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## Comment

# Fade to Black: *El-Masri v. United States* Validates the Use of the State Secrets Privilege to Dismiss “Extraordinary Rendition” Claims

CPT Daniel J. Huyck\*

In the words of Justice Jackson, “comprehensive and undefined presidential powers hold both practical advantages and grave dangers for the country . . . [especially] in a time of transition and public anxiety.”<sup>1</sup> Judge King of the U.S. Court of Appeals for the Fourth Circuit recently dismissed *El-Masri v. United States (El-Masri II)*<sup>2</sup> based on one such undefined presidential power: the state secrets privilege.<sup>3</sup> The state

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\* J.D. Candidate 2009, University of Minnesota Law School; B.S., Northern Michigan University, and Captain in the Minnesota Army National Guard. The positions and opinions in this article are those of the author and do not represent the views of the United States Government, the Department of Defense, the United States Army, or the government of the great state of Minnesota. To all those at MJIL who provided expert advice and assistance, thank you for your hard work and dedication—any errors are mine and mine alone. Thank you is also owed to my wonderful wife and family (who will likely never read past this point). Finally, I dedicate this article to my unborn daughter who is due to arrive June 2008.

1. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634 (1952) (addressing the duty of a president during the times of national trials, specifically the Korean War).

2. 479 F.3d 296, 313 (4th Cir. 2007), *cert. denied*, 75 U.S.L.W. 3663, 76 U.S.L.W. 3021 (U.S. Oct. 9, 2007) (No. 06-1613). *El-Masri's* initial claim alleged that “George Tenet, three corporate defendants, ten unnamed employees of the Central Intelligence Agency (the ‘CIA’), and ten unnamed employees of the defendant corporations . . . were involved in a CIA operation in which he was [unlawfully] detained and interrogated in violation of his rights under the Constitution and international law.” *Id.* at 299.

3. The U.S. government claimed that an adequate defense would pose “an

secrets privilege is integral to the Justice Department's response to post-9/11 counterterrorism litigation.<sup>4</sup> But where the government illegally or mistakenly asserts its authority against an innocent individual, the state secrets privilege effectively bars restitution for that individual—such as in a case of mistaken identity.<sup>5</sup> *El-Masri II* raised important questions concerning the limits of unchecked executive privilege<sup>6</sup> and an individual's right to judicial redress.<sup>7</sup>

When establishing or validating privileges, certain individual interests must be compromised to strike an acceptable balance of all interests.<sup>8</sup> The government's expanding and unchecked use of the state secrets privilege strikes a potentially dangerous balance between protecting legitimate government secrets and the right to judicial redress of wrongs.<sup>9</sup> *El-Masri II* presented the U.S. Supreme Court with an opportunity to further define the substance and limits of the state secrets privilege and address its expanded use during the Global War on Terror.<sup>10</sup> While the Court may have passed in

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unreasonable risk that privileged state secrets would be disclosed." *Id.* at 299–300.

4. Robert M. Chesney, *State Secrets and the Limits of National Security Regulation*, 75 GEO. WASH. L. REV. 1249, 1249 (2007).

5. El-Masri claimed that he was detained in violation of his constitutional rights. *El-Masri II*, 479 F.3d at 299. The claim was dismissed because the court found that the "entire aim of the suit [was] to prove the existence of state secrets." *El-Masri v. Tenet (El-Masri I)*, 437 F. Supp. 2d 530, 539 (E.D. Va. 2006).

6. The judiciary's "de facto surrender" to the executive of the ability to assert unilaterally the state secrets claim has "denude[d] courts of their constitutional responsibility[y]" of ensuring that the branches are operating within their constitutional limits. ROBERT M. PALLITTO & WILLIAM G. WEAVER, *PRESIDENTIAL SECRECY AND THE LAW* 88 (2007).

7. When applying the state secrets privilege, the court balances an individual's private interests in vindicating his or her claim against "the national interest in preserving state secrets." *El-Masri I*, 437 F. Supp. 2d at 539.

