al-Aulaqi—represented by the ACLU and Center for Constitutional Rights (CCR)—filed a claim in the District Court for the District of Columbia to enjoin his assassination, and in response, the Obama Administration invoked the state secrets privilege.<sup>177</sup> Al-Aulaqi charged that the authority contemplated by the Obama Administration is far broader than what the Constitution and international law allow.<sup>178</sup> According to al-Aulaqi, outside of armed conflict, both the Constitution and international law prohibit targeted killing except as a last resort to protect against concrete, specific, and imminent threats of death or serious physical injury.<sup>179</sup> Al-Aulaqi further argued that an extrajudicial policy, under which names are added to CIA and military “kill lists” for a period of months, through a secret executive process, is plainly limited to imminent threats.<sup>180</sup>

In its motion to dismiss, the government argued that the case should be dismissed on procedural grounds and that the court need not address the substantive question about whether disclosing the decision to target al-Aulaqi posed a “reasonable danger” to national security to warrant application of the state secrets privilege.<sup>181</sup> Nevertheless, the government vehemently argued that the case falls squarely

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<sup>175</sup> See, e.g., Elizabeth Williamson, *Ron Paul Condemns Killing of al Qaeda's Awlaki*, WALL ST. J., Sept. 30, 2011, <http://blogs.wsj.com/washwire/2011/09/30/ron-paul-condemns-killing-of-al-qaedas-awlaki/?KEYWORDS=ron+paul+al+qaeda> (stating that the Republican presidential candidate condemned the killing of al-Aulaqi because U.S. authorities “have never been specific about the crime” al-Aulaqi committed).

<sup>176</sup> Peter Finn, *Secret U.S. Memo Sanctioned Killing of Aulaqi*, WASH. POST, Sept. 30, 2011, available at [http://www.washingtonpost.com/world/national-security/aulaqui-killing-reignites-debate-on-limits-of-executive-power/2011/09/30/gIQAx1bUAL\\_story.html](http://www.washingtonpost.com/world/national-security/aulaqui-killing-reignites-debate-on-limits-of-executive-power/2011/09/30/gIQAx1bUAL_story.html).

<sup>177</sup> Al-Aulaqi v. Obama, 727 F. Supp. 2d 1, 8 (D.D.C. 2010).

<sup>178</sup> *Id.* at 12.

<sup>179</sup> *Id.*

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

<sup>181</sup> Opposition to Plaintiff's Motion for Preliminary Injunction and Memorandum in Support of Defendants' Motion to Dismiss at 43, Al-Aulaqi v. Obama, 727 F. Supp. 2d 1 (D.D.C. 2010) (No. 10-1469), 2010 WL 3863135.

within the ambit of the state secrets privilege as the plaintiffs' allegations "put directly at issue the existence and operational details of alleged military and intelligence activities directed at combating the terrorist threat to the United States."<sup>182</sup> The government also argued that the plaintiffs' demand—that the government disclose its "secret" targeting criteria—would compromise national security.<sup>183</sup>

In response, the plaintiff identified the conceptual incompatibility of the government claiming the cloak of secrecy for a targeted killing program that it had already acknowledged publicly. He stated:

The government's sweeping invocation of the state secrets privilege to shut down this litigation is as ironic as it is extreme: that Anwar Al-Aulaqi has been targeted for assassination is known to the world only because senior administration officials, in an apparently coordinated media strategy, advised the nation's leading newspapers that the National Security Council had authorized the use of lethal force against him . . . . Now that the government has placed its asserted authority to kill Plaintiff's son into the public debate, its attempt to preclude judicial consideration of the limits of that authority is both impermissible and unseemly.<sup>184</sup>

This reasoning is reminiscent of *Hepting*, where the court found that the government could not both officially acknowledge that the TSP program existed *and* claim that its existence was a secret.<sup>185</sup> The government conceded that elements of al-Aulaqi's targeting had been made public, but argued that this missed the point:

Even if some aspect of the underlying facts at issue had previously been officially disclosed, the Government's privilege assertions demonstrate that properly protected state secrets would remain intertwined in every step of the case . . . and the inherent risk of disclosures

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<sup>182</sup> *Id.* at 44.

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

<sup>184</sup> Reply Memorandum in Support of Plaintiff's Motion for a Preliminary Injunction and in Opposition to Defendant's Motion to Dismiss at 45-46, *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1 (D.D.C. 2012) (No. 10-01469), 2010 WL 4974323.

