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# Compromising Liberty for National Security: The Need To Rein in the Executive's Use of the State-Secrets Privilege in Post-September 11 Litigation

STEPHANIE A. FICHERA\*

## I. INTRODUCTION

The War on Terror has been plagued by charges of unitary executive misconduct and defiance of our nation's laws and constitutional values. Troubling cases have surfaced from the War on Terror in which U.S. citizens and foreign nationals alike have sought relief for wrongs allegedly suffered at the hands of the federal government, including claims of unlawful detention, prisoner abuse, and unwarranted surveillance. Many of these cases involve executive assertions of the state-secrets privilege—a doctrine powerful enough to cause the outright dismissal of an entire lawsuit at the government's behest. The state-secrets privilege is a common-law evidentiary privilege that enables the Executive to shield from disclosure information purportedly containing state or military secrets on the basis that the disclosure of such information would jeopardize national security.<sup>1</sup> The consequences of a successful assertion of the privilege are assumed primarily by private litigants—in addition to the American public as a whole—because the privilege often results in the dismissal of a plaintiff's case and allows the government to avoid meddlesome litigation, embarrassing disclosure of information, and accountability for wrongdoing. Moreover, a court-approved invocation of the state-secrets privilege imposes another substantial cost: it compromises civil liberties, rights of individual litigants, and fundamental constitutional values in favor of a promised enhancement of national security.

This note focuses on two recent cases, *El-Masri v. United States*<sup>2</sup>

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1. See, e.g., *Hepting v. AT&T Corp. (Hepting II)*, 439 F. Supp. 2d 974, 980 (N.D. Cal. 2006); Meredith Fuchs, *Judging Secrets: The Role Courts Should Play in Preventing Unnecessary Secrecy*, 58 ADMIN. L. REV. 131, 134 (2006).

2. *El-Masri v. United States (El-Masri II)*, 479 F.3d 296 (4th Cir. 2007), cert. denied, 128 S. Ct. 373 (2007); *El-Masri v. Tenet (El-Masri I)*, 437 F. Supp. 2d 530 (E.D. Va. 2006).

and *Hepting v. AT&T Corp.*,<sup>3</sup> which respectively depict two troublesome products of the Bush administration's execution of the War on Terror: (1) extraordinary rendition programs and (2) warrantless, secret surveillance. *El-Masri* involved allegations of unlawful detention and mistreatment of a prisoner in accordance with a Central Intelligence Agency ("CIA") program; the entire case was dismissed on the basis of the state-secrets privilege.<sup>4</sup> *Hepting* considered an action brought by customers against AT&T for its alleged participation in the Executive's warrantless surveillance program.<sup>5</sup> In *Hepting*, however, the court denied the government's motion to dismiss on the grounds of the privilege and suggested special procedural precautions for handling classified material during discovery.<sup>6</sup> As such, these cases will be used to analyze the executive branch's assertion of the state-secrets privilege in controversial War on Terror-related cases and the varying responses of the federal courts.<sup>7</sup>

Furthermore, *Hepting* and *El-Masri* are indicative of the flaws inherent in the state-secrets privilege, including its penchant for slamming the courthouse door on potentially injured individuals, preventing executive accountability, and hedging public debate on contentious, but important issues. The *Hepting* and *El-Masri* decisions also show lower federal courts approaching the state-secrets privilege with different understandings of the scope and extent of executive power, the role of the courts, and the privilege itself. Finally, the circumstances and outcomes of the *Hepting* and *El-Masri* cases shed light on the dangers the state-secrets privilege and unchecked executive power pose to individual rights and liberties.

This note contends that in the legal and political context surrounding cases like *Hepting* and *El-Masri*, the successful assertion of the state-secrets privilege can lead to dangerous, counter-constitutional results and should therefore be considered with heightened judicial scru-

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3. *Hepting II*, 439 F. Supp. 2d 974; *Hepting v. AT&T Corp. (Hepting I)*, No. C-06-672 VRW, 2006 WL 1581965 (N.D. Cal. June 6, 2006).

4. See *El-Masri II*, 479 F.3d at 300; *El-Masri I*, 437 F. Supp. 2d at 540–41.

5. See *Hepting II*, 439 F. Supp. 2d at 978.

6. See *id.* at 980, 1010–11.

7. This note focuses on two cases, one dealing with extraordinary rendition and the other with warrantless surveillance, in an attempt to analyze the character and effect of the state-secrets privilege in recent War on Terror-related litigation. Federal courts have considered the privilege in a number of other cases involving similar issues stemming from the War on Terror. See, e.g., *Tenet v. Doe*, 544 U.S. 1 (2005); *In re Nat'l Sec. Agency Telecomms. Records Litig.*, 483 F. Supp. 2d 934 (N.D. Cal. 2007); *Doe v. CIA*, No. 05 Civ. 7939 LTSFM, 2007 WL 30099 (S.D.N.Y. Jan. 4, 2007); *Al-Haramain Islamic Found., Inc. v. Bush*, 451 F. Supp. 2d 1215 (D. Or. 2006), *rev'd*, 507 F.3d 1190 (9th Cir. 2007); *ACLU v. NSA*, 438 F. Supp. 2d 754 (E.D. Mich. 2006), *vacated*, 493 F.3d 644 (6th Cir. 2007), *petition for cert. filed*, Oct. 3, 2007 (No. 07-468); *Terkel v. AT&T Corp.*, 441 F. Supp. 2d 899 (N.D. Ill. 2006).

tiny. The very danger inherent in the state-secrets privilege lies in the fact that it can be used by the government to conceal illegal and unconstitutional activity, thereby limiting access to courts, undermining notions of separation of powers and checks and balances, and preventing public debate and official accountability. Thus, in light of the political controversy surrounding and questionable constitutionality of the government's warrantless surveillance and extraordinary rendition programs, federal courts should approach the invocation of the privilege critically and with limited deference. In a system of separated powers, checks and balances, and open government, the courts should serve as an outlet for citizens and foreign nationals alike to air their grievances and possibly obtain redress when they have suffered allegedly unconstitutional treatment at the hands of another branch of government. This note, therefore, will argue that the approaches taken by the Northern District of California in the *Hepting* case and by the D.C. Circuit in a 1989 case entitled *In re United States*<sup>8</sup> offer a fair, reasoned, and balanced path for future courts to follow when considering claims of the state-secrets privilege. *Hepting* and *In re United States* serve as examples of how the federal courts can, within the bounds of precedent, address the government's invocation of the state-secrets privilege critically in light of the special context surrounding post-September 11 litigation, thereby preventing the privilege from being used as a means of concealing unconstitutional executive behavior.

In sum, this note seeks to analyze the government's use of the state-secrets privilege in recent cases arising out of the War on Terror as a means of forestalling litigation, withholding information, and preventing governmental liability, and thus, chipping away at structural and theoretical constitutional protections—protections designed to defend individual rights and liberties and to prevent executive overreaching. Part II provides a brief overview of the nature and development of the modern state-secrets privilege, including an examination of the problematic 1953 U.S. Supreme Court decision<sup>9</sup> that set the stage for the modern-day privilege. Part III reviews the outcomes of the *El-Masri* and *Hepting* cases and discusses the courts' respective approaches to the state-secrets privilege. Part IV addresses the problems inherent in the state-secrets privilege in light of its application to cases arising out of the War on Terror. Finally, Part V argues that courts should follow the line of *Hepting* and *In re United States*, which seek to nondeferentially consider public, private, and governmental interests and invoke procedural safeguards to protect national security during litigation when secrecy is deemed genu-

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8. 872 F.2d 472 (D.C. Cir. 1989).

9. *United States v. Reynolds*, 345 U.S. 1 (1953).

inely necessary—an approach that is preferable to simply affording the Executive an absolute privilege.

## II. THE MODERN-DAY STATE-SECRETS PRIVILEGE

In the legal battles that have emerged since September 11 and the inception of the War on Terror, the state-secrets privilege has been employed by the Executive as a means of forestalling litigation, criticism, and public debate regarding the policies made and actions taken in an effort to respond to the international problem of terrorism.<sup>10</sup> Such successful assertions of the privilege negatively affect fundamental constitutional rights and principles. A brief look at the foundation, elements, and nature of the state-secrets privilege will shed light on the problems underlying its invocation in warrantless surveillance and extraordinary rendition cases.

