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## State Secrets & Executive Accountability

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# STATE SECRETS AND EXECUTIVE ACCOUNTABILITY

*Christina E. Wells\**

## INTRODUCTION

Observers have criticized the state secrets privilege for some time. Although ostensibly a common law privilege designed to prevent disclosure of certain evidence potentially damaging to national security,<sup>1</sup> critics argue that it has morphed into a device by which the federal government maintains nearly total secrecy about its actions. It does so, they claim, because officials have convinced courts to defer to their argument that certain evidence must be suppressed<sup>2</sup> or, more invidiously, because officials have convinced courts to dispose of lawsuits altogether, prior to discovery occurring at all.<sup>3</sup> As a result, critics argue that improper use of the privilege interferes with constitutional and statutory rights,<sup>4</sup> prevents public scrutiny of the government's

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\* Enoch H. Crowder Professor of Law, University of Missouri School of Law. Thanks to Bryan Utter who provided valuable research for the essay. I am also grateful to Heidi Kitrosser who organized the symposium and offered valuable insights on the essay. Finally, I want to thank the participants of the University of Kansas School of Law "National Security and Individual Liberty" symposium, at which an earlier version of this essay was presented.

1. See, e.g., *United States v. Reynolds*, 345 U.S. 1, 6–7 (1953) (discussing the "well-established . . . privilege against revealing military secrets").

2. See, e.g., LOUIS FISHER, IN THE NAME OF NATIONAL SECURITY: UNCHECKED POWER AND THE *REYNOLDS* CASE 257 (2006); Paul M. Schwartz, *Warrantless Wiretapping, FISA Reform and the Lessons of Public Liberty: A Comment on Holmes's Jorde Lecture*, 97 CAL. L. REV. 407, 429 (2009); William G. Weaver & Robert M. Pallitto, *State Secrets and Executive Power*, 120 POL. SCI. Q. 85, 101 (2005); Rita Glasionov, Note, *In Furtherance of Transparency and Litigants' Rights: Reforming the State Secrets Privilege*, 77 GEO. WASH. L. REV. 458, 460 (2009); Aziz Huq, *Dangerous Discretion, State Secrets, and the El-Masri Rendition Case*, JURIST, Mar. 12, 2007, [http://www.brennancenter.org/content/resource/dangerous\\_discretion\\_state\\_secrets\\_and\\_the\\_el\\_masri\\_rendition\\_case/](http://www.brennancenter.org/content/resource/dangerous_discretion_state_secrets_and_the_el_masri_rendition_case/).

3. See, e.g., Amanda Frost, *The State Secrets Privilege and Separation of Powers*, 75 FORDHAM L. REV. 1931, 1939–40 (2007); Huq, *supra* note 2; Carrie Newton Lyons, *The State Secrets Privilege: Expanding Its Scope Through Government Misuse*, 11 LEWIS & CLARK L. REV. 99, 117–22 (2007); D.A. Jeremy Telman, *Our Very Privileged Executive: Why the Judiciary Can (and Should) Fix the State Secrets Privilege*, 80 TEMP. L. REV. 499, 500 (2007).

4. See Lyons, *supra* note 3, at 123 (arguing that the misuse of the privilege frees

actions,<sup>5</sup> and harms our system of separated powers because courts abdicate their role as a check on executive action.<sup>6</sup>

Critics of the Bush Administration also argued that it invoked the privilege with greater frequency and to more draconian effect than previous administrations.<sup>7</sup> Specifically, Bush officials sought dismissal of entire lawsuits claiming that the subject matter of the lawsuit was itself a state secret.<sup>8</sup> Substantial debate exists regarding the precise nature of the Bush Administration's use of the privilege.<sup>9</sup> Nevertheless, the

the government of the consequences of its statutory and constitutional violations); Weaver & Pallitto, *supra* note 2, at 90–91 (listing instances in which the privilege prevented citizen litigation).

5. See Richard Abel, *Forecasting Civil Litigation*, 58 DEPAUL L. REV. 425, 436 (2009) (“The imperial Bush presidency has invoked doctrines of executive privilege, state secrets, and sovereign immunity to defeat efforts to expose and punish its illegal acts.”); Neil Kinkopf, *The State Secrets Problem: Can Congress Fix It?*, 80 TEMP. L. REV. 489, 492 (2007) (noting that the government may avoid public accountability when litigants are unable to maintain their lawsuits); Lyons, *supra* note 3, at 126 (arguing that misuse of the privilege interferes with the “public rights” that allow people to serve “as a watchdog on the government”).

6. See Brief of Professors of Constitutional Law, Federal Jurisdiction, and Foreign Relations Law as Amici Curiae in Support of Mohamed and Urging Reversal at 1, *Mohamed v. Jeppesen Dataplan, Inc.*, 586 F.3d 1108 (9th Cir. 2008) (No. 08-15693), 2008 WL 6042363 (arguing that broad construction of the privilege “risks infringing upon . . . the proper separation of powers”); Frost, *supra* note 3, at 1950–58 (attempting to dismiss entire lawsuits interferes with the constitutional structure of government and the courts’ role as a check on executive power); Weaver & Pallitto, *supra* note 2, at 88–90 (excessive secrecy and misuse of privilege poses a threat to democracy); Huq, *supra* note 2 (arguing that courts should play a role in important debates over assertions of government power).

7. See 154 CONG. REC. S198-02 (daily ed. Jan. 23, 2008) (statement of Sen. Kennedy) (“[T]he Bush administration has raised the privilege in over 25 percent more cases per year than previous administrations and has sought dismissal in over 90 percent more cases.”); see also FISHER, *supra* note 2, at 245; Weaver & Pallitto, *supra* note 2, at 101–02.

8. See, e.g., *El-Masri v. United States*, 479 F.3d 296, 310 (4th Cir. 2007) (dismissing plaintiff’s constitutional and statutory claims based on his alleged torture and rendition because “virtually any conceivable response to El-Masri’s allegations would disclose privileged information”); *Mohamed v. Jeppesen Dataplan, Inc.*, 539 F. Supp. 2d 1128, 1136 (N.D. Cal. 2008) (dismissing plaintiffs’ statutory claims because the core of their case involved “allegations’ of covert U.S. military or CIA operations in foreign countries against foreign nationals—clearly a subject matter which is a state secret”), *rev’d* 563 F.3d 992 (9th Cir. 2009), *amended by* 579 F.3d 943 (9th Cir. 2009), *reh’g en banc granted*, 586 F.3d 1108 (9th Cir. 2009).

As this article was going to press, the Ninth Circuit issued an en banc decision affirming the district court’s dismissal of the plaintiff’s complaint. See *Mohamed v. Jeppesen Dataplan, Inc.*, \_\_\_ F.3d \_\_\_, 2010 WL 3489913 (9th Cir. Sept. 8, 2010). Later citations will not reflect the en banc decision.

9. Professor Chesney, after surveying published cases since Reynolds, questions whether Bush Administration officials asserted the privilege significantly more than officials in previous decades. Robert Chesney, *State Secrets and the Limits of National Security Litigation*, 75 GEO. WASH. L. REV. 1249, 1299–1308 (2008) (finding a somewhat steady, although non-linear increase in assertions in decades from 1950 through the early

Administration's tendency to assert the privilege in high profile lawsuits challenging the constitutionality of terrorism-related programs, such as the renditions of individuals to other countries<sup>10</sup> or the warrantless surveillance of citizens' telephone calls,<sup>11</sup> added to its growing public image as excessively secretive.<sup>12</sup>

Detractors of the Bush Administration thus looked expectantly to the Obama Administration for change. In the beginning, there was reason for hope. During the presidential campaign, Obama criticized the Bush Administration for "ignor[ing] public disclosure rules" and invoking the state secrets privilege "more than any other previous administration to get cases thrown out of civil court."<sup>13</sup> Nevertheless, in early 2009, the Obama Administration disappointed critics of the state secrets privilege by defending or extending the Bush Administration's assertions of the privilege.<sup>14</sup> Although the Obama

2000s); see also FISHER, *supra* note 2, at 212 (noting that increased assertion of the privilege, "[a] trend well in place before the terrorist attacks of September 11, 2001, has been on an upward climb"). Other scholars, however, argue that the Bush Administration's use of the privilege outpaced the earlier increases. See Laura Donohue, *The Shadow of State Secrets*, 159 U. PA. L. REV. (forthcoming 2010); Frost, *supra* note 3, at 1939; PATRICE MCDERMOTT & AMY FULLER, OPENTHEGOVERNMENT.ORG, *SECURITY REPORT CARD 2008*, at 20 (2008), <http://www.openthegovernment.org/otg/SecrecyReportCard08.pdf>. They also argue that the Bush Administration has used the privilege qualitatively differently than earlier administrations, invoking it to dismiss lawsuits. Frost, *supra* note 3, at 1939; Telman, *supra* note 3, at 522; see also *infra* Part I.C.

10. See *supra* note 8; see also Note, *Compensating Victims of Wrongful Detention, Torture, and Abuse in the U.S. War on Terror*, 122 HARV. L. REV. 1158, 1163 (2009) ("So far, the government has invoked the state secrets privilege primarily in rendition cases, and the courts have been manifestly deferential.").

11. See, e.g., *AI-Haramain Islamic Found., Inc. v. Bush*, 451 F. Supp. 2d 1215, 1218 (D. Or. 2006), *rev'd*, 507 F.3d 1190 (9th Cir. 2007); *ACLU v. Nat'l Sec. Agency*, 438 F. Supp. 2d 754, 758-60 (E.D. Mich. 2006), *vacated*, 493 F.3d 644 (6th Cir. 2007); *Hepting v. AT&T Corp.*, 439 F. Supp. 2d 974, 978-80 (N.D. Cal. 2006).