<sup>185</sup> See *supra* notes 74-84 and accompanying text.

that would harm national security should be apparent from the outset.<sup>186</sup>

This echoes the Ninth Circuit's dismissal of *Jeppesen Dataplan*, where the court held that dismissal is required when "the claims and possible defenses are so infused with state secrets that the risk of disclosing them is both apparent and inevitable."<sup>187</sup>

On December 7, 2010, the district court dismissed the case on procedural grounds, finding that the claims constituted non-justiciable political questions.<sup>188</sup> Based on these procedural deficiencies, the court did not reach the government's claim of the state secrets privilege, although language in the opinion suggests that, had it reached the question, it would have acceded to the government's argument.<sup>189</sup> While an analysis of all the constitutional and international law arguments implicated by the government's targeted killing program are beyond the scope of this Article, the government's invocation of the state secrets privilege in its motion to dismiss raises many of the questions considered elsewhere in this analysis, but in a much different context. Moreover, as the most recent example of the Executive's use of the state secrets privilege, the *Al-Aulaqi* case represents a culmination of the TSP and rendition cases that preceded it, as both the plaintiffs and the government relied on aspects of some of these decisions to formulate their arguments.

From a policy standpoint, the *Al-Aulaqi* dismissal could have significant implications. The decision cleared the way for the Obama Administration to continue trying to kill al-Aulaqi, representing a decisive victory for the administration in its efforts to shield targeted killings from judicial review, one of its most controversial counterterrorism policies.<sup>190</sup> The court's refusal to factor al-Aulaqi's U.S. citi-

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<sup>186</sup> Opposition to Plaintiff's Motion for Preliminary Injunction and Memorandum in Support of Defendants' Motion to Dismiss at 51-52, *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1 (D.D.C. 2010) (No. 10-1469), 2010 WL 3863135.

<sup>187</sup> *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1089 (9th Cir. 2010) (en banc), cert. denied 131 S. Ct. 2442 (2011).

<sup>188</sup> *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1, 45 (finding that national security, military matters, and foreign relations are "quintessential sources of political questions," and that al-Aulaqi's status as an American citizen does not alter the analysis) (quoting *El-Shifa Pharmaceutical Industries Co. v. United States*, 607 F.3d 836, 841 (D.C. Cir. 2010)).

<sup>189</sup> See *id.* at 53-54.

<sup>190</sup> Charlie Savage, *Suit Over Targeted Killings Is Thrown Out*, N.Y. TIMES, Dec. 7, 2010, available at <http://www.nytimes.com/2010/12/08/world/middleeast/08killing.html>.

zenship into its political question analysis also indicates a further shift toward greater deference for executive decision making in the war-on-terror context.<sup>191</sup> A close reading of the court's opinion, however, suggests some small victories for the ACLU and CCR, and by extension, individual civil liberties. Specifically, although the court deferred to the Obama Administration's targeting of al-Aulaqi under the political question doctrine, it explicitly conditioned this deference on the fact that the Director of National Intelligence had already determined that al-Aulaqi was an operational member of AQAP, and that Congress's 2001 Authorization for Use of Military Force justified the attack on AQAP.<sup>192</sup> Although the court does not say as much, its narrow application of the political question analysis to the specific circumstances of the case—where the Obama Administration had targeted al-Aulaqi under congressionally delegated authority and only with the imprimatur of the Director of National Intelligence—could be interpreted as a small victory for groups like the ACLU and CCR.

The impact of the *Al-Aulaqi* decision on the scope of the state secrets privilege going forward is less clear. Based on the court's reliance on *Jeppesen Dataplan* in dicta, the opinion could reinforce the emerging view that the government publicly acknowledging the existence of a program, and even specific actions undertaken pursuant to that program, are insufficient to defeat a state secrets claim.<sup>193</sup> The court stated that *al-Aulaqi* did not fall within the absolute *Totten* bar because the subject matter of al-Aulaqi's targeted killing was not a state secret in the same way *Totten's* espionage services was a state secret.<sup>194</sup> Rather, hearkening back to *El-Masri*, the case represented a *Reynolds-Totten* hybrid, where the *Reynolds* privilege "converge[d]" with the *Totten* bar such that a non-secret program was nevertheless protected against disclosure because it was "so infused" with other categories of state secrets that *any* disclosure would pose a "reasonable danger" to exposing privileged national security matters.<sup>195</sup> Although this reasoning is not binding because the *Al-Aulaqi* court explicitly declined to reach the state secrets question, the court's detailed analysis in dicta and its invocation of the Ninth Circuit's *Jeppesen Dataplan* decision suggest this reasoning may control going for-

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<sup>191</sup> See *Al-Aulaqi*, 727 F. Supp. 2d at 47.