8. Privileges are not intended to reinforce the factfinding process; instead, they impede the search for truth by excluding information that may be highly probative. 2 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, *FEDERAL EVIDENCE* § 5:2 (3d ed. 2007).

9. See PALLITTO & WEAVER, *supra* note 6, at 86–87 (discussing how the privilege has been mishandled by the judiciary and how the privilege has trumped even constitutional claims); see also Aziz Huq, *Dangerous Discretion: State Secrets and the El-Masri Rendition Case*, JURIST, Mar. 12, 2007, <http://jurist.law.pitt.edu/forumy/2007/03/dangerous-discretion-state-secrets-and.php> [hereinafter Huq, *Dangerous Discretion*] (arguing that the state secrets privilege has "dangerous and unwarranted breadth"); Henry Lanman, *Secret Guarding*, SLATE, May 22, 2006, <http://www.slate.com/id/2142155> (stating that the government has begun to use the privilege to dismiss claims of criminal conduct, creating broad unchecked executive power).

10. Posting of Ben Winograd to SCOTUSblog, <http://scotusblog.com/wp/term->

this instance,<sup>11</sup> these issues will not simply fade away.<sup>12</sup> Eventually either the Court or the U.S. Congress will have to address the executive's increasingly aggressive use of the state secrets privilege.<sup>13</sup>

*El-Masri* exemplifies the United States' expanding use of the state secrets doctrine, and its high potential for misuse. The dismissal of *El-Masri* during the initial stages of the claim stands in stark contrast to the checks and balances utilized by other nations to prevent the misuse of the privilege. This Comment explores the development of the state secrets doctrine from its common law roots through its recognition by the U.S. Supreme Court in 1954. This Comment examines the development of—and differences between—the *Totten*<sup>14</sup> doctrine and the state secrets privilege, and how *El-Masri II*<sup>15</sup> effectively merges the two. Finally, this Comment contrasts how the Canadian government successfully adjudicated a claim similar to *El-Masri* and examines international methods of determining and adjudicating state secrets. This Comment concludes with a

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tracker/petitions-to-watch-conference-of-10507 (Oct. 1, 2007, 4:06). By denying certiorari the U.S. Supreme Court has refused to clarify potential discrepancies on how the privilege is applied within the different federal circuits. *Id.*; see also PALLITTO & WEAVER, *supra* note 6, at 93 (discussing the urge to grant the executive branch deference during times of national emergency). The U.S. Supreme Court's next opportunity to clarify the state secrets privilege is within *American Civil Liberties Union v. National Security Agency*, 493 F.3d 644 (6th Cir. July 6, 2007), which has just been docketed as No. 07-468. Posting of Lyle Denniston to SCOTUSblog, <http://www.scotusblog.com/wp/uncategorized/court-grants-no-new-cases-2> (Oct. 9, 2007, 10:04).

11. This may have been a “defensive denial” because the Court would prefer to confront the state secrets doctrine “in a less fraught context,” such as a commercial or employment case. Aziz Huq, *Supreme Court El-Masri Rejection Undermines Accountability for Renditions*, JURIST, Oct. 12, 2007, <http://jurist.law.pitt.edu/hotline/2007/10/supreme-court-renders-further-blow-to.php> [hereinafter Huq, *Rendition Accountability*]. The theory is that “at least four Justices, who favor broad conceptions of executive power . . . likely thought the case was correctly decided[,]” while four others “thought that pushing for a grant of certiorari would be unwise because of the risk of an adverse judgment.” *Id.*

12. A Google search for “state secrets privilege” conducted on January 15, 2008 returned over 70,000 hits.

13. See TED GUP, *NATION OF SECRETS: THE THREAT TO DEMOCRACY AND THE AMERICAN WAY OF LIFE* 53 (2007) (describing how one of the staunchest supporters of presidential secrecy rebuked the President for hiding information from the House Intelligence Committee); see also Huq, *Dangerous Discretion*, *supra* note 9 (concluding that Congress is better positioned than the courts to check executive claims of secrecy).