12. For discussion of secrecy during the Bush Administration, see Meredith Fuchs, *Judging Secrets: The Role Courts Should Play in Preventing Unnecessary Secrecy*, 58 ADMIN. L. REV. 131, 132-37 (2006); Weaver & Pallitto, *supra* note 2, at 85-86; Christina E. Wells, "National Security" *Information and the Freedom of Information Act*, 56 ADMIN. L. REV. 1195, 1199-1202 (2004).

13. See Glenn Greenwald, *The 180-Degree Reversal of Obama's State Secrets Position*, SALON.COM, Feb. 10, 2009, <http://www.salon.com/opinion/greenwald/2009/02/10/obama/> (quoting the Obama/Biden campaign website).

14. See John Schwartz, *Obama Backs off a Reversal on Secrets*, N.Y. TIMES, Feb. 9, 2009, <http://www.nytimes.com/2009/02/10/us/10torture.html> (discussing the oral argument in *Mohamed v. Jeppesen Dataplan, Inc.*); Electronic Frontier Foundation, *Obama Administration Embraces Bush Position on Warrantless Wiretapping and Secrecy*, Apr. 6, 2009, <http://www EFF.org/press/archives/2009/04/05> (discussing the Obama administration's assertion of the privilege in *Jewel v. Nat'l Sec. Agency*); Press Release, U.S. Dep't of Justice, Statement of Attorney General Eric Holder on Assertion of the State Secrets Privilege in *Shubert v. Obama* (Oct. 30, 2009), available at <http://www.justice.gov/ag/testimony/2009/ag-testimony-091030.html>; Government Defendants' Notice

Administration argued it had carefully reviewed earlier assertions of the privilege, invoking it “only when necessary and in the most appropriate cases,”<sup>15</sup> critics were unappeased. Soon thereafter, President Obama promised to reform executive use of the privilege,<sup>16</sup> and in September 2009 the Justice Department announced a new policy regarding the state secrets privilege.<sup>17</sup> That policy established evidentiary and harm requirements prior to assertion of the privilege, a principle of allowing cases to move forward after assertion of the privilege except in exceptional circumstances, and multiple layers of internal review for each assertion.<sup>18</sup> Attorney General Holder stated that the policy was designed to “provide greater accountability and reliability in the invocation of the state secrets privilege” and to “strengthen public confidence [in the] U.S. government.”<sup>19</sup>

The Obama policy is surely a response to the privilege’s critics, whose arguments raise the specter of unaccountable officials run amok. The Administration’s vision of accountability, however, departs from traditional notions of political accountability that dominate legal discourse.<sup>20</sup> Political accountability has generally meant “vesting of ultimate decisional authority in a person who is elected.”<sup>21</sup> Accordingly,

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of Motion & Motion to Dismiss & for Summary Judgment at 12–21, *Jewel v. Nat’l Sec. Admin.*, No. C:08-cv-4373-VRW (N.D. Cal. June 25, 2009), available at <http://www.eff.org/files/filenode/jewel/jewelmtdobama.pdf> (asserting the privilege in response to a lawsuit pertaining to National Security Agency wiretapping); Government Defendants’ Notice of Renewed Motion to Dismiss & For Summary Judgment & Memorandum in Support at 4–9, *Shubert v. Obama*, No. M:06-cv-01791-VRW (Dec. 15, 2009), available at <http://www.fas.org/sgp/jud/statesec/shubert103009.pdf> (asserting the privilege in another National Security Agency wiretapping case); Petition for Rehearing or Rehearing *En Banc*, *Mohamed v. Jeppesen Dataplan, Inc.*, 563 F.3d 992 (9th Cir. 2009) (No. 08-15693) (asserting the privilege in a rendition lawsuit); available at <http://www.ca9.uscourts.gov/datastore/uploads/enbanc/08-15693.pfr.pdf>.

15. See Schwartz, *supra* note 14.

16. See Kevin Poulsen, *Obama: State Secrets Privilege is “Overbroad,”* WIRED, Apr. 30, 2009, <http://www.wired.com/threatlevel/2009/04/obama-state-secrets-privilege-is-overbroad/>.

17. Press Release, U.S. Dep’t of Justice, Attorney General Establishes New State Secrets Policies and Procedures, (Sept. 23, 2009), <http://www.justice.gov/opa/pr/2009/September/09-ag-1013.html>.

18. See Memorandum from Attorney Gen. Eric Holder to Heads of Executive Dep’ts and Agencies and Heads of Dep’t Components 1 (Sept. 23, 2009), available at <http://www.justice.gov/opa/documents/state-secret-privileges.pdf> [hereinafter Holder Memorandum]; see also *infra* Part II.A.

19. Holder Memorandum, *supra* note 18, at 1.

20. Glen Staszewski, *Reason-Giving and Accountability*, 93 MINN. L. REV. 1253, 1256–64 (2009).

21. Peter M. Shane, *Political Accountability in a System of Checks and Balances: The Case of Presidential Review of Rulemaking*, 48 ARK. L. REV. 161, 196 (1994); see also Rebecca Brown, *Accountability, Liberty and the Constitution*, 98 COLUM. L. REV. 531,

an official is accountable because she can be voted out of office (or is answerable to an elected official, such as the President). Accountability, however, has many different meanings and the Obama policy embraces a concept quite different from political accountability. Specifically, it adopts what this essay terms “explanatory accountability.” That is, by forcing more thoughtful, evaluative invocation of the privilege, the Obama policy requires executive officials to explain and justify their privilege assertions.<sup>22</sup>

Unlike political accountability, which simply assumes officials are accountable because they are “selected and potentially removed from office by the voters,”<sup>23</sup> explanatory accountability involves the expectation that officials might *actually* be asked to justify their particular policy decisions to others or face negative consequences.<sup>24</sup> Explanatory accountability thus involves accountability on a day-to-day basis and in the context of specific relationships and decisions. Although scholars have focused less on this aspect of accountability, it is nonetheless important in checking official action,<sup>25</sup> as the Obama Administration recognizes by attempting to establish an explanatory accountability mechanism regarding the state secrets doctrine.

To the extent that the Obama policy requires officials to justify assertions of the privilege, it shows promise. Psychological research on accountability reveals that individuals who believe they will be held accountable generally reach better-reasoned

533 (1998); Edward Rubin, *The Myth of Accountability and the Anti-Administrative Impulse*, 103 MICH. L. REV. 2073, 2073 (2005); Staszewski, *supra* note 20, at 1256.

22. Professor Staszewski has coined the term “deliberative accountability” to distinguish between political accountability and his notion of accountability as requiring “reason giving.” Our notions of explanatory and deliberative accountability overlap significantly. However, since we come at them from different starting points and via different lenses, I use a different term to emphasize their somewhat different outlooks.

23. Staszewski, *supra* note 20, at 1254.

24. Jennifer S. Lerner & Philip E. Tetlock, *Accounting for the Effects of Accountability*, 125 PSYCHOL. BULL. 255, 255 (1999); *see also* Rubin, *supra* note 21, at 2119 (“As used in ordinary language, accountability refers to the ability of one actor to demand an explanation or justification of another actor for its actions and to reward or punish that second actor on the basis of its performance or its explanation.”).

25. *See, e.g.*, Rubin, *supra* note 21, at 2120 (discussing the role this notion of accountability plays in an administrative state); Staszewski, *supra* note 20, at 1254 (“[V]oters must be able to hold public officials accountable for their *specific policy choices* to ensure that those decisions are consistent with the preferences of a majority.”) (emphasis in original). For a discussion of different explanatory accountability mechanisms regarding government action, *see* Kathleen Clark, *The Architecture of Accountability: A Case Study of the Warrantless Surveillance Program*, 2010 BYU L. REV. (forthcoming).

decisions.<sup>26</sup> Administrative officials willing to ask hard questions of each other may, in fact, more thoughtfully assert the state secrets privilege. The question remains, however, whether the new policy will actually force those hard questions and serve as a mechanism of explanatory accountability. Unfortunately, the policy's standards are unlikely to force such hard questions, as they leave too much to official discretion. Thus, the policy likely will not achieve real accountability within the Administration.

Furthermore, the new policy provides no mechanism of explanatory accountability beyond the executive branch. It never proposes to do in an actual courtroom any of the things arguably required of officials within the executive branch—i.e., prove a significant harm to national security, share evidence of such harm, or engage in detailed description of the harm. Courts cannot discern whether a privilege assertion is justified if executive officials are not required to justify it in detail. Furthermore, under existing court standards, it is unlikely that courts can, or will, routinely force explanatory accountability. Court treatment of the privilege has been notoriously squishy and deferential and judges are inconsistent, at best, in reviewing privilege assertions. The Obama policy is unlikely to improve executive assertions of the privilege absent a change in the courts' approach to the privilege. In fact, the Obama Administration's recent privilege assertions suggest as much.

Section I of this Essay reviews the state secrets privilege, focusing first on the Supreme Court's recognition of it in *United States v. Reynolds*,<sup>27</sup> and then on its subsequent application in the lower courts. Section I specifically discusses some of the common problems associated with *Reynolds*' formulation of the privilege. Section II discusses explanatory accountability and the extent to which the Obama policy is both promising and falls short as a mechanism of such accountability. Section III then explains why the Obama policy cannot serve as an adequate accountability mechanism. Nothing in the policy compels Administration cooperation with courts once the state secrets privilege is asserted. Moreover, the current iteration of the state

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26. Lerner & Tetlock, *supra* note 24, at 263; *see also* discussion *infra* Part II.B.