<sup>192</sup> *Id.* at 46-52.

<sup>193</sup> See *id.* at 52-54.

<sup>194</sup> See *id.* at 53.

<sup>195</sup> See *id.*

ward, making it much harder for plaintiffs to mount successful challenges to government invocations of the state secrets privilege.

### III. PROTECTING STATE SECRETS WHILE PRESERVING THE RULE OF LAW: POSSIBLE APPROACHES FOR REFORMING THE STATE SECRETS PRIVILEGE

The war on terror has created new opportunities for the Executive to expand the reach of the state secrets privilege. Courts considering challenges to the government's TSP wiretapping program, the rendition program, and the targeted killing of Anwar al-Aulaqi have all had to reconcile competing interests in protecting state secrets with preserving the rule of law. A sweeping view of the scope of the state secrets privilege to limit judicial review of executive actions has emerged as a result. Given the diffuse boundaries of the war on terror, even if the particular subject matter at issue in any given case may not be a secret, the government is not hard pressed to assert a colorable claim that the non-secret question is "so infused" with other matters that are state secrets such that *any* disclosure would risk endangering national security. The upshot of the ever-widening reach of the state secrets privilege is that it severely undermines the due process rights of individuals harmed by a government program by insulating the program from judicial scrutiny under the state secrets privilege. To ensure that the privilege does not completely erode due process guarantees, substantive reform to the use and scope of the privilege is necessary.

Each of the three branches can play a role in reforming the exercise of the state secrets doctrine. Congress could enact legislation to prospectively define the parameters of the privilege and bolster the courts' authority to engage in independent judicial review of state secrets claims. While the 110th and 111th Congresses proposed such legislation, no state secrets bill ultimately passed out of committee.<sup>196</sup> Courts could also judicially impose stricter standards of review on executive invocations of state privilege. Some have argued that the judicial decision about whether to examine purportedly privileged materials *ex parte* and *in camera* should be controlled by the more

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<sup>196</sup> See State Secrets Protection Act S. 417, 111th Cong. (1st Sess. 2009); States Secret Protection Act of 2009, H.R. 984, 111th Cong. (1st Sess. 2009); H.R. REP. NO. 110-941, at 117 (2009).

demanding “clear and convincing” standard than by the more deferential “reasonable danger” standard articulated in *Reynolds*.<sup>197</sup>

Irrespective of the other branches taking steps to circumscribe its use of the privilege, the Executive could examine its practices for claiming the privilege, establish uniform procedures for all agencies to apply before asserting the privilege, and revise its classification standards to guarantee that litigants, against whom the privilege has been claimed, are not deprived of their day in court. For those cases where national security truly compels courts to defer to the government’s state secrets claim, the Executive could require agencies invoking the privilege to conduct thorough investigations of all allegations of wrongdoing to ensure that the injured plaintiff receives some degree of process. While such an alternative is in no way a full substitute for a judicial proceeding, it could provide some measure of compensation for the plaintiff without the risk of exposing state secrets.

A. *Enacting Legislation to Constrain Exercise of the Privilege: Congress’s Recent Efforts to Reform State Secrets*

Despite the long history of the states secret privilege, and rising agitation about its potential misuse, Congress has never adopted legislation to circumscribe the Executive’s use of the state secrets privilege in court proceedings. Separation of powers concerns may account in part for this legislative silence, as there is a prominent strain in state secrets jurisprudence finding that the privilege is embedded in the structure of the Constitution. However, Congress’s constitutional authority to define the jurisdiction of the courts and check the Executive would certainly support legislative action in this area.<sup>198</sup>

While Congress contemplated codifying a state secrets type privilege when it adopted the Federal Rules of Evidence (FRE), it ultimately decided to leave the state secrets privilege out of the FRE.<sup>199</sup>

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<sup>197</sup> See Chesney, *supra* note 14, at 1288.

<sup>198</sup> See Frost, *supra* note 1, at 1932 (arguing that the Executive’s assertion of state secrets constitutes an impermissible incursion on the legislative authority to assign federal court jurisdiction). See also Letter from Constitution Project, et. al. to Senator Patrick Leahy, Chairman of the Senate Judiciary Committee, et. al. (Sept. 24, 2009), available at <http://www.constitutionproject.org/pdf/342.pdf> (acknowledging the potentially positive step forward represented by the Department of Justice Memorandum revising the standards for using the state secrets privilege, but urging Congress to adopt legislation to codify these reforms into law) [hereinafter *Constitution Project Letter*].

<sup>199</sup> See Chesney, *supra* note 14, at 1292.