The state-secrets privilege is a common-law evidentiary privilege that permits the government to withhold information from discovery when disclosure threatens to harm national security or expose military affairs.<sup>11</sup> The modern state-secrets privilege<sup>12</sup> was first pronounced in

10. There is some debate among scholars regarding the Bush administration's reliance on the state-secrets privilege in comparison to that of previous Presidents. Meredith Fuchs contends that not only has governmental secrecy generally increased since September 11, but the state-secrets privilege has been used more frequently as a "litigation tactic" as well. See Fuchs, *supra* note 1, at 133–35. As of September 2005, Fuchs reported that

[i]n the 23-year span between the Supreme Court case that authorized the use of the state secrets privilege in 1953 and 1976, the government litigated cases involving the privilege four times. In the 24 years between 1977 and 2001, courts were called to rule on the government's invocation of the privilege 51 times. In the three and one-half years since then, at least six district courts and seven courts of appeals have produced written opinions concerning the privilege. This represents an increase from less than once every five years to twice a year to more than three times a year.

*Id.* at 134–35 (footnotes omitted). In addition, the government has called upon the state-secrets privilege in a number of other cases since the publication of Fuchs's article. See, e.g., cases cited *supra* note 7.

Robert M. Chesney, however, disagrees, arguing that the state-secrets privilege—though an important instrument in defending post-September 11 cases—has *not* been used by the Bush administration with great frequency. See Robert M. Chesney, *State Secrets and the Limits of National Security Litigation*, 75 GEO. WASH. L. REV. 1249, 1301 (2007) [hereinafter Chesney, *State Secrets*]. Chesney addresses the issue in detail, also finding that, in terms of the nature of information, judicial review, and requested relief involved in state-secrets cases, the privilege has been employed in substantially the same fashion. *Id.* at 1301–08. Similarly, in an amicus brief to the Ninth Circuit in the pending appeal of the *Hepting* case, Professor Chesney argued for reversal and contended that the government's assertion of the state-secrets privilege was in line with the privilege's historical scope and use. See Brief of Amicus Curiae Professor Robert M. Chesney in Support of Reversal at 2, *Hepting v. AT&T Corp.*, Nos. 06-17132, 06-17137 (9th Cir. Mar. 19, 2007), 2007 WL 1231995.

11. See, e.g., *Hepting II*, 439 F. Supp. 2d at 980; Fuchs, *supra* note 1, at 134.

12. This paper principally focuses on the nature and consequences of the modern state-secrets privilege. A number of recent works provide in-depth treatment of the historical origins and

the 1953 Supreme Court case, *United States v. Reynolds*.<sup>13</sup> *Reynolds* involved suits brought against the United States by the widows of three civilians killed in the crash of a B-29 aircraft.<sup>14</sup> The widows, suing under the Federal Tort Claims Act, sought production of the Air Force's official investigation report as well as statements made by surviving crew members during the investigation.<sup>15</sup> The Secretary of the Air Force, however, filed a formal claim of privilege, asserting that production of the documents would not be in the "public interest" because the aircraft was engaged in a "highly secret" Air Force mission at the time of the accident.<sup>16</sup> The information, the government claimed, "could not be furnished 'without seriously hampering national security, flying safety and the development of highly technical and secret military equipment.'"<sup>17</sup>

The Supreme Court, reversing both lower federal courts,<sup>18</sup> accepted the government's story and held that the filing of a formal claim of privilege by the Secretary of the Air Force and the indication of a "reasonable possibility that military secrets were involved" secured the government a privilege to refuse production of the documents requested by the plaintiffs.<sup>19</sup> The *Reynolds* Court thus laid the foundation for the modern-day state-secrets privilege as a privilege that "belongs to the [g]overnment"<sup>20</sup> and characterized by a high level of deference to executive judgment and an emphasis on the primacy of national security. *Reynolds* required that there be "a formal claim of privilege, lodged by

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development of the privilege. See, e.g., LOUIS FISHER, IN THE NAME OF NATIONAL SECURITY: UNCHECKED PRESIDENTIAL POWER AND THE *Reynolds* CASE 212–52 (2006); Chesney, *State Secrets*, *supra* note 10, at 1270–1308; Jared Perkins, Comment, *The State Secrets Privilege and the Abdication of Oversight*, 21 *BYU J. PUB. L.* 235, 238–45 (2007).

13. 345 U.S. 1 (1953).

14. *Id.* at 2–3.

15. *Id.* at 3.

16. *Id.* at 4.

17. *Id.* at 5.

18. See *id.* at 5, 12. The district court had ordered the government to produce the requested documents for review to determine whether they contained privileged information. *Id.* at 5. The government refused, and the district court ultimately entered final judgment for the plaintiffs. *Id.* The court of appeals affirmed. *Id.* See generally FISHER, *supra* note 12, at 29–91 (2006) (providing an extensive treatment of the *Reynolds* case at the district and circuit court levels).

19. *Reynolds*, 345 U.S. at 5, 10–11.

20. *Id.* at 7. Moreover, the government has the right to assert the privilege whether or not it is a party to the case. *In re United States*, 872 F.2d 472, 475 (D.C. Cir. 1989) (citing *Fitzgerald v. Penthouse Int'l, Ltd.*, 776 F.2d 1236 (4th Cir. 1985); *Farnsworth Cannon, Inc. v. Grimes*, 635 F.2d 268 (4th Cir. 1980) (en banc)). Note, for example, that the United States intervened as a defendant in the *Hepting* case and proceeded to move for dismissal or summary judgment on the basis of the state-secrets privilege. *Hepting II*, 439 F. Supp. 2d 974, 979 (N.D. Cal. 2006). AT&T, a private corporation, was unable to employ the state-secrets privilege in its defense and instead moved to dismiss the case on issues of standing, affirmative pleading requirements, and statutory, common-law, and qualified immunity. *Id.*

the head of the department which has control over the matter, after actual personal consideration by that officer."<sup>21</sup> Yet, the Court outlined no mechanism for determining whether what the government claimed secret was indeed a secret. In fact, the *Reynolds* Court tolerated a remarkably minimal showing on behalf of the government. Rather than supporting its decision with independent analysis of the government's claims of secrecy, the Court essentially based its decision on an assumption: "On the record before the trial court it *appeared* that this accident occurred to a military plane . . . [testing] secret electronic equipment. Certainly there was a reasonable danger that the accident investigation report *would* contain references to the secret electronic equipment . . . ." <sup>22</sup> And while the Court proposed that the privilege was "not to be lightly invoked,"<sup>23</sup> it eschewed the idea of conducting in camera review of the government's evidence.<sup>24</sup>

Finally, the state-secrets privilege has come to hold severe consequences: "Once successfully invoked, the effect of the privilege is completely to remove the evidence from the case."<sup>25</sup> Moreover, a successful invocation of the privilege can result in the dismissal of a plaintiff's entire case.<sup>26</sup> *Reynolds* has, therefore, resulted in the government often being afforded an absolute privilege, effectively ending the lawsuit and denying the plaintiff his day in court at the behest of the Executive.<sup>27</sup>

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21. *Reynolds*, 345 U.S. at 7-8 (footnote omitted).

22. *Id.* at 10 (emphasis added).

23. *Id.* at 7.

24. The *Reynolds* Court instructed that "[t]he court itself must determine whether the circumstances are appropriate for the claim of privilege, and yet do so without forcing a disclosure of the very thing the privilege is designed to protect." *Id.* at 8 (footnote omitted). The Court further stated that

[i]t may be possible to satisfy the court, from all the circumstances of the case, 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 the 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.* at 10.

25. *In re United States*, 872 F.2d at 476 (citing *Ellsberg v. Mitchell*, 709 F.2d 51, 65 (D.C. Cir. 1983)).

26. *Id.* ("If the information is essential to establishing plaintiff's prima facie case, dismissal is appropriate."); see also *Kasza v. Browner*, 133 F.3d 1159, 1166 (9th Cir. 1998) (discussing when and how the state-secrets privilege could provoke the dismissal of a case). The *Kasza* court stated that a case could be dismissed in three situations: (1) if the plaintiff cannot prove the prima facie elements of the claim without privileged evidence; (2) if the defendant cannot put forth a valid defense to the claim without privileged evidence; or, (3) if the "very subject matter of the action" is a state secret. *Id.* at 1166 (quoting *Reynolds*, 345 U.S. at 11 n.26).