27. 345 U.S. 1 (1953). *Reynolds* is the first case to explicitly recognize the privilege, but courts often locate its roots as far back as the trial of Aaron Burr in 1807. *See, e.g., In re United States*, 872 F.2d 47 (D.C. Cir. 1989); *Hepting v. AT&T Corp.*, 439 F. Supp. 2d 974, 980 (N.D. Cal. 2006). *See generally* FISHER, *supra* note 2, at 212–24; Holly Wells, Note, *The State Secrets Privilege: Overuse Causing Unintended Consequences*, 50 ARIZ. L. REV. 967, 972–73 (2008).

secrets doctrine does not give courts adequate tools to deem judicial review a consistent mechanism of accountability. This Section concludes, however, with a discussion of proposed congressional legislation that may improve judicial review as a mechanism of accountability in cases involving the state secrets privilege.

## I. THE STATE SECRETS PRIVILEGE

### A. *UNITED STATES V. REYNOLDS*

*Reynolds* involved a negligence lawsuit against the government after the deaths of three civilians in an Air Force plane crash. Their families sought discovery of the official accident report and statements of surviving crew members, material over which the government asserted a privilege against disclosure because the plane was testing secret equipment at the time.<sup>28</sup> After refusing to produce the material despite the lower court's order, the government eventually appealed to the Supreme Court.<sup>29</sup> The Supreme Court recognized that the "privilege against revealing military secrets... [was] well-established in the law of evidence," but acknowledged that "judicial experience" with the privilege had been limited.<sup>30</sup> Nevertheless, available precedents suggested clear principles that "control[led] the application of the privilege."<sup>31</sup> First, the privilege belongs to the government and cannot be asserted by a private party.<sup>32</sup> Second, a department head must assert the

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28. 345 U.S. at 4–5.

29. After losing a motion to quash discovery of the material, the government refused to comply with the district court's order of production. The Air Force sent a letter to the court stating that it would "not be in the public interest" to furnish the requested evidence. After opportunity for rehearing, in which the Air Force continued its refusal to furnish the report, but offered the three surviving crew members for examination, the district court again ordered production of the material. The Air Force refused and the court issued an order finding that "the facts on the issue of negligence would be taken as established in plaintiffs' favor." *Id.* The district court eventually entered judgment in the plaintiffs' favor. The court of appeals affirmed the district court. *Id.* at 5.

30. *Id.* at 6–7. Lower courts note that the privilege "extends to diplomatic and intelligence-gathering matters as well as military secrets." *Maxwell v. First Nat'l Bank of Md.*, 143 F.R.D. 590, 594 n.3 (D. Md. 1992); *see also* *Ellsberg v. Mitchell*, 709 F.2d 51, 57 (D.C. Cir. 1983); *Halkin v. Helms*, 690 F.2d 977, 990 (D.C. Cir. 1982).

31. *Reynolds*, 345 U.S. at 7.

32. *Id.* at 7–8. Accordingly, the privilege can be asserted not only in cases where the government is a party, but also in civil cases between private parties where the government intervenes to assert the privilege. *See, e.g.,* *Mohamed v. Jeppesen Dataplan, Inc.*, 539 F. Supp. 2d 1128 (N.D. Cal. 2008), *rev'd*, 563 F.3d 992 (9th Cir. 2009), *amended by* 579 F.3d 943 (9th Cir. 2009), *reh'g en banc granted*, 586 F.3d 1108 (9th Cir. 2009);



privilege, and then only after personal consideration of the matter to be disclosed.<sup>33</sup>

Other than these clear principles, however, the Court described the remainder of the privilege as a “formula of compromise.”<sup>34</sup> On the one hand, the privilege is “not to be lightly invoked.”<sup>35</sup> The Court further rejected the argument that judges were powerless to interfere with executive privilege assertions.<sup>36</sup> “[J]udicial control over the evidence,” the Court noted, “cannot be abdicated to the caprice of executive officers.”<sup>37</sup> Rather, judges are the final arbiters as to “whether the circumstances are appropriate for the claim of privilege.”<sup>38</sup>

On the other hand, courts should review privilege assertions “without forcing a disclosure of the very thing the privilege is designed to protect.”<sup>39</sup> Accordingly, lower courts should not automatically require *in camera* review of arguably privileged information. Rather, if “all the circumstances of the case” convince a judge that compelled disclosure of evidence poses a “reasonable danger . . . to national security . . . 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.”<sup>40</sup>

In addition, the Court found that a judge’s scrutiny of the privilege varies depending upon the litigant’s need for the information:

In each case, the showing of necessity . . . will determine how far the court should probe in satisfying itself that the occasion for invoking the privilege is appropriate. Where there is a

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DTM Research, L.L.C. v. AT&T Corp., 245 F.3d 327 (4th Cir. 2001).

33. *Reynolds*, 345 U.S. at 7–8.

34. *Id.* at 9.

35. *Id.* at 7. The Court designed its requirements to limit the assertion of the privilege to department heads based on personal consideration. *See, e.g.*, Nat’l Lawyers Guild v. Attorney Gen., 96 F.R.D. 390, 396 (S.D.N.Y. 1982) (noting that the purpose of the requirements is “to insure that the privilege is claimed by someone in the executive branch with sufficient authority and responsibility so that the court can rely upon his judgment that the claim was prudently invoked”).

36. 345 U.S. at 6. The government argued that forced disclosure would cause “unwarranted interference with the powers of the executive . . . to choose whether to disclose public documents contrary to the public interest.” Brief for the United States at 8–9, *Reynolds*, 345 U.S. 1 (1953) (No. 21).

37. 345 U.S. at 9–10. The Court analogized to the privilege against self-incrimination when it noted that “complete abandonment of judicial control would lead to intolerable abuses.” *Id.* at 8.

38. *Id.* at 8.

39. *Id.*

40. *Id.* at 10.

strong showing of necessity, the claim of privilege should not be lightly accepted, but even the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that military secrets are at stake.<sup>41</sup>

Applying this scrutiny, the *Reynold's* Court, without reviewing the accident report, found assertion of the privilege appropriate in light of the danger that the report "would contain references to the secret electronic equipment,"<sup>42</sup> and because of plaintiffs' minimal need for the information.<sup>43</sup>

### B. APPLICATION IN THE LOWER COURTS

Lower courts vary in their approaches to *Reynolds'* "formula of compromise." Some take seriously *Reynolds'* command that the privilege is "not to be lightly invoked" and engage in searching scrutiny of the privilege assertion. Others, however, are quite deferential to assertions of the privilege, requiring only minimal showings. The latter practice has been especially criticized.

Courts engaging in searching scrutiny view *Reynolds* as requiring the government to disentangle sensitive and non-sensitive information so that the latter can be released.<sup>44</sup> In addition, such courts are more likely to use *in camera* review of evidence to determine whether the government's assertion is appropriate.<sup>45</sup> Some courts go as far as ruling that *in camera* review is obligatory in certain instances.<sup>46</sup> Courts engaging in

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41. *Id.* at 11. Courts emphasize that the litigant's need for the information applies only to the level of scrutiny applied to the privilege assertion—necessity for the information is not an issue once the court determines that the privilege applies. *See, e.g., Halkin v. Helms*, 690 F.2d 977, 990 (D.C. Cir. 1982) ("Although the courts in evaluating claims of the privilege may take cognizance of the need for the information demonstrated by the party seeking disclosure, such need is a factor only in determining the extent of the court's inquiry into the appropriateness of the claim.").

42. *Reynolds*, 345 U.S. at 10.

43. *Id.* at 11. The Court found that there was no evidence suggesting a link between the electronic equipment and the accident, and also that the government had offered access to the surviving crew members. *Id.*

44. *Hepting v. AT&T Corp.*, 439 F. Supp. 2d 974, 983 (N.D. Cal. 2006); *Linder v. Calero-Portocarrero*, 183 F.R.D. 314, 325 (D.D.C. 1998); *Jabara v. Kelly*, 75 F.R.D. 475, 492 (E.D. Mich. 1972).

45. *Hepting v. AT&T Corp.*, No. C-06-672, 2006 WL 1581965, at \*4 (N.D. Cal. June 6, 2006) (ordering *in camera* review to determine whether the state secret privilege applies); *Jabara*, 75 F.R.D. at 491-92 (discussing *in camera* review of evidence). Professor Chesney's review of all reported state secrets cases is especially helpful in determining the existence and scope of *in camera* review. *See Chesney, supra* note 9, at Appendix.

46. *Ellsberg v. Mitchell*, 709 F.2d 51, 59 n.37 (D.C. Cir. 1983) ("[W]hen a litigant must lose if the claim is upheld and the Government's assertions are dubious in view of the nature of the information requested and the circumstances surrounding the case,

active review also tend to view the privilege as evidentiary in nature and applicable only to specific pieces of evidence, rather than as a way to suppress all discovery or trigger dismissal of the lawsuit.<sup>47</sup>

Courts viewing the privilege expansively, however, treat privilege assertions with the “utmost deference” although the reasons for that deference differ.<sup>48</sup> At some level, the very nature of the Court’s “compromise” argues for deference. *Reynolds* allows courts to uphold privilege assertions after eschewing *in camera* review<sup>49</sup> based on little more than conclusory and self-serving government declarations.<sup>50</sup> Furthermore, the Court’s balancing test favors deference. Asking courts to determine whether evidence that it often has not reviewed poses a “reasonable danger” to national security requires speculation that weights the balance in favor of the government.<sup>51</sup>

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careful *in camera* examination of the material is not only appropriate . . . but obligatory.”); *Am. Civil Liberties Union v. Brown*, 619 F.2d 1170, 1173 (7th Cir. 1980) (en banc) (“[A] party’s showing of need often compels the district court to conduct an *in camera* review of documents allegedly covered by the privilege in order to determine whether the records are properly classified ‘secret’ by the Government.”); see also *Rahman v. Chertoff*, No. 05-C-3761, 2008 WL 4534407 (N.D. Ill. Apr. 16, 2008).