In light of the perceived abuses of the privilege in the years following the September 11th attacks, the 110th and 111th Congresses attempted without success to pass legislation that would define and confine the Executive's use of the state secrets privilege.<sup>200</sup> At an oversight hearing on reforming the state secrets privilege, convened to support the passage of H.R. 5607, the "State Secret Protection Act of 2008," several witnesses urged congressional action to address the increased use of the privilege to seek dismissal of cases at the pleading stages.<sup>201</sup> H. Thomas Wells, Jr., the then President-Elect of the American Bar Association attributed this executive abuse of the privilege in part to the "absence of congressional guidance."<sup>202</sup> Wells stated further that congressional silence has permitted courts to adopt "divergent" approaches to resolving state secrets cases and abdicating judicial oversight "without engaging in sufficient inquiry into the Government's assertion of the privilege."<sup>203</sup> Other witnesses concurred: "The thrust of legislation on state secrets should be to emphasize judicial flexibility and creativity in finding alternatives to the original material that will permit the case to proceed whenever possible."<sup>204</sup>

Senator Leahy introduced the State Secrets Protection Act (S 417) on February 11, 2009, coinciding with Representative Nadler's introduction of the State Secret Protection Act of 2009 (HR 984) in the House.<sup>205</sup> The objective of both bills was to strengthen the role of the courts to monitor the Executive. Each bill prohibited dismissal of a case on state secrets grounds until (1) the plaintiff has a full opportunity to complete non-privileged discovery and litigate the issue to which the privilege is relevant without regard to that privileged information, and (2) the court determines the need for secrecy after a full *ex parte* and *in camera* review.<sup>206</sup> This view conflicts with *Reynolds*, where the Supreme Court acquiesced to the government's assertion of state secrets without reviewing the documents *ex parte* and *in camera*, despite the fact that the Third Circuit had subjected the privileged

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<sup>200</sup> See State Secrets Protection Act S. 417, 111th Cong. (1st Sess. 2009); States Secret Protection Act of 2009, H.R. 984, 111th Cong. (1st Sess. 2009); H.R. REP. NO. 110-941, at 117 (2009).

<sup>201</sup> H.R. REP. NO. 110-941, at 117 (2009).

<sup>202</sup> *Id.*

<sup>203</sup> *Id.*

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

<sup>205</sup> State Secrets Protection Act S. 417, 111th Cong. (1st Sess. 2009); States Secret Protection Act of 2009, H.R. 984, 111th Cong. (1st Sess. 2009).

<sup>206</sup> S. 417, 111th Cong. § 4053(b) (2009); H.R. 984, 111th Cong. § 7(c) (2009).

materials to *ex parte* and *in camera* review.<sup>207</sup> Many argue that courts are best situated to check executive excesses in the national security arena, but that Congress must throw its weight behind the courts to buttress judicial review.<sup>208</sup> To the extent that courts are able to judicially enforce higher standards of review for considering privileged materials *ex parte* and *in camera*, Congress has a role in reinforcing the courts' judicial review.<sup>209</sup> Without congressional action to restore the state secrets privilege to its proper role, courts will likely continue down the path argued in *El-Masri* and *Jeppesen Dataplan* where the scope and availability of the privilege expands as private parties' constitutional rights of confrontation and due process recede.<sup>210</sup>

Another Congress-based approach for constraining the Executive's use of the privilege would be to involve the congressional intelligence committees in an advisory capacity at the stage in a trial when the judge must rule on whether disclosing the protected information would endanger national security.<sup>211</sup> To offset the concern that courts are institutionally inept to evaluate the merits of a state secrets claim, the congressional intelligence committees could be included in the process. Because the elected officials on these committees have the familiarity, judgment, and—crucially—the political accountability for decision making about these issues, they could compensate for the courts' perceived deficiencies in these areas. Moreover, it would allow the courts and Congress to reinforce their collaborative effort to constrain the excesses of the Executive Branch.

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<sup>207</sup> See *supra* notes 39-52 and accompanying text.

<sup>208</sup> See H. Res 417, 111th Cong. ¶13 (2009) (asserting the “sense of the House of Representatives” that the Obama Administration must take the necessary steps to “[e]nsure that Americans can bring claims against their government,” by “guarantee[ing]” that the state secrets privilege shall not constitute grounds for dismissal of case or claim and that there will be “independent judicial review” of state secrets claims).

<sup>209</sup> See Frost, *supra* note 1, at 1934 (arguing that Congress and the courts have the capacity to collaborate to prevent overreaching by the executive). See also Neil Kinkopf, *The State Secrets Problem: Can Congress Fix It?*, 80 TEMP. L. REV. 489, 492-94 (2007) (attributing judicial “reticence” in rejecting government invocations of the state secrets privilege to Congress's failure to establish guidelines for the courts to apply in deciding the applicability of the privilege).