27. See *Ellsberg*, 709 F.2d at 57 ("When properly invoked, the state-secrets privilege is absolute."); see also *Halkin v. Helms (Halkin II)*, 690 F.2d 977, 990 (D.C. Cir. 1982) (contending that *Reynolds* establishes that state secrets are absolutely privileged from disclosure in courts);

Yet, as Louis Fisher has made clear, the *Reynolds* decision arguably rests on a shaky legal foundation for it was essentially based on misrepresentations made by the government to the Court.<sup>28</sup> In 2000, the daughter of one of the victims of the B-29 crash was able to review the declassified accident report on the Internet.<sup>29</sup> As it turned out, the document contained no vital governmental secrets and no references to secret military equipment, but merely the names of the individuals who had been at fault in the accident.<sup>30</sup> Despite the government's representations to the courts during the original *Reynolds* litigation, production of the documents to the widows posed no risk that secret information would be revealed and that the nation would subsequently be exposed to security threats.<sup>31</sup>

Accordingly, it is problematic that nearly sixty years after *Reynolds*, a harsh and absolute privilege that was established by a case founded on governmental misrepresentations continues to play a significant role in present legal disputes. In light of its uneasy history, it is not surprising that Fisher views the state-secrets privilege as unnecessary, contrary to notions of private rights and fair judicial procedure, and supportive of arbitrary executive power.<sup>32</sup> Thus, the combination of a privilege that fosters arbitrary executive power with the recent surveillance and prisoner abuse cases—cases in which the privilege has been raised with troubling results—is dangerous, not only in terms of judicial procedure and private rights, but in terms of structural constitutional protections that define our system of government as well.

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*Halkin v. Helms (Halkin I)*, 598 F.2d 1, 7 (D.C. Cir. 1978) (declaring that the state-secrets privilege is absolute).

28. See FISHER, *supra* note 12, at 3. Fisher has further charged that the Supreme Court “unwisely” embraced the state-secrets privilege “without any independent analysis.” *Id.* at 17. Fisher wrote, for example, that

[a]t the level of the Supreme Court . . . the justices accepted what the government alleged about the accident report and the survivor statements, without ever making an independent inspection of the materials. Not only did that undermine the case brought by the widows, it also signaled that the Court functioned as part of the executive branch rather than as an independent institution.

*Id.* at 28.

29. *Id.* at 165–68.

30. See *id.* at 166, 256.

31. See *id.* at 255. After discovering the accident report, the survivors of the victims of the B-29 crash returned to the Supreme Court, requesting that it vacate the 1953 *Reynolds* decision and reinstate the original district court judgment in the plaintiffs' favor. *Id.* at 176, 181. The Supreme Court twice refused to review the case. *Id.* at 188, 211. For an in-depth discussion of the discovery of the accident report and the extensive legal campaign that ensued, see *id.* at 165–211.

32. *Id.* at 253. Fisher also contends that *Reynolds* resulted in the enlargement of executive power in military and foreign affairs, arguing that the case sent “an ominous signal that in matters of national security, the judiciary is willing to fold its tent and join the executive branch.” *Id.* at 253, 257.



## III. TWO CASE STUDIES

Although a number of cases raising similar issues involving the War on Terror and the state-secrets privilege have come to the courts in recent years,<sup>33</sup> this note focuses on the *El-Masri* and *Hepting* cases, which respectively encompass two realities of the post-September 11 world: extraordinary rendition and warrantless surveillance. As Robert M. Chesney explains,

the privilege has the capacity to prevent courts from engaging the most significant constitutional issue underlying the post-9/11 legal debate: whether and to what extent recognition of an armed conflict with al Qaeda permits the executive branch to act at variance with the framework of laws that otherwise restrain its conduct.<sup>34</sup>

These cases prove useful in analyzing the state-secrets privilege in this context because they offer two approaches to the privilege and illustrate two possible outcomes of litigation in which the privilege is invoked by the Executive. Moreover, *Hepting* and *El-Masri* espouse different understandings of the role of the federal courts in the face of the privilege and of the balance between constitutional rights and liberties and governmental secrecy and national security.

A. *The El-Masri Case and Extraordinary Rendition*

In *El-Masri v. Tenet*,<sup>35</sup> the U.S. District Court for the Eastern District of Virginia considered the case of a German citizen of Lebanese descent who asserted that he was a victim of the United States' "extraordinary rendition" program.<sup>36</sup> Extraordinary rendition is an intelligence-gathering scheme that purportedly has been used in conjunction with the War on Terror. Apparently, the program involves the secret abduction and transfer of suspects to other countries—countries that use torture and forms of interrogation widely considered unacceptable in the United States—to obtain information.<sup>37</sup> In its opinion, the court detailed El-Masri's allegations and paints a disturbing picture of his experience.<sup>38</sup> El-Masri claimed that he was wrongfully abducted while attempting to cross the border between Serbia and Macedonia and subse-

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33. See, e.g., sources cited *supra* note 7.

34. Chesney, *State Secrets*, *supra* note 10, at 1269.

35. 437 F. Supp. 2d 530 (E.D. Va. 2006).

36. *Id.* at 532.

37. See David Weissbrodt & Amy Berquist, *Extraordinary Rendition: A Human Rights Analysis*, 19 HARV. HUM. RTS. J. 123, 125 (2006); see also Chesney, *State Secrets*, *supra* note 10, at 1257–58.

38. See *El-Masri I*, 437 F. Supp. 2d at 532–34. For a more thorough treatment of El-Masri's story, see Chesney, *State Secrets*, *supra* note 10, at 1255–63.

quently imprisoned.<sup>39</sup> While imprisoned, he was allegedly deprived of the opportunity to contact a lawyer, his wife, a translator, or the German government.<sup>40</sup> During extensive interrogations, El-Masri consistently denied any association with al Qaeda.<sup>41</sup> El-Masri also recounted instances where his captors—among other things—allegedly stripped him of his clothing, beat him, sodomized him with a foreign object, dressed him in a diaper, and injected him with sedatives.<sup>42</sup> El-Masri insisted that the detention, questioning, and abuse he endured was the work of CIA agents and private corporations involved in the program, acting pursuant to unlawful CIA policies.<sup>43</sup> El-Masri finally contended that former CIA Director, George Tenet, and Secretary of State, Condoleezza Rice, were aware that his detention was the result of mistaken identity one or two months before his release.<sup>44</sup> By the time El-Masri made his way back to Germany, he discovered that his wife and children had returned to Lebanon under the impression that they had been abandoned.<sup>45</sup>

El-Masri proceeded to bring a civil suit against Tenet, ten unknown CIA agents, three private corporations, and ten unknown private employees, stating three causes of action: a *Bivens* claim, a claim under the Alien Tort Statute (“ATS”) for violations of international principles proscribing arbitrary detention, and another claim under the ATS for violating international legal norms prohibiting cruel, inhuman, or degrading treatment.<sup>46</sup> The United States intervened in the case and moved for summary judgment, arguing that allowing the suit to continue to discovery would result in the disclosure of state secrets.<sup>47</sup>

The Eastern District of Virginia embraced a deferential and absolutist approach to the government’s assertion of the state-secrets privilege, which it described as “a privilege of the highest dignity and significance.”<sup>48</sup> Moreover, the court took a clear stance in favor of frank exec-

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39. *El-Masri I*, 437 F. Supp. 2d at 532.

40. *Id.*

41. *Id.* at 533.

42. *Id.*

43. *Id.* at 532–34.

44. *Id.* at 534.

45. *Id.*

46. *Id.* at 534–35.