47. *Mohamed v. Jeppesen Dataplan, Inc.*, 563 F.3d 992 (9th Cir. 2009) (making clear privilege was an evidentiary privilege), amended by 579 F.3d 943 (9th Cir. 2009), reh’g en banc granted, 586 F.3d 1108 (9th Cir. 2009); *Hepting*, 439 F. Supp. 2d at 994; *Spock v. United States*, 464 F. Supp. 510, 520 (S.D.N.Y. 1978); *Jabara*, 75 F.R.D. at 492–93.

48. *Halkin v. Helms*, 690 F.2d 977, 990 (D.C. Cir. 1982); *In re United States*, Misc. No. 374, 1993 WL 262658, at \*7 (Fed. Cir. Apr. 30, 1993) (order on writ of mandamus); *Zuckerbraun v. Gen. Dynamics Corp.*, 935 F.2d 544, 547 (2d Cir. 1991); *Northrop Corp. v. McDonald Douglas Corp.*, 751 F.2d 395, 402 (D.C. Cir. 1984).

49. See, e.g., *Trulock v. Lee*, 66 F. App’x 472, 477–78, 2003 WL 21267827 (4th Cir. 2003); *Kasza v. Browner*, 133 F.3d 1159, 1159 (9th Cir. 1998); *Zuckerbraun*, 935 F.2d at 548; *Northrop Corp.*, 751 F.2d at 401; see also *Weaver & Pallitto*, supra note 2, at 108 (noting the courts’ “demonstrated reluctance to . . . conduct *in camera* inspections of material before affirming secrecy”). Professor Chesney’s appendix reflects the number of times courts have sustained privilege assertions without utilizing *in camera* review of the actual disputed materials. See Chesney, supra note 9, at 1315–22.

50. *Nat’l Lawyers Guild v. Attorney Gen.*, 96 F.R.D. 390, 396 n.11 (S.D.N.Y. 1982) (citing 8 WIGMORE ON EVIDENCE § 2378a, at 793 (1940)) (noting that an affidavit is usually prepared by subordinates after which it “works its way up through channels, until it arrives upon the desk of the departmental head, who perfunctorily signs it without further consideration”).

51. Christopher D. Yamaoka, *The State Secrets Privilege: What’s Wrong With It, How It Got That Way and How the Courts Can Fix It*, 35 HASTINGS CONST. L.Q. 139, 155 (2007) (“[W]hile the opinion cautions courts not to give too much discretion, it requires courts not to insist on complete disclosure.”) (emphasis added); Huq, supra note 2 (“All the government has to do to cloak itself in secrecy is use an ex parte proceeding to scare a non-specialist judge into believing that their claim of confidentiality is reasonable.”). For a discussion of the psychological phenomena leading to such weighting, see Christina E. Wells, *Questioning Deference*, 69 MO. L. REV. 903, 921–29 (2004).

Courts apply deferential scrutiny for other reasons, as well. Some accept the argument that the privilege, though evidentiary in nature, has constitutional overtones implicating executive prerogative.<sup>52</sup> Others acknowledge that practical reasons prevent judges from “safely and reliably evaluat[ing] invocations of the state secrets privilege.”<sup>53</sup> Thus, some courts feel “ill-equipped to provide the kind of security highly sensitive information should have”<sup>54</sup> even with *in camera* and *ex parte* review of the materials. Other courts rely on “mosaic theory,” accepting the government’s argument that judges lack sufficient expertise to decide secrecy issues. According to mosaic theory, intelligence work is “akin to the construction of a mosaic” where an item of information seems (or is) insignificant standing alone, but actually has great importance to one who pieces the innocuous information together.<sup>55</sup> Courts adhering to the theory believe they are “ill-equipped to become sufficiently steeped in foreign intelligence matters to serve effectively in the review of secrecy classifications in that area.”<sup>56</sup> As a result, they defer to the government’s arguments favoring broad secrecy.

As critics of the state secrets privilege have noted, deferential review can have a significant impact on disclosure of government-held information. The government’s tendency to exaggerate national security harms posed by the release of information is well-documented.<sup>57</sup> Accordingly, judicial

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52. *Halkin*, 598 F.2d at 9; *Zuckerbraun*, 935 F.2d at 547; *El-Masri v. United States*, 479 F.3d 296, 303 (4th Cir. 2007). Reynolds did not ground the privilege in the Constitution. Rather it referred to English precedents as the source of the privilege. *United States v. Reynolds*, 345 U.S. 1, 5 (1953). However, the Court alluded to the “constitutional overtones” involved in the government’s argument. *Id.* at 6 & n.9. Some lower courts have relied on that allusion and a later statement in *United States v. Nixon*, 418 U.S. 683 (1974), that in areas of military or diplomatic secrets “the courts have traditionally shown the utmost deference to Presidential responsibilities,” *id.* at 710.

There is also a rich scholarly discussion about the source of the privilege. See, e.g., Chesney, *supra* note 9, at 1271–98; Telman, *supra* note 3, at 502–03; Brief of Professors of Constitutional Law, *supra* note 6, at 3–5.

53. *Ellsberg v. Mitchell*, 709 F.2d 51, 57 (D.C. Cir. 1983).

54. *Id.* at 58 (quoting *Clift v. United States*, 597 F.2d 826, 829 (2d Cir. 1979)).

55. *Halkin*, 598 F.2d at 8–9 (quoting *United States v. Marchetti*, 466 F.2d 1309, 1318 (4th Cir. 1972)).

56. *Id.*; *El-Masri*, 479 F.3d at 305; *Kasza v. Browner*, 133 F.3d 1159, 1166 (9th Cir. 1998); *Edmonds v. Dep’t of Justice*, 405 F. Supp. 2d 23, 32 (D.D.C. 2005). For in-depth discussion of mosaic theory, see Christina Wells, *CIA v. Sims: Mosaic Theory and Government Attitude*, 58 ADMIN. L. REV. 845 (2006), and David E. Pozen, Note, *The Mosaic Theory, National Security and the Freedom of Information Act*, 115 YALE L.J. 628 (2005).

57. Wells, *supra* note 12, at 1198–1205 (discussing the historical relationship between national security and presidential secrecy); Christina E. Wells, *Information Control in Times of Crisis: The Tools of Repression*, 30 OHIO N.U. REV. 451, 452–61

acceptance of government affidavits without more will likely result in inadequate segregation of sensitive and non-sensitive information. It further allows government officials to hide evidence of wrongdoing or embarrassing information. Critics often point to the *Reynolds* case as evidence of both phenomena. Recently declassified documents reveal that the government's assertion of the privilege did not protect sensitive information; rather, it merely hid the government's negligence with respect to the plane accident.<sup>58</sup>

Judicial deference to mosaic theory compounds the problem by allowing suppression of non-sensitive information on extremely tenuous grounds. Mosaic theory expressly shields from production otherwise innocuous information that *might, if* combined by knowledgeable actors with other information, pose a danger to national security. It is thus more nebulous than *Reynolds'* potentially-deferential standard and favors greater suppression.<sup>59</sup> Mosaic theory broadens the state secrets privilege, changing it from a tool for protecting "the most sensitive information" from disclosure into a tool that allows suppression of "unclassified information that cannot in any sense be reasonably characterized as a state secret."<sup>60</sup>

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(2004) (discussing historical efforts to keep national security related information secret).

58. Erin M. Stulp, Comment, *The Military and State Secrets Privilege: The Quietly Expanding Power*, 55 CATH. U. L. REV. 831, 844-47 (2006) (noting that a report was wrongly treated as sensitive); Weaver & Pallitto, *supra* note 2, at 99 ("[I]t is now known that the goal of the government in claiming the privilege in *Reynolds* was to avoid liability and embarrassment."); Jack Weinstein, *The Role of Judges in a Government of, by, and for the People: Notes for the Fifty-Eighth Cardozo Lecture*, 30 CARDOZO L. REV. 1, 92 (2008) (noting that the "very case recognizing the 'state secrets' privilege was based on an executive impulse to conceal its own mistakes").

Other examples abound. Soon after World War II, the government secretly and forcibly repatriated anti-communist Russians, refusing to declassify its files on the subject even twenty years later. See *Epstein v. Resor*, 421 F.2d 930 (9th Cir. 1970) (providing a description of Operation Keelhaul). Similarly, the CIA went to great lengths to keep the public from knowing about MKULTRA, a human subject psychological research project, many of whose subjects were unaware they were participants. See Wells, *supra* note 56, at 848-49.

59. Wells, *supra* note 56, at 855 ("[T]he presence of so many variables in mosaic theory—a hostile intelligence agency that might be lurking about (or not), a bigger picture that could be constructed (or not), with this innocuous (or not) piece of the puzzle—leads to extreme judicial deference."); Pozen, *supra* note 56, at 641 (noting that the mosaic theory presents judges with reasons to "fear disclosure and mistrust their own judgment").