<sup>210</sup> Press Release, The Constitution Project, Constitution Project Disappointed that U.S. Supreme Court Declined Review in State Secrets Case (May 16, 2011) *available at* [www.constitutionproject.org/pdf/SCOTUS\\_Denies\\_Jeppesen\\_May2011.pdf](http://www.constitutionproject.org/pdf/SCOTUS_Denies_Jeppesen_May2011.pdf) (arguing that the Court's failure to reexamine the state secrets doctrine in *Jeppesen Dataplan* and confine the privilege to its narrower roll shows the need for Congress “to pass legislation to restore the role of courts as a check on executive power”).

<sup>211</sup> See Chesney, *supra* note 14, at 1253.

B. *Reinforcing Judicial Review: Applying Heightened Standards of Review to State Secrets Claims*

By design, courts serve as a bulwark against the excesses of the political branches. The challenge courts face when confronted with a claim of state secrets is reconciling their Article III duties with the Executive's potentially competing Article II duties.<sup>212</sup> While the temptation for the Executive to concentrate its power is understandable, a robust state secrets privilege insulates an overreaching Executive from meaningful oversight. To the extent courts are able to fashion judicial devices for determining when and how the state secrets privilege applies, they may represent the most important method of controlling Executive Branch activity.<sup>213</sup> Given the inability of Congress to enact legislation to constrain the application of the privilege,<sup>214</sup> courts are perhaps also the best equipped to block the Executive Branch from self-interestedly invoking the privilege to protect itself from embarrassment and potential civil and criminal liability.<sup>215</sup> Academic arguments claiming that courts should automatically defer to the Executive's expertise in national security and foreign affairs matters<sup>216</sup> ignore the potentially more serious—and structural—conflict of interest problem that occurs when an Executive, accused of wrongdoing, can self-servingly invoke the state secrets privilege to conceal its actions from public view.<sup>217</sup> Reinforcing judicial review of state secrets claims represents an important check on the potential for Executive Branch abuse of the privilege.

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<sup>212</sup> See *El-Masri v. United States*, 479 F.3d 296, 305 (4th Cir. 2007) (stating that the Executive occupies a position superior to that of the courts in evaluating the consequences of a release of sensitive information).

<sup>213</sup> See Weaver & Pallitto, *supra* note 13, at 88 (analyzing the tension between the executive and the judicial branches when the state secrets privilege is invoked in the national security context).

<sup>214</sup> See *supra* Part III.A.

<sup>215</sup> See D.A. Jeremy Telman, *Our Very Privileged Executive: Why the Judiciary Can (and Should) Fix the State Secrets Privilege*, 80 TEMP. L. REV. 499, 501 (2007) (arguing that although the courts "have made a mess" of the state secrets privilege, they are much more capable than Congress of curbing the Executive's use of the state secrets privilege).

<sup>216</sup> See ERIC A. POSNER & ADRIAN VERMUELE, *TERROR IN THE BALANCE: SECURITY, LIBERTY, AND THE COURTS* chs. 3, 7 (2007).

<sup>217</sup> See generally Ben Wizner, Staff Attorney, ACLU, Remarks at the American Constitution Society Panel Discussion: The State Secrets Privilege: Time for Reform? (Apr. 4, 2008) (transcript available at [http://www.acslaw.org/files/2008-04-07\\_ACS\\_State\\_Secrets\\_Privilege.doc](http://www.acslaw.org/files/2008-04-07_ACS_State_Secrets_Privilege.doc)).

The most direct approach would be to impose higher standards on agencies seeking to dismiss cases at the pleading stage based on purported state secrets. As the Plaintiffs argued in their certiorari petition for *Jeppesen Dataplan*, the growing trend for courts to grant pre-discovery dismissal on state-secrets grounds raises significant due process concerns.<sup>218</sup> Others have argued that the judicial decision about whether to examine allegedly privileged materials *ex parte* and *in camera* should be controlled by the more demanding “clear and convincing” standard than the deferential “reasonable danger” standard articulated in *Reynolds*.<sup>219</sup> In *Reynolds*, the Supreme Court convolutedly framed its “reasonable danger” standard as follows: When the court determines that there is a “reasonable danger that compulsion of the evidence will expose military matters which . . . should not be divulged,” the court will not “jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence, even by the judge alone, in chambers.”<sup>220</sup> In other words, if there is a “reasonable danger” that the documents would reveal privileged and injurious information, judges must refrain from examining the documents to determine if in fact the allegedly injurious information actually exists in the documents.