47. *Id.* at 535. Interestingly, an article in the *New York Times* contended that there was “substantial evidence” that El-Masri was indeed “subjected to the C.I.A.’s practice of extraordinary rendition,” stating that “a report issued by the Council of Europe concluded that Mr. Masri’s account of having been abducted and mistreated was substantially accurate.” Adam Liptak, *U.S. Appeals Court Upholds Dismissal of Abuse Suit Against C.I.A., Saying Secrets Are at Risk*, N.Y. TIMES, Mar. 3, 2007, at A1. Moreover, the article noted that a German court has issued arrest warrants for thirteen people believed to be involved in the matter. *Id.*

48. *El-Masri I*, 437 F. Supp. 2d at 536. In a recent article, Cass R. Sunstein considered

utive privilege in wartime:

In times of war, our country, chiefly through the Executive Branch, must often take exceptional steps to thwart the enemy. Of course, reasonable and patriotic Americans are still free to disagree about the propriety and efficacy of those exceptional steps. But what this decision holds is that these steps are not proper grist for the judicial mill where, as here, state secrets are at the center of the suit and the privilege is validly invoked.<sup>49</sup>

The *El-Masri* court did not reach the merits, but instead dismissed the entire suit on the basis of the state-secrets privilege, stating that “El-Masri’s private interests must give way to the national interest in preserving state secrets.”<sup>50</sup> To evaluate the government’s claim of privilege regarding the purportedly secret “operational details of the extraordinary rendition program,”<sup>51</sup> the court adopted the following test: “If a court finds that the state secrets privilege has been validly asserted, it must then determine whether the case must be dismissed to prevent public disclosure of those secrets, or whether special procedural mechanisms may be adequate to prevent disclosure of the state secrets.”<sup>52</sup> The court decided that the United States validly asserted the state-secrets privilege<sup>53</sup> and that El-Masri’s case could not be fairly litigated without risking the disclosure of details about the extraordinary rendition program—that is, El-Masri would have to prove that he was abducted, detained, and mistreated as a result of a government-sanctioned program.<sup>54</sup> Thus, El-Masri’s case could not be litigated at all, leaving him without hope for a remedy from the judicial branch.<sup>55</sup> The opinion, however, is arguably short for such troubling allegations of governmental misconduct, and the court failed to make a vigorous effort to determine whether the information that the government claimed was “secret” truly deserved protection.

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positions adopted by federal courts in deciding conflicts between national security and freedom. Cass R. Sunstein, *National Security, Liberty, and the D.C. Circuit*, 73 GEO. WASH. L. REV. 693 (2005). Sunstein termed one such position “National Security Fundamentalism” and argued that National Security Fundamentalists understand the Constitution to call for a highly deferential role for the judiciary, above all on the ground that when national security is threatened, the president must be permitted to do what needs to be done to protect the country. For National Security Fundamentalists, courts should adopt a strong presumption in favor of allowing the president to do as he wishes. If the president cannot safeguard the nation’s security, who will?

*Id.* at 693. The *El-Masri* court’s posture arguably falls into this category.

49. *El-Masri I*, 437 F. Supp. 2d at 540–41.

50. *Id.* at 539.

51. *Id.* at 538.

52. *Id.*

53. *Id.*

54. *Id.* at 539.

55. *Id.* at 541.

On March 2, 2007, the U.S. Court of Appeals for the Fourth Circuit affirmed the lower court's dismissal of El-Masri's suit, adopting—and even extending—the deferential approach to the state-secrets privilege that characterized the Eastern District of Virginia's opinion in the case.<sup>56</sup> The Fourth Circuit's opinion not only enfeebles federal judicial power, but also stresses a constitutionalized understanding of the state-secrets privilege.<sup>57</sup> The court maintained that

[a]lthough 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. *Reynolds* itself suggested that the state secrets doctrine allowed the Court to avoid the constitutional conflict that might have arisen had the judiciary demanded that the Executive disclose highly sensitive military secrets. In *United States v. Nixon*, the Court further articulated the doctrine's constitutional dimension, observing that the state secrets privilege provides exceptionally strong protection because it concerns areas of Art. II duties [in which] the courts have traditionally shown the utmost deference to Presidential responsibilities.<sup>58</sup>

Thus, Fourth Circuit jurisprudence affords the executive branch a high level of deference in the area of foreign affairs and shows little interest in acting as a check against executive overreaching.<sup>59</sup> Moreover, the court twice used the word “obliged” to qualify and justify its decision.<sup>60</sup> In doing so, the Fourth Circuit minimized its judicial role and denied

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56. See *El-Masri II*, 479 F.3d 296, 302 (4th Cir. 2007). On October 9, 2007, the U.S. Supreme Court denied El-Masri's petition for a writ of certiorari challenging dismissal by the lower courts. *El-Masri v. United States*, 128 S. Ct. 373 (2007).

57. See *El-Masri II*, 479 F.3d at 303–04. The Fourth Circuit ruled that “[t]he state secrets privilege that the United States has interposed in this civil proceeding . . . has a firm foundation in the Constitution, in addition to its basis in the common law of evidence.” *Id.* at 304. The notion of a “constitutionalized” state-secrets privilege is dangerous because it indicates an improper expansion of the common-law privilege. In doing so, it expands executive power at the expense of judicial and congressional power. A mere “function of constitutional significance” is not sufficient to warrant destructive and abusive executive power in the context of these cases. Cf. Brief of Amici Curiae Professor Erwin Chemerinsky et al. in Support of Hepting and Urging Affirmance at 15, *Hepting v. AT&T Corp.*, Nos. 06-17132, 06-17137 (9th Cir. May 2, 2007), available at <http://www.eff.org/legal/cases/att/chemerinskyamicus.pdf> (“[U]nlike executive privilege, which the Supreme Court has suggested is ‘inextricably rooted in the separation of powers under the Constitution,’ *United States v. Nixon*, 418 U.S. 683, 708 (1974), the state secrets privilege is a common-law evidentiary rule that may generally be superseded—and the applicability of which may be regulated—by statute.”).

58. *El-Masri II*, 479 F.3d at 303 (citation and internal quotation marks omitted).

59. *Id.* The court contended that the judiciary had only a limited role as a check on presidential action in foreign affairs, explaining—without citing any authority—that “the Executive's constitutional authority is at its broadest in the realm of military and foreign affairs.” *Id.*

60. See *id.* at 304–06.

responsibility for the unjust outcome of El-Masri's case,<sup>61</sup> one that left an individual without access to U.S. courts and without a channel of reparation for injuries allegedly committed by members of the federal government.

### B. *The Hepting Case and Warrantless Surveillance*

The Northern District of California has taken a different approach and has attempted to lessen the effect of the state-secrets privilege without stretching the bounds of precedent. *Hepting v. AT&T Corp.*<sup>62</sup> was decided by the Northern District of California a few months after *El-Masri I*. The *Hepting* court, however, made a notably more searching and less deferential inquiry than the *El-Masri* court into the government's assertion of the state-secrets privilege regarding a warrantless surveillance program—equally problematic allegations that go to the heart of American constitutional values. In *Hepting*, customers brought suit against AT&T, arguing that it participated in a warrantless surveillance program orchestrated by the National Security Agency (“NSA”).<sup>63</sup> The plaintiffs contended that the program “illegally tracks the domestic and foreign communications and communications records of millions of Americans”<sup>64</sup> and violates the First and Fourth Amendments in addition to a number of federal and state statutes.<sup>65</sup>

Accordingly, the United States intervened and moved to dismiss the suit on the basis of the state-secrets privilege.<sup>66</sup> The Northern District of

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61. The court wrote that “[a] court is obliged to honor the Executive’s assertion of the privilege if it is satisfied, from all the circumstances of the case, that there is a reasonable danger that compulsion of the evidence will expose military matters, which in the interest of the national security, should not be divulged.” *Id.* at 305 (internal quotation marks omitted). It also stated that “[i]n such a situation, a court is obliged to accept the executive branch’s claim of privilege without further demand.” *Id.* at 306.

62. 439 F. Supp. 2d 974 (N.D. Cal. 2006). The *Hepting* case is presently on appeal to the Ninth Circuit. See *Hepting v. AT&T Corp.*, No. 06-CV-672 (9th Cir. filed Nov. 8, 2006). Oral argument was heard in the case on August 15, 2007. See *id.* In its brief to the Ninth Circuit, appellant AT&T argued that the complaint should have been dismissed because the plaintiffs lacked standing and because the state-secrets privilege would prevent full and fair litigation of the issue. Brief of Appellant AT&T Corp. at 26–30, *Hepting v. AT&T Corp.*, No. 06-17132 (9th Cir. Mar. 9, 2007), 2007 WL 1119749.

63. *Hepting II*, 439 F. Supp. 2d at 978.

64. *Id.*

65. *Id.* at 978–79. The alleged statutory violations committed by AT&T in its collaboration in the NSA surveillance program include the following: Section 109 of Title I of the Foreign Intelligence Surveillance Act of 1978; Section 802 of Title III of the Omnibus Crime Control and Safe Streets Act of 1968; Section 705 of Title VII of the Communications Act of 1934; Section 201 of Title II of the ECPA (“Stored Communications Act”); Section 201 of the Stored Communications Act, as amended by section 212 of Title II of the USA PATRIOT Act; and California’s Unfair Competition Law. *Id.*

66. *Id.* at 979; see also *Hepting I*, No. C-06-672 VRW, 2006 WL 1581965, at \*1 (N.D. Cal. June 6, 2006).