14. *Totten v. United States*, 92 U.S. 105 (1875).

15. 479 F.3d 296 (4th Cir. 2007), *cert. denied*, 75 U.S.L.W. 3663, 76 U.S.L.W. 3021 (U.S. Oct. 9, 2007) (No. 06-1613).

recommendation for stricter judicial scrutiny of invocations of the state secrets privilege and the establishment of a legislative committee to determine the limits of the executive branch's ability to assert state secrets privilege. The legislative committee would also serve an appellate function for claims.

## I. BACKGROUND

The source of the state secrets privilege has been attributed to Article I of the U.S. Constitution,<sup>16</sup> separation of powers, executive privilege, and other sources.<sup>17</sup> Regardless of its origin, the nature and scope of the privilege are not well defined.<sup>18</sup> The question of whether the state secrets privilege is a common law evidentiary rule or a constitutional rule derived from separation of powers is of great importance.<sup>19</sup> If the privilege is based on the separation of powers, the legislature and judiciary may only possess limited ability to "alter or override" the privilege's impact on litigation.<sup>20</sup> If the privilege is evidentiary, however, the legislature and judiciary have much more freedom to override executive claims to the privilege.<sup>21</sup>

This Comment relies on a thorough understanding of the origin of the state secrets privilege and the *Totten* doctrine as they relate to the public's ability to access information for adjudication of government wrongs.<sup>22</sup> Following an in-depth look at the origins of both the state secrets privilege and *Totten* doctrine, this Comment moves on to explore the U.S. Government's development and increased utilization of the state secrets privilege to dismiss claims concerning extraordinary rendition.

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16. *Id.* at 304 (citing *Dep't of the Navy v. Egan*, 484 U.S. 518, 527 (1988)).

17. DAVID BANISAR, *GOVERNMENT SECRECY: DECISIONS WITHOUT DEMOCRACY* 17 (2007), available at <http://www.openthegovernment.org/otg/govtsecrecy.pdf> (citation omitted).

18. Chesney, *supra* note 4, at 1270.

19. *Id.*

20. *Id.*

21. *Id.*

22. "Without information, the people have no power to make choices about their government—no ability to meaningfully participate in the decision-making process, to hold their governments accountable, to thwart corruption, to reduce poverty, or, ultimately, to live in a genuine democracy." ARTICLE 19, *ACCESS TO INFORMATION: AN INSTRUMENTAL RIGHT FOR EMPOWERMENT* 9 (2007), available at <http://www.article19.org/pdfs/publications/ati-empowerment-right.pdf>.

A. THE STATE SECRETS PRIVILEGE AND THE *TOTTEN* DOCTRINE

"A ranking of the various privileges recognized in our courts would be a delicate undertaking at best, but it is quite clear that the privilege to protect state secrets must head the list."<sup>23</sup>

The state secrets privilege can trace its roots to the crown privilege that developed in England and Scotland.<sup>24</sup> Even though the U.S. Supreme Court did not officially recognize the common law state secrets<sup>25</sup> privilege until 1953,<sup>26</sup> the privilege's root in America is actually much older.<sup>27</sup> Despite the privilege's apparent age, there is little jurisprudence defining its scope or impact, especially when compared with other existing executive

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23. *Halkin v. Helms (Halkin I)*, 598 F.2d 1, 7 (D.C. Cir. 1978). The *Halkin I* court held that the state secrets privilege is absolute, and if disclosures *in camera* are inconsistent with the normal rights of a party to inquiry and cross-examination then the interest of the individual litigant must give way to the government's privilege against disclosure. *Id.* (citing *Heine v. Raus*, 399 F.2d 785, 791 (4th Cir. 1968)).