The Fourth Circuit in *El-Masri* gave the *Reynolds* “reasonable danger” test a particularly emphatic reading: Once a court determines that the state secrets privilege applies, “no attempt is made to balance the need for secrecy of the privileged information against a party’s need for the information’s disclosure; a court’s determination that a piece of evidence is a privileged state secret removes it from the proceedings entirely.”<sup>221</sup> Rather than examine the contested evidence and make a judgment about how it relates to the Executive’s claim of privilege—a common exercise for courts with respect to disputed evidence—this “reasonable danger” test erects an overly deferential standard by which the courts strip themselves of the capacity to review the allegedly privileged evidence. By adopting the more stringent “clear and convincing” standard for precluding *ex parte* and *in camera*

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<sup>218</sup> See *supra* notes 165-168 and accompanying text.

<sup>219</sup> Chesney, *supra* note 14, at 1288.

<sup>220</sup> See *United States v. Reynolds*, 345 U.S. 1, 10 (1953).

<sup>221</sup> *El-Masri v. United States*, 479 F.3d 296, 306 (4th Cir. 2007) (summarizing the *Reynolds* “reasonable danger” test as requiring absolute protection from disclosure—even for the purpose of *in camera* examination by the court—of all information that has been determined to be privileged under the state secrets doctrine).

review, the courts would restore greater balance between the Judicial and Executive Branches in the state-secrets context by subjecting more contested secret evidence to *ex parte* and *in camera* review.

The Supreme Court has expressed some doubt about subjecting all state secrets claims to *ex parte* and *in camera* review, cautioning that even the protections promised by a judge's discrete review of secret evidence, in private, are inadequate to meet the government's overriding need for secrecy in certain cases.<sup>222</sup> The Court made this point in *Tenet v. Doe*, which was a legal challenge by two former spies against the CIA for the agency's failure to compensate them for espionage services they performed for the U.S. during the Cold War.<sup>223</sup> Lower courts rejected the government's invocation of *Totten*, holding that *Totten* posed no bar to reviewing at least some of the former spies' claims.<sup>224</sup> The Supreme Court reversed, stating that the substance of these claims—secret espionage services rendered by the plaintiff in service of the government—fell squarely within the *Totten* bar for state secrets claims.<sup>225</sup> This is perhaps not a surprising result, given the factual similarities between this case and *Totten*. However, the Court's skepticism about *in camera* review as a workable compromise between the government's demand for secrecy and the plaintiff's rights to a full and fair hearing deserves attention. The Court asserted that “[t]he state secrets privilege and the more frequent use of *in camera* judicial proceedings simply cannot provide the absolute protection we found necessary in enunciating the *Totten* rule.”<sup>226</sup> Although this reasoning should be read narrowly as confined to the specific factual circumstances at issue in *Totten* and *Tenet*,<sup>227</sup> proponents of a more robust state secrets privilege may invoke it to argue that *in camera* judicial proceedings are inapplicable in *any* case where the *Totten* bar applies.

Some courts have proposed other creative approaches for evaluating state secrets claims. In reviewing evidence that could potentially

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<sup>222</sup> See *Tenet v. Doe*, 544 U.S. 1, 3-5 (2005).

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

<sup>224</sup> *Id.* at 6.

<sup>225</sup> *Id.* at 10-11.

<sup>226</sup> *Id.* at 11.

<sup>227</sup> *Id.* (“[T]he possibility that a suit may proceed and an espionage relationship may be revealed, if the state secrets privilege is found not to apply, is unacceptable: ‘Even a small chance that some court will order disclosure of a source’s identity could well impair intelligence gathering and cause sources to “close up like a clam.”’) (quoting *CIA v. Sims*, 471 U.S. 159, 175 (1985)).

harm national security, courts could consider mandatory appointment of an expert under FRE 706 to assist the court in deciding whether the disclosure of particular evidence will pose a “reasonable danger” to national security.<sup>228</sup> Other courts have suggested that adding an attorney with security clearance to the plaintiff’s team or granting security clearance to the plaintiff’s counsel would provide a means for cases to go forward without compromising state secrets.<sup>229</sup> In *Black v. Sheraton Corp. of America*, the District Court for the District of Columbia stated that any evidence concerning the government’s illegal acts, and evidence refuting allegations of government illegality, cannot be privileged.<sup>230</sup> While widespread adoption of such a view is unlikely, the fact that some courts have recognized the potential for abuse inherent in exercising the state secrets privilege, and taken steps to preemptively reject self-interested invocations of the privilege, suggests that courts could eventually shake free from their submissiveness to government claims of state secrets.