60. Weaver & Pallitto, *supra* note 2, at 104.

## C. STATE SECRETS AND LAWSUIT DISMISSALS

Critics of the state secrets privilege have recently pointed to a different concern arising from *Reynolds*' malleable test—i.e., government attempts to dismiss lawsuits prior to the discovery process. The possibility of dismissal after successful invocation of the state secrets privilege has always existed. Typically, however, dismissal occurred because the excluded evidence was critical to proving plaintiffs' prima facie case, or the defendants could not mount an adequate defense absent the evidence.<sup>61</sup> Within the last fifteen years, however, even where plaintiffs could proceed with lawsuits using non-sensitive information, government officials have asserted the privilege (and courts have dismissed) based on the theory that “the very subject matter” of the litigation is a state secret.<sup>62</sup> Critics decry this trend, arguing that it effectively transforms the state secrets privilege from an evidentiary rule into a “de facto grant of immunity.”<sup>63</sup>

The trend has largely resulted from an unwarranted expansion of *Totten v. United States*,<sup>64</sup> a case related to *Reynolds*. The *Totten* doctrine originated as a bar to litigation in situations involving clandestine espionage relationships. Thus, the Supreme Court found that a party to a secret espionage contract could not enforce it against the government because “public policy forbids the maintenance of any suit . . . the trial of which would inevitably lead to the disclosure of matters which the law

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61. As the court in *Kasza v. Browner*, 133 F.3d 1159, 1166 (9th Cir. 1998), summarized: “[B]y invoking the privilege over particular evidence, the evidence is completely removed from the case. The plaintiff’s case then goes forward based on evidence not covered by the privilege. If, after further proceedings, the plaintiff cannot prove the *prima facie* elements of her claim with nonprivileged evidence, then the court may dismiss her claim as it would with any plaintiff who cannot prove her case. Alternatively, ‘if the privilege deprives the *defendant* of information that would otherwise give the defendant a valid defense to the claim, then the court may grant summary judgment to the defendant.’” *Id.* at 1166 (emphasis in original) (quoting *Bareford v. Gen. Dynamics Corp.*, 973 F.2d 1138, 1141 (5th Cir.1992) (citations omitted)). *Accord* *Am. Civil Liberties Union v. Nat’l Sec. Agency*, 438 F. Supp. 2d 754 (E.D. Mich. 2006); *Hepting v. AT&T Corp.*, 439 F. Supp. 2d 974, 984 (N.D. Cal. 2006).

62. *Kasza*, 133 F.3d at 1166 (“[I]f the ‘very subject matter of the action is a state secret, then the court should dismiss the plaintiff’s action based solely on the invocation of the state secrets privilege.” (quoting *United States v. Reynolds*, 345 U.S. 1, 11 n.26 (1953))). For cases dismissed upon a subject matter theory, see *El-Masri v. Tenet*, 437 F. Supp. 2d 530 (E.D. Va. 2006); *Edmonds v. U.S. Dep’t of Justice*, 323 F. Supp. 2d 65 (D.D.C. 2004); *Trulock v. Lee*, 66 F. App’x 472, 473 (4th Cir. 2003); *Bareford v. Gen. Dynamics Corp.*, 973 F.2d 1138, 1144 (5th Cir. 1992); *Bowles v. U.S.*, 950 F.2d 154, 155 (4th Cir. 1991); *Guong v. U.S.*, 860 F.2d 1068 (Fed. Cir. 1988). For a discussion of the increase in pre-discovery dismissals, see *Frost*, *supra* note 3, at 1939–40; *Stilp*, *supra* note 58, at 837–41; *Wells*, *supra* note 27, at 975.

63. Owen Fiss, *The Example of America*, 119 YALE L.J. 1, 15 (2009).

64. 92 U.S. 105 (1875).

itself regards as confidential.”<sup>65</sup> The Court further observed no unfairness in such a result because both parties to the contract “must have understood that the lips of the other were to be forever sealed respecting the relation of either to the matter.”<sup>66</sup> As the Supreme Court later reiterated, *Totten* acts as a bar to justiciability where secret espionage contracts are at the heart of the case.<sup>67</sup> Such a doctrine should be read narrowly and contrasts with the state secrets doctrine, which requires a balancing to determine whether specific evidence should be disclosed.

Nevertheless, government officials increasingly rely on a footnote in *Reynolds* to weave *Totten*-like justiciability arguments into state secrets privilege assertions. *Reynolds* did refer to *Totten* to illustrate a situation where even compelling necessity could not overcome a privilege claim: “[T]he very subject matter of the action, a contract to perform espionage, was a matter of state secret. The action was dismissed on the pleadings without ever reaching the question of evidence, since it was so obvious that the action should never prevail over the privilege.”<sup>68</sup> Government officials point to this language when urging dismissal of lawsuits at the pleadings stage based on the state secrets privilege.<sup>69</sup> The Bush Administration was especially aggressive in using such language to argue for pre-discovery dismissals in the overwhelming majority of post-September 11th lawsuits.<sup>70</sup>

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65. *Id.* at 107.

66. *Id.* at 106; *see also* Yamaoka, *supra* note 51, at 148.

67. *See* Tenet v. Doe, 544 U.S. 1, 8–11 (2005).

68. *United States v. Reynolds*, 345 U.S. 1, 11 n.26 (1953).

69. They sometimes also rely on broad language at the end of *Totten* to extend the doctrine beyond its initial boundaries. For discussion, *see* Sean C. Flynn, *The Totten Doctrine and Its Poisoned Progeny*, 25 VT. L. REV. 793, 794 (2001); Yamaoka, *supra* note 51, at 145.

70. Government officials made these assertions in lawsuits involving rendition. *See, e.g.*, *Mohamed v. Jeppesen Dataplan, Inc.*, 539 F. Supp. 2d 1128, 1136 (N.D. Cal. 2008), *rev'd* 563 F.3d 992 (9th Cir. 2009), *amended by* 579 F.3d 943 (9th Cir. 2009), *reh'g en banc granted*, 586 F.3d 1108 (9th Cir. 2009); *El-Masri v. Tenet*, 437 F. Supp. 2d 530, 535–41 (E.D. Va. 2006). For lawsuits involving government eavesdropping, *see* *Terkel v. AT&T Corp.*, 441 F. Supp. 2d 899, 908–20 (N.D. Ill. 2006); *Hepting v. AT&T Corp.*, 439 F. Supp. 2d 974, 980–99 (N.D. Cal. 2006); *Al-Haramain Islamic Found., Inc. v. Bush*, 451 F. Supp. 2d 1215, 1220–33 (D. Or. 2006), *rev'd*, 507 F.3d 1190 (9th Cir. 2007); *Defendants' Motion to Dismiss, Or in the Alternative, for Summary Judgment at § 4, Am. Civil Liberties Union v. Nat'l Sec. Agency*, 438 F. Supp. 2d 754 (E.D. Mich. 2006) (No. 2:06-CV-10204), *vacated*, 493 F.3d 644 (6th Cir. 2007). For lawsuits alleging government constitutional and statutory violations, *see* *Defendants' Motion to Dismiss, Edmonds v. U.S. Dep't of Justice*, 323 F. Supp. 2d 65 (D.D.C. 2004) (No. 1:02CV01448), 2002 WL 32969563.

In some cases it is difficult to tell whether government officials differentiate between *Totten*, subject matter, and prima facie theories of dismissal, as they are often discussed together as reasons supporting dismissal at the pleading stage. *See, e.g.*, Brief for

*Reynolds* and *Totten*, however, involve distinct situations that argue against eliding the boundaries of the two doctrines.<sup>71</sup> *Totten*'s distinct bar arises from its specific facts—litigation over a clandestine relationship that both parties agreed to keep secret. In such instances “the very subject matter of the case” cannot remain secret if litigation is to occur, a fact the plaintiff knows when entering the contract. Allowing subject matter dismissals beyond these types of clandestine relationships, however, is problematic. First, it is difficult to restrict the breadth of such assertions—especially when supported by vague allegations of harm, attempts to avoid *in camera* review of documents, and arguments grounded in mosaic theory. The vagueness of the government's argument effectively casts the subject matter of any lawsuit as a state secret merely because the government wants to keep it secret. Second, many lawsuits in which the state secrets privilege arises involve allegations of constitutional or statutory violations rather than contractual disputes. From a due process perspective, a plaintiff facing dismissal is not in the same position as a party to a secret espionage contract who understood the nature of her relationship with the government. Not surprisingly, critics raise serious concerns that expansion of the privilege leaves government officials unaccountable for potentially illegal and unconstitutional actions.<sup>72</sup>

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Appellee United States of America, *Schwartz v. Raytheon*, 150 F. App'x 627 (9th Cir. 2005) (No. 03-55571), 2004 WL 3079536. Courts fall into a similar trap. See *Jeppesen*, 539 F. Supp. 2d at 1133–36; *El-Masri*, 479 F.3d at 306. This is not surprising given how difficult it is to differentiate between the prima facie and subject matter theories. For example, in *Arar v. Ashcroft* government officials sought dismissal of the case based on the prima facie theory. 414 F. Supp. 2d 250, 252 (E.D.N.Y. 2006), *aff'd*, 532 F.3d 157 (2d Cir. 2008), *vacated*, 585 F.3d 559 (2nd Cir. 2009). Yet they repeatedly mentioned that state secrets were “at the core” of plaintiff's case. Memorandum in Support of the United States' Assertion of State Secrets Privilege, *Arar v. Ashcroft*, 414 F. Supp. 2d 250 (E.D.N.Y. 2006) (No. 104CV00249), 2005 WL 6140578. Such language suggests that the government easily could have pursued a subject matter theory of dismissal. Accordingly, many of the arguments made against the subject matter theory could also apply to the prima facie theory if it is used broadly to seek dismissal at the pre-discovery stage.

For cases in which the Bush Administration did not seek dismissal at the pre-discovery stage, see *Rahman v. Chertoff*, No. 05-C-3761, 2008 WL 4534407 (N.D. Ill. Apr. 16, 2008); *Burnett v. Al Baraka Inv. & Dev. Corp.*, 323 F. Supp. 2d 82 (D.D.C. 2004).