California first issued an opinion in the *Hepting* case on June 6, 2006, in which it primarily addressed the state-secrets privilege issue.<sup>67</sup> The court held that in order to determine whether and to what extent the state-secrets privilege applied, it was necessary to review certain classified documents.<sup>68</sup> While the court adopted a fair and respectful approach to the government's often-legitimate need for secrecy, it also sought to balance competing interests and gave the impression that it was intent on seeing the case proceed. As such, the court ordered that the government provide the classified documents for review *in camera* by the judge.<sup>69</sup> The court explained the reasoning underlying its decision to balance competing interests:

The court is mindful of the extraordinary due process consequences of applying the privilege the government here asserts. The court is also mindful of the government's claim of exceptionally grave damage to the national security of the United States that failure to apply the privilege could cause. At this point, review of the classified documents affords the only prudent way to balance these important interests.<sup>70</sup>

Unlike the courts weighing in on the *El-Masri* case, the *Hepting* court did not shy away from analyzing the government's appeal for secrecy and claim of national security risks. It successfully fulfilled its duty to act as a check against executive power by reviewing the documents that the government claimed held secrets and posed security threats, explaining that "[a]lthough *ex parte, in camera* review is extraordinary, this form of review is the norm when state secrets are at issue."<sup>71</sup>

The Northern District of California revisited the *Hepting* case on July 20, 2006. Declining to dismiss the plaintiffs' case, the district court undertook an extensive consideration of state-secrets privilege-related precedent in making its decision<sup>72</sup> and addressed two issues: (1)

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67. *Hepting I*, 2006 WL 1581965, at \*1.

68. *Id.* at \*1, \*3.

69. *Id.* at \*4. The court stated that "this case cannot proceed and discovery cannot commence until the court examines the classified documents to assess whether and to what extent the state secrets privilege applies." *Id.* at \*1.

70. *Id.* at \*4 (citation and internal quotation marks omitted).

71. *Id.* at \*3.

72. The court considered the meaning and applicability of various federal cases. See *Hepting II*, 439 F. Supp. 2d 974, 980-84 (N.D. Cal. 2006). The court considered the following cases: *Totten v. United States*, 92 U.S. 105 (1876) (creating a privilege regarding contacts between spies and the government for espionage services); *Tenet v. Doe*, 544 U.S. 1 (2005) (reaffirming the *Totten* rule); *United States v. Reynolds*, 345 U.S. 1 (1953) (pronouncing the modern state-secrets privilege); *Halkin v. Helms*, 598 F.2d 1 (D.C. Cir. 1978) (upholding the invocation of the state-secrets privilege with respect to information sought by plaintiffs claiming to be the victims of surveillance of foreign communications during the Vietnam War); *Ellsberg v. Mitchell*, 709 F.2d 51 (D.C. Cir. 1983) (requiring the government in a warrantless electronic surveillance to adequately disclose its basis for asserting the privilege and advocating judicial procedures to

“whether the state secrets privilege applies and requires dismissal of this action or immediate entry of judgment in favor of defendants”<sup>73</sup> and (2) “whether a piece of information constitutes a ‘state secret’ [by] determining whether that information action is a ‘secret.’”<sup>74</sup> The court thus embarked on a lengthy consideration of whether the information that the government claimed was secret actually was a secret. In doing so, the court relied on information regarding official public disclosures, media reports, and information leaked to the public as well as on documents filed under seal with the court to hold that the subject matter of the suit was not a secret, noting that it did not believe that permitting the case to proceed would create a “reasonable danger” to national security.<sup>75</sup>

It is significant to note that the Northern District of California demonstrated a noticeably different tone and understanding of its role in this case than did the Eastern District of Virginia and the Fourth Circuit in *El-Masri*. The *Hepting* court, for example, stated that

it is important to note that even the state secrets privilege has its limits. While the court recognizes and respects the executive’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. . . . 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>76</sup>

Thus, the Executive was not afforded the same degree of leeway in the Northern District of California as it was in the Eastern District of Virginia and the Fourth Circuit. The Northern District of California also seems much more willing to scrutinize executive decisionmaking—including its claims of secrecy. And, unlike the *El-Masri* courts, the court in this case appeared hesitant to leave the plaintiffs without a judicial remedy, noting that “no case dismissed because of its ‘very subject matter’ was a state secret involving ongoing, widespread violations of individual constitutional rights, as plaintiffs allege here.”<sup>77</sup> It is thus clear that the Northern District of California was not only concerned with maintaining judicial integrity and setting limits for the exercise of the privilege and of executive power, but it was also concerned with the effect of the privilege on individual constitutional rights.

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handle claims of privilege); *Kasza v. Browner*, 133 F.3d 1159 (9th Cir. 1998) (dismissing a case because the “very subject matter” of the plaintiff’s action was a state secret); *El-Masri I*, 437 F. Supp. 2d 530 (E.D. Va. 2006) (dismissing the plaintiff’s case on the basis of the state-secrets privilege).

73. *Hepting II*, 439 F. Supp. 2d at 980.

74. *Id.* at 986.

75. *See id.* at 979, 989, 994.

76. *Id.* at 995.

77. *Id.* at 993.

## VI. A CRITICAL LOOK AT THE STATE-SECRETS PRIVILEGE IN APPLICATION

In the wake of September 11 and the inception of the War on Terror, the state-secrets privilege has cropped up in a broad range of cases challenging the policies and actions of the executive branch. The policies formulated by the Bush administration in response to the September 11 terrorist attacks—including arguably illegal warrantless surveillance, detention, and torture of individuals—are highly controversial and widely questioned. Extraordinary rendition and warrantless surveillance implicate vital American constitutional rights, from the First and Fourth Amendments to due process and notions of liberty. The successful exercise of the state-secrets privilege in these suits also implicates important structural and theoretical elements of constitutional law, including separation of powers, governmental accountability, checks and balances, public involvement and debate, and judicial roles and remedies.

Separation of powers<sup>78</sup> and checks and balances<sup>79</sup> serve a central purpose in our constitutional scheme of government. In his concurring opinion in the 1998 Supreme Court case, *Clinton v. City of New York*,<sup>80</sup> Justice Anthony Kennedy considered the relationship between separation of powers and liberty, writing that “[l]iberty is always at stake when one or more of the branches seek to transgress the separation of pow-

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78. Erwin Chemerinsky explains that “[t]he Constitution is based on a simple version of shared and separated powers. For almost every major government action, at least two branches of government should have to be involved.” Erwin Chemerinsky, *The Assault on the Constitution: Executive Power and the War on Terrorism*, 40 U.C. DAVIS L. REV. 1, 4 (2006) [hereinafter Chemerinsky, *The Assault on the Constitution*]. Professor Chemerinsky also contends that

[t]he key flaw in the Bush administration’s approach is that it ignores the basic framework that two branches of government should be involved in all major government actions. The Fourth, Fifth, and Sixth Amendments require arrests, and especially detentions, to be approved by the judiciary. The courts must approve searches, including electronic eavesdropping under the Fourth Amendment. In addition to these constitutional protections, treaties and statutes also regulate torture. Government treatment of individuals is not simply a matter of executive prerogative.

*Id.* at 19.

79. Chemerinsky has also commented that “the Bush administration rejects the ability of the courts to review its actions and even of Congress to check its conduct. Its actions and positions cannot be reconciled with a system based on checks and balances.” *Id.* at 3. He further contends that “[i]n the past, the Supreme Court has served an essential role in the system of separation of powers by checking executive power and rejecting presidential actions that usurp the powers of other branches of government or prevent them from carrying out their constitutional duties.” *Id.* at 17. A number of cases arising out of the War on Terror have passed through the lower federal courts, raising issues that the U.S. Supreme Court has yet to rule on. Because issues of extraordinary rendition, illegal electronic surveillance, and the like are so significant in terms of the interplay of federal executive and judicial power, Chemerinsky’s statement can, arguably, apply to the role of lower federal courts as well.