Of course, courts should still show some deference to the Executive’s institutional competence in matters of national security. However, the blind, reflexive judicial deference advocated by some<sup>231</sup> reflects an overly cramped view about the abilities of judges to apply their constitutional power of judicial review and ignores the grave dangers inherent to a self-interested Executive, invoking state secrets simply to conceal its own misbehavior.

### C. *Executive Self-Policing: Establishing Greater Bureaucratic Controls to Standardize and Constrain the Use of the State Secrets Privilege*

Of all the potential approaches for reforming the state secrets privilege, executive self-policing may seem the most farfetched. Presi-

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<sup>228</sup> See *Hepting v. AT&T*, 439 F. Supp. 2d 974, 1010-11 (N.D. Cal. 2006).

<sup>229</sup> See *Al Odah v. United States*, 346 F. Supp. 2d 1, 14 (D.D.C. 2004) (requiring that counsel have “security clearance at the level appropriate for the level of knowledge the Government believes is possessed by the detainee”); *In re Guantanamo Detainee Cases*, 344 F. Supp. 2d 174, 178 (D.D.C. 2004) (requiring that petitioners’ counsel receive “necessary security clearance” to gain access to classified information relevant to cases).

<sup>230</sup> *Black v. Sheraton Corp. of America*, 371 F. Supp. 97, 101-02 (D.D.C. 1974).

<sup>231</sup> See, e.g., *El-Masri v. United States*, 479 F.3d 296, 305 (4th Cir. 2007) (stating that courts should defer to the Executive on matters relating to national security); see also Posner & Vermuele, *supra* note 216, at 217-48 (arguing that the national security exigencies at stake in the war on terror require high levels of judicial deference and low levels of judicial process to individuals the Executive labels as “public threats”).

dents, once in power, are disinclined to surrender the great authority and secrecy that presidents past have laboriously consolidated over time.<sup>232</sup> The predisposition to consolidate its power aside, there are opportunities available for the Executive to reform how it uses the state secrets privilege without eroding or compromising its Article II powers.

In response to the outrage generated by the Bush Administration's perceived abuse of the state secrets privilege,<sup>233</sup> the Obama Administration, in 2009, announced new policies in a Department of Justice Memorandum meant to govern its invocation of the privilege.<sup>234</sup> The Memorandum promised that the government would "invoke the privilege in court only when genuine and significant harm to national defense or foreign relations is at stake."<sup>235</sup> Perhaps the biggest change from past policies, at least in theory, is the requirement that any agency seeking to invoke state secrets, including the intelligence community and military, must first convince the Justice Department and a team of government lawyers that the release of the sensitive information would present significant harm to "national defense or foreign relations."<sup>236</sup> Previously, the claim that state secrets were at risk could be invoked with the approval of one official by simply stating that the disclosure would be harmful.<sup>237</sup> The new procedures also required the department to provide periodic updates to congressional oversight committees with respect to the cases in which the privilege had been invoked and the basis for invoking the privilege.<sup>238</sup>

The Memorandum also stated that, where a claim of state secrets is properly invoked but the complaint raises credible allegations of

<sup>232</sup> See Wills, *supra* note 57, at 3-4.

<sup>233</sup> See, e.g., MAJORITY STAFF OF H. COMM. ON THE JUDICIARY, 110TH CONG., *REINING IN THE IMPERIAL PRESIDENCY: LESSONS AND RECOMMENDATIONS RELATING TO THE PRESIDENCY OF GEORGE W. BUSH* at 16 (Jan. 13, 2009) (lambasting the "imperial" excesses of the Bush Administration, including its efforts to avoid accountability through "extraordinary assertions of state secrets").

<sup>234</sup> Memorandum from the Attorney Gen. to the Dep't of Justice Heads of Exec. Dep'ts and Agencies, *Policies and Procedures Governing Invocation of the State Secrets Privilege* (Sept. 23, 2009), available at [www.justice.gov/opa/documents/state-secret-privileges.pdf](http://www.justice.gov/opa/documents/state-secret-privileges.pdf) [hereinafter DOJ MEMORANDUM].

<sup>235</sup> *Id.* at 1.

<sup>236</sup> *Id.* at 1, 3.

<sup>237</sup> See Carrie Johnson, *Obama Tightens State Secrets Standard*, WASH. POST, Sept. 23, 2009.