71. Lyons, *supra* note 3, at 122–23; Wells, *supra* note 27, at 976–77; Yamaoka, *supra* note 51, at 144–49.

72. Robyn Blumner, *Injustice Hides Behind the Badge of Security*, ST. PETERSBURG TIMES (Fla.), Feb. 10, 2008, at 5P (“This closing of the courthouse door to civil litigants is absurd and dangerous. It reduces the Constitution to the status of a suggestion box, to be followed at the pleasure of the president.”); Fiss, *supra* note 63, at 16 (noting that the expansion of the privilege threatens “the rule—long the hallmark of our legal system—



## II. ACCOUNTABILITY AND EXECUTIVE ASSERTIONS OF THE STATE SECRETS PRIVILEGE

Presumably in response to these accountability concerns, the Obama Administration announced its new policy regarding the state secrets privilege in September 2009. Critics' response to the Administration's new policy, however, has been tepid at best.<sup>73</sup> This Section discusses whether that response is warranted or whether the policy actually provides the "greater accountability and reliability in the invocation of the state secrets privilege" that the administration claims.<sup>74</sup> As discussed below, although the policy shows promise, its vagueness prevents it from being anything other than a symbolic gesture.

### A. THE OBAMA POLICY

The Attorney General's memorandum establishes policies and procedures for all executive agencies wanting to invoke the state secrets privilege in litigation. Under the new policy, the Department of Justice ("DOJ") will defend an assertion of the privilege only if the government agency "makes a sufficient showing that assertion of the privilege is necessary to protect information the unauthorized disclosure of which reasonably could be expected to cause significant harm to the national defense or foreign relations (national security) of the United States."<sup>75</sup> Agencies must establish that assertion of the privilege is necessary by submission of an affidavit to DOJ officials based on personal knowledge. That affidavit must "specif[y] in detail" the nature of the information to be protected from disclosure, the significant harm that disclosure is reasonably expected to cause, why disclosure will cause such harm, and any other relevant information regarding whether the privilege should be

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that subjects all government officials, even the CIA, to the Constitution, and entrusts the judiciary with the task of determining whether these officials have followed the Constitution."); Editorial, *Whose Privilege?*, N.Y. TIMES, Apr. 18, 2008, at A24 ("[W]ith a clear goal of avoiding accountability . . . the Bush administration has imposed a level of secrecy on its operations that has no place in a democracy.").

73. Editorial, *An Incomplete State Secrets Fix*, N.Y. TIMES, Sept. 29, 2009, <http://www.nytimes.com/2009/09/29/opinion/29tue1.html> (noting that the policy was "a positive step forward, on paper, but did not go nearly far enough"); Kurt Opsahl, *Obama's Disappointing State Secrets Procedures*, EFF.COM, Sept. 24, 2009, <http://www.eff.org/deeplinks/2009/09/obamas-disappointing-state-secrets-procedures> (noting that "the new policy falls far short of the real reform that's needed").

74. Holder Memorandum, *supra* note 18, at 1.

75. Holder Memorandum, *supra* note 18, at 1. This standard applies to classified information and nonpublic, but non-classified, information that meets the standard. Holder Memorandum, *supra* note 18, at 1.

invoked.<sup>76</sup> Additionally, the memorandum establishes a policy of not seeking to dismiss a litigant's claim or lawsuit unless doing so "is necessary to protect against the risk of significant harm to national security."<sup>77</sup>

The new policy further establishes a multi-level system of review. Accordingly, the Assistant Attorney General of the relevant division must recommend in writing whether to defend an assertion of the privilege.<sup>78</sup> A recommendation to defend an assertion of the privilege requires the Assistant Attorney General to determine based on personal evaluation that the requirements described above have been met.<sup>79</sup> A State Secrets Review Committee, consisting of senior DOJ officials, then "evaluates" the Assistant Attorney General's recommendation and makes its own recommendation.<sup>80</sup> Any recommendation against defending the privilege, however, requires the Committee to consult with the Director of National Intelligence and the agency seeking to invoke the privilege.<sup>81</sup> Finally, the Deputy Attorney General reviews the Committee's recommendation. In turn, he or she recommends appropriate action to the Attorney General without whose approval an assertion of the privilege will not be defended.<sup>82</sup>

#### B. THE OBAMA POLICY AND EXPLANATORY ACCOUNTABILITY

By requiring other agency officials to justify assertion of the state secrets privilege to DOJ, the Obama policy involves explanatory accountability, which equates accountability with thoughtful and deliberative invocation of the privilege. This

76. Holder Memorandum, *supra* note 18, at 2.

77. Holder Memorandum, *supra* note 18, at 1 ("The Department's policy is that the privilege should be invoked only to the extent necessary to protect against the risk of significant harm to national security. The Department will seek to dismiss a litigant's claim or case on the basis of the state secrets privilege only when doing so is necessary to protect against the risk of significant harm to national security.").

78. Holder Memorandum, *supra* note 18, at 2.

79. Holder Memorandum, *supra* note 18, at 2.

80. Holder Memorandum, *supra* note 18, at 2-3.

81. Holder Memorandum, *supra* note 18, at 3.

82. Holder Memorandum, *supra* note 18, at 3. The memorandum also notes that the Department of Justice will investigate allegations of wrongdoing even if it defends privilege assertions. Thus, for each privilege assertion that precludes adjudication of claims, but which otherwise raises "credible allegations of government wrongdoing, the Department will refer those allegations to the Inspector General of the appropriate department or agency for further investigation." Holder Memorandum, *supra* note 18, at 3.

concept of accountability comports both with common sense<sup>83</sup> and psychological understandings of the term. Psychologists typically define accountability as “the implicit or explicit expectation that one may be called on to justify one’s beliefs, feelings, and actions to others.”<sup>84</sup> Accountability also “implies that people who do not provide a satisfactory justification for their [own] actions will suffer negative consequences . . . . [and that] people who do provide compelling justifications will experience positive consequences.”<sup>85</sup> Accountability research shows that “when individuals know in advance that they will be called on to justify their decisions, especially to audiences with views that are unknown, individuals spend more cognitive resources in decision making.”<sup>86</sup>

Aspects of the Obama policy’s overall structure show potential for improved explanatory accountability and decision-making.<sup>87</sup> By requiring that each agency defend with particularity its assertion to an entity separate from the agency, the policy forces a possibly neutral decision-maker into the mix. As a result, there exists no guarantee that the agency’s assertion will be defended (i.e., there is an audience with unknown views). Officials may thus spend more cognitive resources and make better, more self-critical decisions about privilege assertions. Specifically, requiring agency officials to account to the DOJ could alleviate a number of cognitive biases, including the tendency to overestimate (or manipulate) the likelihood of an event based upon the ease with which it can be brought to mind (i.e., the availability heuristic),<sup>88</sup> the tendency to be

83. See Wells, *supra* note 51, at 936 n.183 (noting that accountability “is generally defined as liability to give account of, and answer for, discharge of duties or conduct”); Rubin, *supra* note 21.

84. Lerner & Tetlock, *supra* note 24, at 263.

85. Lerner & Tetlock, *supra* note 24, at 263.

86. Gia B. Lee, *The President’s Secrets*, 76 GEO. WASH. L. REV. 197 (2008). This increased cognitive effort comes about because people want to avoid embarrassment in front of their audience. Lerner & Tetlock, *supra* note 24, at 263; Itamar Simonson & Peter Nye, *The Effect of Accountability on Susceptibility to Decision Errors*, 51 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 416, 441 (1992).

87. Accountability within the executive branch is certainly not “inherently futile or self-serving.” Steven Aftergood, *A Problematic New Policy on State Secrets*, *SECURITY NEWS*, Sept. 24, 2009, [http://www.fas.org/blog/secretcy/2009/09/state\\_secrets-2.html](http://www.fas.org/blog/secretcy/2009/09/state_secrets-2.html) (discussing the executive branch internal review panel for classification decisions); see also Beth George, *An Administrative Law Approach To Reforming the State Secrets Privilege*, 84 NYU L. REV. 1691 (2009) (discussing possible executive branch reforms to exert control over state secrets privilege). Such accountability mechanisms, however, must actually work. This Section focuses on whether proposed mechanisms actually have the desired effect.

88. Mark Seidenfeld, *Cognitive Loafing, Social Conformity, and Judicial Review of*

overconfident in one's judgments, particularly when uncertainty is involved (the overconfidence bias),<sup>89</sup> the tendency to rely only on confirmatory evidence, while ignoring disconfirmatory evidence (the confirmation trap bias),<sup>90</sup> and the reputational influences that cause Groupthink (the pressure to conform to group norms).<sup>91</sup> As I have discussed elsewhere, such biases are likely to be associated with national security threats and, similarly, assertions of the state secrets privilege.<sup>92</sup>

The question remains, however, whether the policy is sufficiently specific and independent to improve accountability in practice. Accountability improves decision-making because it motivates decision-makers to

prepare themselves by engaging in an effortful and self-critical search for reasons to justify their actions. This search leads participants to (a) survey a wider range of conceivably relevant cues; (b) pay greater attention to the cues they use; (c) anticipate counter arguments, weigh their merits relatively impartially, and factor those that pass some threshold of plausibility into their overall opinion or assessment of the situation; and (d) gain greater awareness of their cognitive processes by regularly monitoring the cues that are allowed to influence judgment and choice.<sup>93</sup>

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*Agency Rulemaking*, 87 CORNELL L. REV. 486, 523 (2002); Diederik A. Stapel et al., *The Impact of Accuracy Motivation on Interpretation, Comparison, and Correction Processes: Accuracy X Knowledge Accessibility Effects*, 74 J. PERSONALITY & SOC. PSYCHOL. 878, 891 (1998); Erik P. Thompson et al., *Accuracy Motivation Attenuates Covert Priming: The Systematic Reprocessing of Social Information*, 66 J. PERSONALITY & SOC. PSYCHOL. 474, 484 (1994).