80. 524 U.S. 417, 449–53 (1998) (Kennedy, J., concurring).



ers.”<sup>81</sup> Justice Kennedy described liberty as “fundamental” and argued that “[c]oncentration of power in the hands of a single branch is a threat to liberty.”<sup>82</sup> The state-secrets privilege, in many respects, serves to concentrate power solely in the hands of the executive branch. Allowing the Executive to claim the state-secrets privilege in controversial litigation addressing extraordinary rendition and warrantless surveillance allows the Executive to control not only evidence and discovery in the litigation, but also the possible dismissal of the plaintiff’s entire claim, thus usurping much of the traditional and constitutional role of the judicial branch. Consequently, the Executive is able to forestall public debate and official accountability;<sup>83</sup> commandeer judicial review, remedies, and access to courts; and most significantly, restrict the exercise and enforcement of individual rights.

The operation of the state-secrets privilege in recent cases arising out of the War on Terror raises two separation-of-powers concerns: (1) whether the executive branch can act outside the bounds of the Constitution without reproach; and (2) whether the judicial branch can review the Executive’s claim of evidentiary privilege and decline to afford the privilege, forcing the Executive to produce information and face possible public responsibility for its policies.<sup>84</sup> Both issues come to light in the cases dealing with extraordinary rendition and warrantless surveil-

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81. *Id.* at 450.

82. *Id.*

83. Meredith Fuchs writes that “[i]n almost any case involving an intelligence, law enforcement, or military agency, classified information likely will be involved, and the state secrets privilege therefore constitutes a potent weapon for government litigators to avoid liability.” Fuchs, *supra* note 1, at 153. Fuchs also contends that secrecy allows the government to control public opinion and avoid criticism or embarrassment. *Id.* at 154–55. The dismissal of the *El-Masri* case on the basis of the privilege, for example, allowed the government not only to avoid liability to the plaintiff were his claims found to have merit, but also to conceal these particular allegations from broad public scrutiny.

84. It has also been argued that the state-secrets privilege—specifically in the context of the *Hepting* case—contravenes the doctrine of separation of powers in terms of the relationship between the Executive and Congress. See Brief of Amici Curiae Professor Erwin Chemerinsky et al., *supra* note 57, at 3–21. In the United States’ system of shared powers and checks and balances, Congress—like the judiciary—plays a role in limiting the power of the Executive. The Chemerinsky brief contends that Congress has sought to place limits on the executive branch’s ability to act in secret, especially in the realm of electronic surveillance:

When it comes to the presidency, the Constitution strikes the balance between liberty and efficacy differently. Unlike the legislature, the President can act efficiently and secretly. But the President’s use of these capacities is subject to legislative limits. Absent this constitutional constraint, there would be little to stop the abuse of Presidential capacities. The President’s capacity for secrecy, for example, can be used (and historically has been used) to cloak activities that work against the interests and liberties of the people. Boundaries set through the relatively liberty-enhancing legislative process are a crucial means to protect against such abuses.

*Id.* at 18.

lance of private communications. Professor Chemerinsky discusses the Bush administration, executive power, and fundamental constitutional principles in an article published in 2006.<sup>85</sup> He explains that

checking executive power was a central goal of the American constitution. The framers of the Constitution feared executive power the most. Indeed, in their view, endowing virtually all power in a single individual . . . threatened all liberty. Having endured the tyranny of the King of England, the framers viewed the principle of separation of powers as the central guarantee of a just government.<sup>86</sup>

Affording the Executive an absolute privilege that has the power to trigger the full dismissal of an individual's suit raises a number of constitutional problems. For one, it restricts the checking function of the judiciary and can enable the Executive to act in disregard of the law without facing any legal consequences.<sup>87</sup> By refusing to extend the state-secrets privilege to the Executive when appropriate, the courts ensure that the Executive's conduct will be reviewed and that it will face litigation and possible liability when an individual brings compelling allegations of wrongdoing. In doing so, the judiciary maintains itself as a separate branch of government independent from the will of the Executive. Chemerinsky also argues that "it is the federal courts' role to restrain and remedy unconstitutional government conduct, and separation of powers is enhanced, not infringed, when the judiciary hears and decides constitutional cases."<sup>88</sup> In upholding the structural and theoretical protections that underlie the U.S. Constitution, federal courts are able to protect individual rights by facilitating access to the courts and offering the potential of a judicial remedy when the private interest in litigation and redress outweighs the governmental interest in secrecy and security.

Professor Chemerinsky touches on similar concerns in his article: The President, as Commander in Chief, has no power to violate the Bill of Rights. Indeed, if the President can authorize wiretapping without a warrant, he could authorize searches of homes without complying with the Fourth Amendment. Under this reasoning, the President could suspend freedom of speech or the press as Com-

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85. See Chemerinsky, *The Assault on the Constitution*, *supra* note 78.

86. *Id.* at 16–17 (citation omitted); see also THE FEDERALIST NO. 47 (James Madison) (declaring that "[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny").

87. See Chesney, *State Secrets*, *supra* note 10, at 1268. Chesney argues that "[a]ssertions of the privilege may have the immediate effect of curtailing judicial review, and also the indirect effect of reducing the capacity of both Congress and the voting public to act as a check on the executive." *Id.* at 1269.

88. ERWIN CHERMERINSKY, FEDERAL JURISDICTION 34–35 (4th ed. 2003).

mander in Chief. If presidential power can trump the Fourth Amendment's requirement for a warrant, there is no reason why it cannot be used to override any other constitutional provision.<sup>89</sup>

The general understanding of Chemerinsky's argument can be extended to the extraordinary rendition program as well. If the executive branch can authorize or even merely condone the abduction, detention, and torture of noncitizens abroad—in violation of domestic laws and constitutional values in addition to international treaties and legal norms—there is little reason to believe that such conduct could not be broadened to include U.S. citizens or aliens present within the United States.

The post-September 11 United States does indeed face much uncertainty and danger. And, of course, the threat of terrorism poses new and considerable security threats that the executive branch must address swiftly, carefully, and securely. Yet many argue that by eroding liberty and other constitutional values, the Executive fails to make the nation any safer from terrorism.<sup>90</sup> The controversies created by the Executive's policies and actions in this realm undermine the United States' international integrity and credibility. Instead of rallying the public to fight terrorism and solve international problems in a unified fashion, constitutionally questionable executive policies divide the public and focus its attention on disagreement and political squabbles. Moreover, what is temporarily gained by undertaking to protect security through secrecy and misconduct may not be worth what is forever lost by eroding constitutional limits on and expectations of the nation's governing regime. As it has been often made clear by members of the U.S. Supreme Court, the celebrated values and ideals that define the United States' governmental structure cannot be left by the wayside in times of war and anxiety. Justice Kennedy has, for example, proclaimed that "[t]he Constitution's structure requires a stability which transcends the convenience of the moment."<sup>91</sup> And in the words of Justice Breyer: "The Constitution always matters, perhaps particularly so in times of emergency."<sup>92</sup>

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89. Chemerinsky, *The Assault on the Constitution*, *supra* note 78, at 13.

90. *See, e.g.*, Brief of Amici Curiae Professor Erwin Chemerinsky et al., *supra* note 57, at 27–28 (discussing the potentially negative impact of secrecy on national security); Chemerinsky, *The Assault on the Constitution*, *supra* note 78, at 20 (“[T]here is no reason to believe that the country has been made any safer by the loss of liberty.”).

91. *Clinton v. City of New York*, 524 U.S. 417, 449 (1998) (Kennedy, J., concurring).

92. Stephen G. Breyer, Assoc. Justice, U.S. Supreme Court, Address to the Association of the Bar of the City of New York: Liberty, Security, and the Courts (Apr. 14, 2003), available at [http://www.supremecourtus.gov/publicinfo/speeches/sp\\_04-15-03.html](http://www.supremecourtus.gov/publicinfo/speeches/sp_04-15-03.html).

## V. TWO MODELS FOR FUTURE STATE-SECRETS CASES

The operation of the state-secrets privilege in the context of the warrantless surveillance and extraordinary rendition cases being litigated after September 11 threatens the integrity of the structural and theoretical principles that define our system of open, constitutional government. The state-secrets privilege's shaky, common-law roots in the *Reynolds* case—its legacy tarnished by the Supreme Court's reliance upon governmental misrepresentations about secrecy and national security—combined with its modern-day application in cases arising out of September 11 and the War on Terror—cases in which patently unconstitutional behavior on the part of the government is alleged—reveal its tendency to clash with central constitutional values and protections. Federal courts are therefore in need of a realistic way to rein in the privilege while still having the flexibility to accommodate the government's legitimate and sincere security concerns. Two cases—*Hepting v. AT&T Corp.* and *In re United States*—serve as examples of a better approach to the state-secrets privilege in the context of War on Terror-related issues for both cases successfully accommodate the security needs of the government without comprising the protections of the Constitution.