24. PALLITTO & WEAVER, *supra* note 6, at 101. The executive privilege also derives from the crown privilege; however, in the United States the executive privilege is different in that it is a qualified privilege meant to protect executive communication between the President and his advisors from partisan members of Congress and is not necessarily connected to national security. *Id.* at 93.

25. "A 'secret of state' is a governmental secret relating to the national defense or the international relations of the United States." 1 MICHAEL H. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE § 509 (4th ed. 1996).

"Official information" is information within the custody or control of a department or agency of the government the disclosure of which is shown to be contrary to the public interest and which consists of: (A) intragovernmental opinions or recommendations submitted for consideration in the performance of decisional or policymaking functions, or (B) . . . investigatory files compiled for law enforcement purposes and not otherwise available, or (C) information within the custody or control of a governmental department or agency whether initiated within the department or agency or acquired by it in its exercise of its official responsibilities and not otherwise available to the public[.]

*Id.*

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

27. Four years after *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), Chief Justice John Marshall revisited the issue of confidential government information during Aaron Burr's trial for treason. *United States v. Burr*, 25 F. Cas. 30 (C.C.D. Va. 1807) (No. 14,692d). Marshall, sitting as Circuit Justice, upheld Burr's right to subpoena correspondence between President Jefferson and General Wilkinson, while stipulating that the court would withhold any irrelevant information that "would endanger the public safety" if disclosed. *Id.* at 37. In *Burr*, Marshall held that when the information is required for the defense of a party the court would "very reluctantly deny" such a request. *Id.*

privileges.<sup>28</sup>

### 1. *The Totten Doctrine: Secret Contracts Are Non-Actionable*

The government first claimed the state secret privilege in *Totten v. United States*.<sup>29</sup> The U.S. Supreme Court determined that an action cannot be maintained when that action would result in the disclosure of a secret contract for clandestine services to the government.<sup>30</sup> The Court found that “[t]he service stipulated by the contract was a secret service” and that both “employer and agent must have understood that the lips of the other were to be for ever [sic] sealed respecting the relation of either to the matter.”<sup>31</sup> Because it was a breach of the contract to even initiate the claim, the action could not be maintained.<sup>32</sup> This was not a direct holding on state secrets privilege; rather it established a recognized contractual privilege between the government and another willing party to a contract for secret services.<sup>33</sup> The application of the *Totten* doctrine requires a party to voluntarily enter into a secret contract with the U.S. Government, where each party’s lips remain forever sealed concerning that contract.<sup>34</sup>

The U.S. Supreme Court affirmed *Totten* in *Tenet v. Doe*.<sup>35</sup>

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28. See *Reynolds*, 345 U.S. at 7.

29. *Totten v. United States*, 92 U.S. 105 (1875). William A. Lloyd entered into a contract with President Lincoln to infiltrate the insurrection states and report back information allegedly for \$200 per month plus expenses. *Id.* at 105–06. After the war Lloyd brought suit for breach of contract after he was reimbursed for expenses only. *Id.* at 106.

30. *Id.*

31. *Id.*

32. *Id.* at 107.

33. See *id.*; see also *United States v. Reynolds*, 345 U.S. 1, 11 n.26 (1953) (characterizing *Totten* as a case where “the very subject matter of the action . . . was a matter of state secret”).

34. See *Totten*, 92 U.S. at 106.

35. *Tenet v. Doe*, 544 U.S. 1, 3 (2005). *Tenet* involved an alleged secret agreement between the CIA and two foreign intelligence agents. *Id.* The agents claim that the CIA “reneged on its agreement to provide lifetime financial support.” John Harrington et al., *National Security*, 40 INT’L LAW. 487, 489 (2006). “The Ninth Circuit Court of Appeals determined that the complaint was not governed by *Totten* and need not be dismissed. The Supreme Court reversed that decision and found that *Totten* squarely governed the suit, affirming the continued validity of the *Totten* rule.” *Id.* (internal citations omitted). The *Totten* line of cases provide an absolute bar to any kind of judicial review when there is a secret espionage relationship between the plaintiff and the government. *Id.* (internal citation omitted). In such a case the state secrets privilege does not provide the absolute protection necessary in any action which would lead to the disclosure of matters the