<sup>238</sup> DOJ MEMORANDUM, *supra* note 234, at 4.

government wrongdoing, “the Department [of Justice] will refer those allegations to the Inspector General of the appropriate department or agency for further investigation, and will provide prompt notice of the referral to the head of the appropriate department or agency.”<sup>239</sup> While an Inspector General investigation is a poor substitute for judicial review, a vigorous investigation by each Inspector General, with full access to all relevant witnesses, documents, tapes, photographs, and other materials, could provide at least a small measure of recompense for those individuals that were denied their day in court by the state secrets privilege.<sup>240</sup> Despite these promised reforms, the Obama Administration continues to invoke the privilege in much the same fashion as its predecessor, demonstrating the need for Congressional action to reform the privilege, from codifying the self-policing mechanisms adopted by the Justice Department<sup>241</sup> to enacting legislation to narrow the circumstances in which the privilege can be invoked.

## CONCLUSION

Discerning the proper balance between protecting national security and preserving civil liberties has been one of the more belabored academic questions in post-9/11 scholarship.<sup>242</sup> The tradeoff between keeping America safe and upholding due process is often characterized as a zero sum game, with every incremental diminishment of civil liberties leading to a commensurate increase in the nation’s overall security.<sup>243</sup> This interpretation of the national security and civil liberties balance also informs the use of the state secrets privilege. Two of the key due process guarantees enshrined in the Bill of Rights are the individual’s right “to be confronted” with the evidence against him,<sup>244</sup> and his right to not be “deprived of life, liberty, or property, without due process of law.”<sup>245</sup> In cases where the government invokes state

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<sup>239</sup> DOJ MEMORANDUM, *supra* note 234, at 3.

<sup>240</sup> Letter from ACLU et. al. to Eric Holder, Attorney Gen. et. al. (Dec. 15, 2010) available at [www.constitutionproject.org/pdf/Letter\\_May\\_2011.pdf](http://www.constitutionproject.org/pdf/Letter_May_2011.pdf) (urging the Attorney General to require the Department of Justice, the Department of State, the Department of Homeland Security, and the Central Intelligence Agency to fulfill the requirements of the DOJ Memorandum by issuing IG investigations of all credible complaints dismissed on state secrets grounds).

<sup>241</sup> See Constitution Project Press Release, *supra* note 210.

<sup>242</sup> See, e.g., Posner & Vermuele, *supra* note 216, at chs. 3, 7.

<sup>243</sup> *Id.*

<sup>244</sup> See U.S. CONST. amend. VI.

<sup>245</sup> *Id.* amend. V.

secrets to shield documents from disclosure, the plaintiff's right to confrontation and her full due process rights to marshal evidence to vindicate her claim are severely compromised.

The government has expanded its use of the state secrets privilege in war-on-terror cases, repeatedly claiming that any meaningful judicial consideration of legal challenges to the TSP wiretapping program, the rendition program, or the targeted killing of Anwar al-Aulaqi would pose grave threats to national security. Judicial deference to such claims of state secrecy—whether or not the claims merit privileged treatment—exact a decisive toll on claimants, permanently shutting the courthouse doors on their claims. In the wake of the Fourth Circuit's *El-Masri* decision, prospects for tilting the balance towards greater judicial openness have grown even dimmer. When an individual makes a credible claim of harm, suffered through government wrongdoing—even secret government wrongdoing—the cost of not having the opportunity to seek judicial redress for that harm and to be made whole is substantial. From heightening judicial scrutiny of executive claims of state secrets and reconfiguring *Reynolds's* “reasonable danger” test to allow for more frequent *ex parte* and *in camera* review, to creating alternative fora to review legitimately invoked state secrets claims, several approaches exist for transforming the state secrets privilege into a mechanism that better balances national security with individual due process rights. Whether or not these approaches will gain traction, however, is another story. The war on terror shows no signs of abating, and the Obama Administration, despite its statements in favor of government openness and accountability, remains steadfast in its pro-state-secrets stance. The prospects for congressional action also appear dim, especially with Congress's rightward shift after the 2010 mid-term elections and the intractable legislative gridlock that has followed.

However, these political obstacles need not foreclose meaningful reform to the state secrets privilege. The idea that the Executive Branch should not have unlimited power to thwart judicial review and marginalize claimants' due process rights should appeal (at least conceptually) to advocates for limited government on both the right and left. Moreover, as time passes and the scope of the government's “secret” war-on-terror initiatives becomes known, political opposition to a constrained state secrets privilege (again, at least conceptually) should diminish. Perhaps the best course, then, is for advocates to

recognize these emerging opportunities for reform and to re-tailor their message to emphasize that a more modest version of the state secrets privilege aligns with common-sense, middle-of-the road expectations about the proper balance between federal power and civil liberties.