### A. *Hepting v. AT&T Corporation*

In *Hepting I*, the U.S. District Court for the Northern District of California took the first step in handling the government's claim of privilege with a critical and prudent scrutiny, seeking to verify the propriety and scope of the government's claim and to balance the parties' competing interests.<sup>93</sup> The court first decided that it was necessary that the judge inspect the classified documents at issue to determine whether and

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93. Cf. Brief of Amici Curiae Professor Erwin Chemerinsky et al., *supra* note 57, at 25–26. Professor Chemerinsky justifies the *Hepting* court's balancing approach to the state-secrets privilege as follows:

[A]lthough the case law interpreting the privilege does not empower courts to balance the competing interests, that does not relieve courts of their independent authority—and, given the absolute nature of the privilege, responsibility—to scrutinize governmental claims to the privilege with as much rigor as is possible, under the circumstances. That is all that Judge Walker did below.

Any less-rigorous standard would risk turning the state secrets privilege into an automatic shield for unlawful governmental action, an outcome the Supreme Court pointedly and emphatically rejected in *Reynolds*.

*Id.*; see also Brief of Amici Curiae National Security Archive, Project on Government Oversight, Project on Government Secrecy, Public Citizen, Inc. and the Rutherford Institute in Support of Affirmance and *Hepting* and *Al-Haramain* at 6, *Hepting v. AT&T Corp.*, Nos. 06-17132, 06-17137, 06-36083 (9th Cir. May 7, 2007), 2007 WL 1766484 (similarly arguing that the state-secrets privilege requires independent judicial balancing to prevent the privilege from enabling the government to shield unconstitutional programs from judicial scrutiny).

to what extent the state-secrets privilege applied.<sup>94</sup> The court further noted that “[a]lthough *ex parte, in camera* review is extraordinary, this form of review is the norm when state secrets are at issue.”<sup>95</sup> It is significant that the Northern District of California insisted on conducting *in camera* review of the purportedly classified documents<sup>96</sup> rather than accepting the government’s claim of privilege and of potential hazard to national security at face value. The judge is able to provide for judicial procedures that protect against widespread dissemination of the information (to the public, the press, or terrorists) while conducting the necessary review. In doing so, the judge remains respectful of the government’s often-legitimate need for secrecy for purposes of military affairs and national security while also remaining mindful of the government’s policy-driven motives for fabrication. This approach allows the court to weed out dishonest or misrepresented claims of executive privilege, while still having the leeway to grant the privilege when precluding discovery or barring the door to the courthouse is indeed appropriate.

The *Hepting I* court adopted a second positive approach to the government’s claim of state-secrets privilege: it sought to balance the interests of the parties.<sup>97</sup> Robert M. Chesney has explained it in the following terms:

The state secrets privilege as it currently stands strikes a balance among security, justice for individual litigants, and democratic accountability that is tilted sharply in favor of security, tolerating almost no risk to that value despite the costs to the competing concerns. This is understandable and appropriate in at least some contexts, but where the legality of government conduct is itself at issue, it may be appropriate to explore other solutions to the secrecy dilemma.<sup>98</sup>

The procedures and point of view embraced in *Hepting* provide such a solution. Rather than favoring the government’s security needs without evaluation or scrutiny, any privilege received by the government is, thus, the result of a balanced and searching judicial inquiry that weighs the public, private, and governmental interests involved.

Though markedly less deferential, the approach taken by the *Hepting I* court is arguably in line with the *Reynolds* design. The *Reynolds* Court emphasized that “[t]oo much judicial inquiry into the claim of privilege would force disclosure of the thing the privilege was meant to

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94. *Hepting I*, No. C-06-672 VRW, 2006 WL 1581965, at \*1 (N.D. Cal. June 6, 2006).

95. *Id.* at \*3.

96. The government claimed that these classified documents contained information about “sources and methods” and “intelligence activities.” *Id.* at \*1.

97. *Id.* at \*4.

98. See Chesney, *State Secrets*, *supra* note 10, at 1314.

protect, while a complete abandonment of judicial control would lead to intolerable abuses.”<sup>99</sup> Ex parte, in camera review of classified documents enables a court to prevent abuses—such as calling upon the privilege to protect unconstitutional, governmental programs—by maintaining judicial control over the government’s assertion of the state-secrets privilege, while still protecting against public disclosure of any national security or military secrets the documents may contain.

Although the *Reynolds* Court also noted that it would “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>100</sup> history has shown that the Court may have placed too much faith in the word of governmental officials. Allowing the judge to take an involved, probing, and less deferential role in the approval of the government’s claim of privilege also allows the judge—with minimal threat to national security because only the judge views the purportedly privileged information—to better ensure that the government is not abusing the state-secrets privilege and is not proffering false information to the court.

The *Hepting II* case tackles the state-secrets privilege in a similar, nondeferential way.<sup>101</sup> The case speaks to the limits of the state-secrets privilege and to the nature of the judicial role in context of the privilege. The *Hepting II* court sought to place limits on the government’s assertion of the state-secrets privilege.<sup>102</sup> One way in which the court accomplished this goal was by refusing to dismiss the case on the basis of the privilege prior to the commencement of discovery.<sup>103</sup> Because of public disclosures<sup>104</sup> regarding the surveillance program made by both the government and AT&T, the court was unable to conclude that “merely maintaining” the action would create a “‘reasonable danger’ of harming national security.”<sup>105</sup> The court further noted that “the government . . . opened the door for judicial inquiry by publicly confirming and denying material information about its monitoring of communication content.”<sup>106</sup> The fact that the defendants had made public disclosures regarding the

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99. *United States v. Reynolds*, 345 U.S. 1, 8 (1953).

100. *Id.* at 10.

101. *See Hepting II*, 439 F. Supp. 2d 974 (N.D. Cal. 2006).

102. *See id.* at 995 (“[I]t is important to note that even the state secrets privilege has its limits.”).

103. *See id.* at 994–95.

104. *See id.* at 991–98. The court noted that AT&T and the government have essentially disclosed that AT&T assists the government in monitoring communications. *See id.* at 991–92. The government additionally admitted the existence of a “terrorist surveillance program” that operates without warrants. *See id.* at 992.

105. *Id.* at 994.

106. *Id.* at 996.

program indicated to the court that the “very subject matter”<sup>107</sup> underlying Hepting’s action was not a state secret.<sup>108</sup>

Thus, the Northern District of California effectively assessed the government’s claim of state-secrets privilege by conducting a two-step review. First, the court reviewed classified materials in camera to determine whether the privilege applied and to determine what interests the claim of privilege implicated. Second, the court analyzed whether the subject matter of the action was indeed a state secret. In determining that it was not, the court thus allowed the case to proceed to discovery, noting that the privilege would be further assessed in light of the facts that surfaced during the process.<sup>109</sup>

The court appropriately refused to dismiss the entire case on the sole basis of the state-secrets privilege,<sup>110</sup> remarking that “[t]he 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>111</sup> The *Hepting II* case thus makes another extremely important point relevant to the legal issues deriving from the War on Terror: the court emphasized the special context underlying Hepting’s allegations against AT&T and the United States—an arguably illegal, systematic program of warrantless surveillance that intrudes upon the constitutional rights of individuals.<sup>112</sup> Both the *Hepting* and *El-Masri* cases deal with allegations of grave violations of constitutional and individual rights. Because the Northern District of California applied the state-secrets privilege in a way that enabled the *Hepting* case to move forward into discovery, the plaintiffs have a chance to vindicate violations of their constitutional and statutory rights. When the Eastern District of Virginia and Fourth Circuit dismissed *El-Masri*’s case, however, he was left without a remedy for his injuries in the U.S. court system, and any constitutional violations committed by the government went unpunished.

Finally, the Northern District of California in *Hepting II* adopted an

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107. *Id.* at 993 (citing *Kasza v. Browner*, 133 F.3d 1159, 1170 (9th Cir. 1998)) (stating that “[t]he court must . . . dismiss this case if ‘the very subject matter of the action’ is a state secret and therefore ‘any further proceeding . . . would jeopardize national security.’”).

108. *Id.* at 994 (“[T]he very subject matter of this action is hardly a secret.”).

109. *See id.* at 994–95.

110. *Id.* at 1011.

111. *Id.* at 995.