*Tenet* expanded *Totten* to all clandestine spy relationships and not simply breach of secret contract claims.<sup>36</sup> The Court went on to distinguish the *Totten* doctrine from the state secrets privilege.<sup>37</sup> The Court emphasized that the state secrets privilege is evidentiary in nature and when upheld prevents only the disclosure of classified material that may foreclose a claim, where the *Totten* doctrine, when successful, will fully bar the claim from proceeding.<sup>38</sup>

## 2. The U.S. Supreme Court Recognizes the State Secrets Privilege

*Marbury v. Madison*<sup>39</sup> provided the first “glimmer” of the state secrets privilege in American law.<sup>40</sup> Marbury sought to elicit testimony from Attorney General Levi Lincoln concerning whether the commissions at issue in the case had been found in the Secretary of State’s office.<sup>41</sup> Mr. Lincoln refused, claiming that he was privileged from testifying “as to any facts which came officially to his knowledge” while acting in his capacity as secretary of state.<sup>42</sup> The Court, siding with Marbury, reasoned that nothing confidential was in the information requested but suggested that Mr. Lincoln would not have to disclose the information if it were disclosed to him “in confidence.”<sup>43</sup>

In 1953 the U.S. Supreme Court ruled on the substantive issue of the state secrets privilege for the first time in *United States v. Reynolds*.<sup>44</sup> In 1948 an Air Force plane was involved in a fatal crash while on a mission testing secret electronics equipment.<sup>45</sup> The widows of those killed brought suit under the Tort Claims Act and in the pre-trial stages motioned under Rule 34 of the Federal Rules of Civil Procedure for production of the Air Force accident report.<sup>46</sup> The Government refused to produce

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law itself regards as confidential—such as allowing the secret agents’ relationship with the government to be revealed. *Tenet*, 544 U.S. at 10–11.

36. Harrington et al., *supra* note 35, at 489.

37. *Tenet*, 544 U.S. at 10 (stating that *Totten* cannot be “reduced to an example of the state secrets privilege”).

38. Harrington et al., *supra* note 35, at 489–90.

39. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

40. Chesney, *supra* note 4, at 1271.

41. *Id.* at 1271–72.

42. *Marbury*, 5 U.S. (1 Cranch) at 143.

43. *Id.* at 144.

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

45. *Id.* at 2–3.

46. *Id.* at 3.



the report, claiming that the information was privileged.<sup>47</sup> The district court ordered the Air Force to allow the court to review the documents *in camera* to determine whether they contained privileged matter.<sup>48</sup> After the government refused to honor the order, the court entered judgment in the widows' favor.<sup>49</sup> After granting certiorari and finding that a state secrets privilege was valid, the U.S. Supreme Court determined that Rule 34 of the Federal Rules of Civil Procedure permitted the government to refuse production of privileged information.<sup>50</sup> In establishing the state secrets privilege, the Court relied on the English precedent outlined in *Duncan v. Cammell, Laird & Co.*<sup>51</sup> The House of Lords, in considering the function of the court when dealing with the state secrets privilege, held that the court must treat the decision of the non-judicial official as "conclusive."<sup>52</sup> They further held that it is not proper for a judge to inspect the documentation to determine if the public interest requires its exclusion, but rather that the privilege must be asserted in such a manner as to satisfy the judge that the proper executive department head has seen and reviewed the information.<sup>53</sup> Some claim that the holding in *Duncan* is incorrect, however, and that it is a misstatement of Scottish law.<sup>54</sup> In fact, concerning the question of the discovery of documents the House of Lords unanimously overruled *Duncan* in the unanimous 1968

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47. *Id.* at 3-4. The Secretary of the Air Force sent a letter to the district court stating that it would not be in the public interest to furnish the report and filed a formal Claim of Privilege. *Id.* at 4.