89. Asher Koriat et al., *Reasons for Confidence*, J. EXPERIMENTAL PSYCHOL.: HUM. LEARNING & MEMORY 107, 116–17 (1980) (noting that requiring decision-makers to generate reasons opposing their course of action decreased overconfidence); Philip E. Tetlock & Jae Il Kim, *Accountability and Judgment Processes in Personality Prediction Task*, 52 J. PERSONALITY & SOC. PSYCHOL. 700, 706–07 (1987).

90. Accountability may tend to increase the desire to bolster one's evidence, but explicit instructions to consider alternatives can correct for the problem. David M. Sanbonmatsu et al., *Overestimating Causality: Attributional Effects of Confirmatory Processing*, 65 J. PERSONALITY & SOC. PSYCHOL. 892, 894–99 (1993).

91. Marceline B.R. Kroon et al., *Managing Group Decision Making Processes: Individual Versus Collective Accountability and Groupthink*, 2 INT'L J. CONFLICT MGMT. 91, 109–10 (1991).

92. Wells, *supra* note 51, at 921–35.

93. Lerner & Tetlock, *supra* note 24, at 263; see also Jennifer S. Lerner & Philip E. Tetlock, *Bridging Individual, Interpersonal, and Institutional Approaches To Judgment and Decision Making: The Impact of Accountability on Cognitive Bias*, in EMERGING PERSPECTIVES ON JUDGMENT AND DECISION RESEARCH 431, 438 (Sandra L. Schneider & James Shanteau eds., 2003); Andrew Quinn & Barry R. Schlenker, *Can Accountability Produce Independence? Goals as Determinants of the Impact of Accountability on Conformity*, 28 PERSONALITY & SOC. PSYCHOL. BULL. 472, 473 (2002); Philip E.

For decision-makers to engage in such effort, however, the audience must be willing to ask questions that force them to actually account for their decisions. Unfortunately, the Obama policy only superficially does this. First, the policy requires that the State Secrets Review Committee consult with the Director of National Intelligence only when it recommends against assertion of the privilege.<sup>94</sup> While one can certainly envision good reasons to consult with the Director of National Intelligence, a one-sided policy requiring consultation only when DOJ refuses to defend the privilege smacks of a mechanism allowing government officials one last attempt to convince DOJ to change its mind. This is not a neutral accountability mechanism.

In addition, the policy is likely too vague to force DOJ attorneys to act as explanatory accountability mechanisms. Thus, its requirements that the privilege be asserted only in cases where disclosure will cause “significant harm,” that such harm be described and proved to DOJ attorneys, and that assertions be narrowly-defined still leave too much discretion to DOJ attorneys to rubberstamp privilege assertions.<sup>95</sup> For example, the addition of the modifier “significant” to the requirement that disclosure be reasonably likely to cause harm does little to rein in official discretion regarding assertion of the privilege. Anybody can formulate an argument that harm is “significant;” the word is absolutely meaningless without context and a requirement of detailed descriptions.

The breadth of the policy’s definition of national security (and its application to non-classified information)<sup>96</sup> lends further credence to this argument as one can sweep almost anything within this definition with little or no explanation. As Robert Nagel has noted “the palpable range of choice” inherent in such vague formulae for decision communicate not real decision-making, but “power without responsibility.”<sup>97</sup> Similarly, although the policy requires justification based on personal knowledge of

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Tetlock, *Accountability and Complexity of Thought*, 45 J. PERSONALITY & SOC. PSYCHOL. 74, 81 (1983); Philip. E. Tetlock et al., *Social and Cognitive Strategies for Coping with Accountability: Conformity, Complexity, and Bolstering*, 57 J. PERSONALITY & SOC. PSYCHOL. 632, 639–40 (1989).

94. See Holder Memorandum, *supra* note 18.

95. See, e.g., Chris Guthrie et al., *The “Hidden Judiciary:” An Empirical Examination of Executive Branch Justice*, 58 DUKE L.J. 1477, 1488 (2009) (discussing whether ALJ’s decision-making improves if they think they know the views of the superiors to which they are ostensibly accountable).

96. See *supra* note 75 and accompanying text.

97. Robert F. Nagel, *The Formulaic Constitution*, 84 MICH. L. REV. 165, 202–03 (1985).

the type and mechanism of harm, it is not clear that affidavits—often one sided and self-serving<sup>98</sup>—will provide the kind of detail necessary for true accountability.<sup>99</sup> Further, the policy does not obviously provide a mechanism for DOJ officials to question privilege assertions (although that may, in fact, be contemplated by the Obama Administration).<sup>100</sup> Without a clear mandate regarding such questioning, too much is left to the vagaries of individual attorneys reviewing assertions—will they accept affidavits on face value, or will they ask for more if the affidavits are deemed unacceptable?

Finally, although the Administration apparently desires to avoid broad assertions of the privilege, there is no requirement that agency officials explain whether narrower options are available with respect to their assertion of the privilege. Although one could assume that only the narrowest assertion of such a privilege meets the requirements of “necessary” to protect against information that could “reasonably be expected to cause significant danger” to national security, that requirement is not written down. Given the inherent vagueness in the standards and lack of any compulsion to consider alternatives, it is not clear how DOJ attorneys will approach broad assertions of the privilege.

The Obama Administration could avoid some of these problems if its policy set out more specifically the kinds of particulars it sought during internal review of privilege assertions. For example, it could impose requirements that officials: (1) articulate in writing specific factors relevant to their decision; (2) realistically assess alternative courses of action; and (3) respond to meaningful questions and concerns by DOJ attorneys. It could further ask for the Director of National Intelligence’s input along

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98. See *supra* note 50 and accompanying text.

99. I disagree somewhat with Professor Chesney’s argument that affidavits based on personal knowledge can serve as an accountability mechanism. See Robert Chesney, *National Security Fact Deference*, 95 VA. L. REV. 1361, 1419 (2009). To be sure, Professor Chesney urges that such affidavits should “require comparable declarations focused on the underlying decision-making process as a precondition to deference.” *Id.* But the detail such explanations must contain is unclear. In addition, Professor Chesney does not clearly argue for external processes to counter what he acknowledges will likely be self-serving declarations. *Id.* Without more detailed requirements, it is simply unclear how affidavits (especially if reviewed *ex parte*) have much effect on executive accountability.

100. The policy requires consultation with an agency and the Director of National Intelligence once the DOJ decides not to defend an assertion of the privilege. See *supra* note 81 and accompanying text. But DOJ officials do not appear to have the ability to question officials as to the basis for their assertion prior to their decision not to defend the privilege.

the way, regardless of DOJ's likely decision. Those requirements would improve accountability by forcing a version of internal "hard look" review already familiar to many agency officials.<sup>101</sup> Others have shown that such review can enhance accountability and executive decision-making.<sup>102</sup> Without such changes, the Obama policy remains largely hortatory.

### III. WHY THE OBAMA POLICY CAN NEVER BE ENOUGH—THE NEED FOR ACCOUNTABILITY THROUGH MORE RIGOROUS JUDICIAL REVIEW

Even assuming the Obama policy could serve as an accountability mechanism within the administration, it falls far short of providing adequate accountability to others. Absence of such external checks renders illusory any potential accountability established by the policy. Nothing in the policy, for example, requires that executive officials provide *to courts* any of the justifications or evidence ostensibly required during administrative review.<sup>103</sup> Given that the privilege is actually raised in court proceedings, lack of such requirements is notable. The policy thus allows government officials to broadly assert the privilege based on little or no evidentiary support—a pattern the Obama Administration has continued in the last year.

For example, in *Mohamed v. Jeppesen Dataplan, Inc.*, a lawsuit challenging the legality of the CIA's rendition of alleged terrorist suspects, the Administration's petition for *en banc* rehearing reasserted the state secrets privilege with no changes from the Bush Administration's earlier stance. To be sure, the petition invoked the Obama policy as a reason for rehearing. It noted that the request for rehearing was

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101. See *Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Corp.*, 463 U.S. 29, 42–45 (1983) (discussing hard look review); Jeffrey J. Rachlinski & Cynthia R. Farina, *Cognitive Psychology and Optimal Government Design*, 87 *CORNELL L. REV.* 549, 587–89 (2002) (noting that a hard look review requires an agency "to articulate the factors it considers relevant to its decision, engage in some perceptible assessment of alternative courses of action, and respond to meaningful comments by outsiders").

102. Rachlinski & Farina, *supra* note 101, at 588–89; Seidenfeld, *supra* note 88, at 508–25.

103. Opsahl, *supra* note 73 ("[A]ll the Executive Branch has promised here is that it will check *with itself* before invoking the state secrets privilege. What's needed instead is a policy that ensures that the separation of powers is restored—that a court can ensure that the secrecy is warranted and, if necessary, that a case be dismissed because so much secrecy is needed.") (emphasis in original). When questioned about this omission, DOJ officials stated that sharing such evidence with courts was presumed by the policy. Aftergood, *supra* note 87. As discussed in the text, however, it is not clear whether the Obama administration will live up to this presumption.

based upon the most careful and deliberative consideration, at the highest levels, of all possible alternatives to relying upon the state secrets privilege. As the President made clear two weeks ago, while the state secrets privilege is necessary to protect against national security, the United States will not invoke the privilege to prevent disclosure of “the violation of a law or embarrassment of the government.”<sup>104</sup>

Yet nowhere does the brief provide further information as to the nature of those “possible alternatives” considered and discarded. The Administration filed no additional affidavits to support its petition. Rather, it relied on the affidavit of the former CIA director filed during the Bush Administration’s invocation of the privilege and the statement that his conclusions “have been reinforced by additional review—following the panel decision in this case—at the highest levels of the Department of Justice.”<sup>105</sup> In other words, the court must trust the Obama Administration’s assertion that *Mohamed* involves a special case under the new policy.