112. *See id.* at 978–79. The plaintiffs claimed that AT&T collaborated with the NSA in a “massive warrantless surveillance program that illegally tracks the domestic and foreign communications and communication records of millions of Americans.” *Id.* at 978. The plaintiffs claimed violations of the First and Fourth Amendments and several statutes regulating electronic surveillance and communications. *Id.* at 978–79. Likewise, the allegations made in the *El-Masri* case also suggest the existence of an illegal governmental program of extraordinary rendition. *See El-Masri I*, 437 F. Supp. 2d 530, 532–34 (E.D. Va. 2006).

encouraging stance on the role of the federal courts, noting that “[w]hile the court recognizes and respects the executive’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.”<sup>113</sup> Accordingly, the *Hepting* court remained faithful to the role of the courts to decide cases and interpret the law, acting as a check against the abuse of power by a coequal branch. The Northern District of California’s approach to the state-secrets privilege thus not only allowed it to give credence to the government’s need for confidentiality in the realm of national security without tolerating abuse of the privilege by the Executive, but also demonstrates an attempt to maintain judicial integrity and to uphold notions of separation of powers.

### B. *In re United States*

*In re United States*,<sup>114</sup> a 1989 case out of the D.C. Circuit, likewise adopted a favorable approach to the government’s claim of the state-secrets privilege. The wife of a deceased member of the Communist Party of the United States of America brought suit under the Federal Tort Claims Act against the United States, alleging injuries to herself and her husband from intelligence activities conducted by the Federal Bureau of Investigation from 1950 to 1964.<sup>115</sup> At the district court level, the government filed a motion to dismiss the case on the basis of the state-secrets privilege,<sup>116</sup> refusing to answer the complaint or participate in discovery.<sup>117</sup> The district court denied the motion and ordered the government to answer the complaint.<sup>118</sup> The government proceeded to petition the D.C. Circuit for a writ of mandamus, asking the court to recognize the applicability of the state-secrets privilege and to order the district court to dismiss the case.<sup>119</sup> The D.C. Circuit characterized the case as follows:

Through the extraordinary means of a petition for mandamus, the Government urges us to direct the district court to dismiss the plaintiff’s complaint merely on the basis of its unilateral assertion that privileged information lies at the core of this case, which affects both the plaintiff’s ability to establish her claims and the government’s

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113. *Hepting II*, 439 F. Supp. 2d at 995.

114. 872 F.2d 472 (D.C. Cir. 1989).

115. *Id.* at 473.

116. *Id.* at 473–74. The government claimed that “continuation of plaintiff’s action [would] inevitably result in disclosure of information that [would] compromise current foreign intelligence and counterintelligence investigative activities, [would] reveal confidential sources and methods, and [would] damage sensitive diplomatic relations with other nations.” *Id.* at 478.

117. *Id.* at 473.

118. *Id.* at 474.

119. *Id.*



ability to defend itself.<sup>120</sup>

The court accordingly denied the government's petition for mandamus and affirmed the lower court's decision to allow the case to proceed to discovery,<sup>121</sup> disfavoring the outright dismissal of a suit at the behest of the government. The court remarked that "[d]ismissal of a suit, and the consequent denial of a forum without giving the plaintiff her day in court . . . is indeed draconian. '[D]enial of the forum provided under the Constitution for the resolution of disputes is a drastic remedy that has rarely been invoked.'"<sup>122</sup> Rather than dismissing the plaintiff's case from the start, the district court decided to conduct "an item-by-item determination" of the applicability of the state-secrets privilege.<sup>123</sup> The D.C. Circuit thus supported the district court's analysis of the state-secrets privilege and its conclusion that by exercising control over any sensitive evidence, the litigation could proceed without jeopardizing national security.<sup>124</sup>

The D.C. Circuit also advocated a limited state-secrets privilege, arguing that "[b]ecause evidentiary privileges by their very nature hinder the ascertainment of truth, and may even torpedo it entirely, their exercise should in every instance be limited to their narrowest purpose."<sup>125</sup> This is significant in the context of cases involving the War on Terror for the government can use the privilege in an attempt to conceal the truth about the warrantless surveillance and extraordinary rendition programs from the judiciary, Congress, and the public. Finally, like the *Hepting* court, the D.C. Circuit considered the validity of the government's claim of privilege, noting that it could not "reasonably determine merely on the basis of [an] *in camera* affidavit that evidence of the Government's activities of twenty to thirty years ago will result in the disclosure of state secrets today."<sup>126</sup>

Similar to the *Hepting* case, *In re United States* constitutes another nondeferential treatment of the state-secrets privilege that can function

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120. *Id.* at 477.

121. *Id.* at 474.

122. *Id.* at 477 (citing *Fitzgerald v. Penthouse Int'l, Ltd.*, 776 F.2d 1236, 1242 (4th Cir. 1985)).

123. *Id.* at 478. The district court conducted an *in camera* review of a classified affidavit and opted to consider and apply the state-secrets privilege on a piecemeal basis for the following reasons. First, the court held that the "very subject matter" of the litigation was not a state secret. *Id.* Instead, the suit challenged the government's conduct and technique with respect to certain investigations. Second, it decided that it was inappropriate to apply the evidentiary privilege to the disputed information before the relevancy of that information had been determined. *Id.* *In re United States* thus supplies additional support for the argument that cases involving the state-secrets privilege—especially cases claiming violations of individual or constitutional rights—should be permitted to proceed to discovery.

124. *Id.*

125. *Id.* at 478–79 (internal quotation marks omitted).

126. *Id.* at 479.

as a model for future courts. Eschewing the Executive's unilateral assertion of secrecy, the D.C. Circuit allowed the case to proceed to discovery, indicating disapproval of the premature dismissal of a case on the basis of an unsubstantiated claim of governmental secrecy. Like *Hepting*, the court suggested procedural protections to balance competing interests and accommodate the government's need for discretion, scrutinizing the government's claim of secrecy to ensure that it warrants a grant of privilege. Significantly, the D.C. Circuit projected an interest in protecting and preserving the judiciary's search for truth—an interest that is necessary to the proper functioning of the judiciary.

## VI. CONCLUSION

The issues in dispute in the *Hepting* and *El-Masri* cases go to the heart of American constitutional law and raise concerns about the current administration's esteem for individual rights and constitutional values. The state-secrets privilege has come to play a central role in the litigation of these and other cases, yet the privilege is burdened with foundational and constitutional weaknesses. These weaknesses are amplified in the context of the War on Terror, a controversial executive undertaking permeated with accusations of misconduct and illegality, because the state-secrets privilege works not only to undermine notions of separation of powers and checks and balances, but also acts as an accomplice to the government's attempts to restrict constitutional and individual rights for the sake of national security.

The privilege permits, and even enables, the government to make misrepresentations to the courts and, thus, to wrongfully obstruct litigation and avoid accountability. By allowing for the outright dismissal of a case, the privilege not only leaves a plaintiff claiming victimization at the hands of the Executive without a remedy, but it also forecloses public debate and the possibility of forced change. It is, therefore, imperative that the judiciary look at the government's claim of state-secrets privilege with a critical eye in cases involving allegations of unconstitutional governmental conduct in connection with the War on Terror. At the same time, however, the legitimate need for national security and the ability of the Executive to act confidently, effectively, and genuinely in times of war and crisis indeed deserve respect and accommodation by the federal courts. As Justice Breyer has explained,

ultimately the courts must determine not only the absolute importance of the security interest, but also, and more importantly, its relative importance, i.e., its importance when examined through the Constitution's own legal lens—a lens that emphasizes the values that

a democratic society places upon individual human liberty.<sup>127</sup>

In line with that point of view, *Hepting* and *In re United States* provide an outline for how future courts can accommodate the needs of the government and balance competing interests without compromising individual liberties and rights. Meredith Fuchs suggests that “[s]ecrecy becomes a danger when it undermines the very values the government invokes it to protect: democratic self-government, informed debate, accountability, and security.”<sup>128</sup> The level of secrecy the state-secrets privilege affords to the Executive enables the Executive to abuse its power and erode the values, rights, and protections that define the American system of government and way of life. Such abuse of power divides the nation and hinders its ability to fight terrorism effectively because notions of freedom, justice, and open, democratic government must be observed stringently at home in order for others to struggle to adopt them abroad.

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127. Breyer, *supra* note 92.

128. *See* Fuchs, *supra* note 1, at 176.