Perhaps it does. One can certainly foresee cases for which the state secrets privilege was ideally created. Many of them probably involve the CIA. But the Administration’s petition does nothing to suggest that it has thought about the uniqueness of this particular case. Instead, as with the Bush Administration, it seeks dismissal at the pleading stage because the very subject matter of the case is a state secret.<sup>106</sup> As the Ninth Circuit panel observed in *Mohamed*, the Obama Administration’s argument essentially amounts to the notion that “state secrets form the subject matter of a lawsuit, and therefore require dismissal, any time a complaint contains allegations, the truth or falsity of which has been classified as secret by a government official.”<sup>107</sup> Such assertions are broad, vague and, when made at the pleading stage, have little to do with specific discussion of the costs and benefits associated with actual evidentiary issues. They certainly do not fit within the accountability framework described above in that the Obama Administration has never justified its decision to re-assert the privilege, described the specific harms likely to

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104. Petition for Rehearing or Rehearing En Banc at 1, *Mohamed v. Jeppesen Dataplan, Inc.*, 563 F.3d 992 (9th Cir. 2009) (No. 5:07-cv-02798), available at [http://www.aclunc.org/cases/active\\_cases/mohamed\\_v.\\_jeppesen\\_dataplan\\_inc.shtml](http://www.aclunc.org/cases/active_cases/mohamed_v._jeppesen_dataplan_inc.shtml).

105. *Id.* at 1–2.

106. *Id.* at 2 (“[P]ermittting this suit to proceed would pose an unacceptable risk to national security.”).

107. *Mohamed*, 563 F.3d at 1003.



ensue, or listed the possible alternatives to dismissal.<sup>108</sup> Its assertion of the privilege in at least two other cases follows a similar pattern.<sup>109</sup>

If nothing in the Obama policy or subsequent actions suggests that the Administration will hold itself accountable, courts' inconsistency in applying the privilege presents further problems. As noted in Section II, the state secrets privilege is simply too malleable in its current iteration to force the kind of accountability discussed above. Although many courts eschew the "subject matter argument,"<sup>110</sup> enough of them adopt it or related rhetoric to provide ammunition for Administration officials seeking dismissal at the pleading stage. Hence, government officials litigating *Mohamed* could point: (1) to another rendition case, *El-Masri v. Tenet*,<sup>111</sup> where a federal court dismissed the lawsuit based upon the subject matter argument; and (2) a Ninth Circuit case that only arguably dismissed based upon that theory.<sup>112</sup> Furthermore, even those

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108. One would not expect terribly specific information to appear in public documents, and the allegations in CIA Director Hayden's public affidavit are quite vague and pro forma. Thus, the Director claimed that allowing the case to go forward risked disclosing "information" that would pose serious or potentially grave danger to national security, including: (1) information that would tend to confirm or deny whether Jeppesen or other private entities assisted the CIA; (2) information that would tend to confirm or deny that foreign governments assisted the CIA; (3) information about the scope and operation of the CIA's terrorist detention program (including locations, methods of interrogation and identities of detainees), and (4) any other information about CIA clandestine activities. Redacted, Unclassified Brief for Intervenor-Appellee the United States at 5-6, *Mohamed v. Jeppesen Dataplan, Inc.*, 586 F.3d 1108 (9th Cir. 2009) (No. 08-15693), 2008 WL 4973859 (citing the Hayden unclassified affidavit). The Government's brief (which references Director Hayden's affidavit) does not attempt to explain exactly how or to what extent the lawsuit would result in such revelations, nor does it attempt to identify specific information that would result in such revelations. Rather, it merely asserts conclusions.

Perhaps the classified affidavit fills in those gaps. The Ninth Circuit, however, made its decision with full access to the classified and supposedly more detailed affidavit. It nevertheless concluded that the government's assertion of the privilege was too vague and that dismissal was warranted. *See supra* note 107 and accompanying text.

109. *See supra* note 14 and accompanying text.

110. *See, e.g., Al-Haramain Islamic Found., Inc. v. Bush*, 57 F.3d 1190 (9th Cir. 2007).

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

112. *See, e.g., Kasza v. Browner*, 133 F.3d 1159 (9th Cir. 1998). In *Kasza*, the court actually dismissed the case during the discovery stage based on plaintiffs' inability to make a prima facie case. *Id.* at 1170. However, it also noted that because "the very subject matter of [plaintiff's] action is a state secret, we agree with the district court that her action must be dismissed." *Id.* This aspect of *Kasza's* rhetoric has been influential in later cases. The Ninth Circuit panel in *Mohamed* limited *Kasza's* reach, rejecting the argument that *Kasza* involved or recognized subject matter dismissals beyond Totten's narrow context. *Jeppesen*, 563 F.3d at 1002 n.5 (describing *Kasza* as a case involving dismissal based on plaintiffs' inability to prove her prima facie case).

courts that do not dismiss based upon a subject matter theory occasionally dismiss at the pleadings stage because litigants will not be able to prove their prima facie case.<sup>113</sup> Dismissals at such an early stage, however, are akin to subject matter dismissals and consider little, if any, evidence as part of the decision.<sup>114</sup>

If courts are to apply the state secrets privilege in a manner consistent with explanatory accountability, changes are in order. Suggesting comprehensive changes is beyond the scope of this Essay, but it is worth brief note that pending congressional legislation, if passed, could move us toward such accountability.<sup>115</sup> The State Secrets Protection Act<sup>116</sup> would require courts to tighten the existing privilege in several ways, although it also adopts aspects of the Obama policy, such as the requirement that the government show the information to be disclosed would be “reasonably likely to cause significant harm to the national defense or the diplomatic relations of the United States.”<sup>117</sup> Not surprisingly, the Act also adopts aspects of the existing privilege, allowing the government to assert the privilege in lawsuits, whether or not a party, and to support that assertion with affidavits.<sup>118</sup>

However, the Act also requires courts to undertake preliminary review of the material over which the privilege is asserted either through review of the material itself or detailed indices of the material, which should accompany the typical

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113. See, e.g., *Terkel v. AT&T Corp.*, 441 F. Supp. 2d 899, 917 (N.D. Ill. 2006).

114. See *supra* notes 61–62.

115. That legislation also provides the additional advantage of congressional oversight of executive action. As Professor Frost has noted, congressional exercise of control over federal court jurisdiction can “bolster the democratic legitimacy of judicial decision making.” Frost, *supra* note 3, at 1952. Further, by defining the parameters of the state secrets privilege, Congress and courts can coordinate executive oversight, thus serving important separation of powers functions. Frost, *supra* note 3, at 1953.

Of course, Congress may also serve as an independent accountability mechanism by generally requiring executive officials to share information regarding clandestine activities, see Clark, *supra* note 25; Heidi Kitrosser, *Congressional Oversight of National Security Activities: Improving Information Funnels*, 29 CARDOZO L. REV. 1049 (2008), or by specifically requiring information regarding assertions of the privilege, see State Secrets Protection Act, H.R. 984, 111th Cong. § 9 (2009) (requiring the Attorney General to report use of privilege to various congressional committees). Scholars express some doubt as to whether the Obama Administration will share intelligence information willingly, although the Obama policy specifically calls for congressional notification. See, e.g., Kathleen Clark, *A New Era of Openness?: Disclosing Intelligence To Congress Under Obama*, 26 CONST. COMMENT. 313, 313 (2010); Holder Memorandum, *supra* note 18, at 4.

116. H.R. 984.

117. *Id.* §§ 2, 6(d) (discussing standard and burden of proof).

118. *Id.* § 4.

affidavits.<sup>119</sup> Such detailed description or actual review of the material would go far toward allowing courts to adequately assess claims that information poses a danger to national security (although some scholars argue persuasively for requiring *in camera* production of actual materials in a greater number of cases).<sup>120</sup> If the court determines that a privilege assertion is valid, the Act also requires a determination as to whether a non-privileged substitute is possible, thus allowing the case to proceed. If the government refuses, the court can impose sanctions and find against the government on the issues to which the privileged information is relevant.<sup>121</sup> Such requirements alert the government that it must seek paths other than total secrecy, and that officials may be punished for failing to adequately account for those possible alternatives. The Act's bar on granting motions to dismiss or summary judgment motions until non-government parties have had an adequate opportunity to participate in "non-privileged discovery" further reins in the current amorphous nature of the privilege by eliminating dismissals at the pleading stage based on little or no evidence of harm.<sup>122</sup> Accordingly, government officials must make specific arguments regarding evidence and issues that are more likely to hold them accountable, rather than blanket arguments for secrecy. The Act, then, provides courts with many of the tools to act as accountability mechanisms regarding assertions of the state secrets privilege, while still maintaining secrecy when necessary.

### CONCLUSION

Although the Obama policy is a positive first step, it is currently little more than a symbolic gesture. At a time when individual liberties and lives are at stake, we deserve more than empty rhetoric and assurances regarding the Administration's desire for greater accountability regarding state secrets. Real accountability depends upon a willingness to *actually* justify one's actions to others. Much needs to change—both in the Obama policy and in the court's application of the state secrets privilege—for that kind of accountability to come about.

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119. *Id.* § 5(a), (c). There is also the possibility of use of special masters in certain cases. *Id.* § 5(b).

120. Fuchs, *supra* note 12, at 171–75; Telman, *supra* note 3, at 519–20, Yamaoka, *supra* note 51, at 156–60.

121. H.R. 984 § 7(b).

122. *Id.* § 7(c).