48. *Id.* at 5.

49. *Id.*

50. *Id.* at 6.

51. *Id.* at 7 n.15. *Duncan v. Cammell, Laird & Co.*, [1942] A.C. 624, is often cited as the primary modern common law case on the issue of crown privilege. PALITTO & WEAVER, *supra* note 6, at 102.

52. EDMUND M. MORGAN, BASIC PROBLEMS OF STATE AND FEDERAL EVIDENCE 127 (Jack B. Weinstein ed., 5th ed. 1976). What the *Reynolds* Court failed to consider, however, is that the English privilege grew out of royal prerogatives which were claimed by the crown to be beyond the reach of law; and the crown, as the "fountain of justice" purported to always act in the public interest. *E.g.*, WILLIAM BLACKSTONE, 1 COMMENTARIES \*266, \*270. In such a situation the crown was acting as both the judiciary and executive: as Queen Elizabeth I told Parliament, "[you] should do well to meddle with no matters of State, but such as should be propounded unto them, and to occupy themselves in other matters, concerning the Common-Wealth." H.L. JOUR. (Apr. 1571), available at <http://www.british-history.ac.uk/report.aspx?compid=43682>.

53. MORGAN, *supra* note 52, at 127.

54. See PALITTO & WEAVER, *supra* note 6, at 102 (citing several English and Scottish cases wherein the court overrode the Crown's assertion of privilege on the grounds of public interest).

*Conway* decision.<sup>55</sup>

The *Reynolds* Court cited Wigmore's treatise on evidence, which acknowledged that there must be a privilege for secrets of State (i.e., matters the disclosure of which would endanger the nation's governmental requirements or its relations of friendship and profit with other nations).<sup>56</sup> But Wigmore cautioned that such a privilege is often improperly invoked and loosely applied and therefore requires a strict definition of its legitimate limitations.<sup>57</sup> *Reynolds* attempted to define such limitations by focusing the privilege to the head of an executive agency within the government and by allowing the courts to balance the necessity of the evidence against the claim of privilege.<sup>58</sup>

The *Reynolds* decision was the U.S. Supreme Court's attempt to establish the elements of the common law state secrets doctrine.<sup>59</sup> The Court determined that the privilege: 1) belongs to the government and must be asserted by the government;<sup>60</sup> 2) must be a formal claim lodged by the head of the controlling department after personal consideration by such

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55. *Conway v. Rimmer*, [1968] 1 All E.R. 874 (H.L.) (U.K.). Lord Hodson stated that "in some classes of documents, such as those concerned with claims for negligence against the Crown, privilege should in future not be claimed." *Id.* at 902; see also GARY SLAPPER & DAVID KELLY, *PRINCIPLES OF THE ENGLISH LEGAL SYSTEM* 36 (3d ed. 1997).

56. *United States v. Reynolds*, 345 U.S. 1, 7 nn.11 & 13 (1953). In his treatise on evidence, Wigmore recognized that the state secrets privilege exists but determined that in the United States, it is the courts and not the executive that determine the validity of the claim; and that a court which abdicates the function of determining admissibility will "furnish the bureaucratic officials too ample opportunities for abusing the privilege." 8 JOHN HENRY WIGMORE, *EVIDENCE IN TRIALS AT COMMON LAW* § 2379 (John T. McNaughton ed., rev. ed. 1961).

57. *Id.* Wigmore found the state secrets privilege to be so abstract that he was forced to divide it into eight categories of exemptions; but concerning the duty to give evidence, Wigmore was clear that there was no exemption for the universal testimonial duty to give evidence in judicial investigations. Louis Fisher, *State Your Secrets*, *LEGAL TIMES*, June 26, 2006, at 68.

58. *Reynolds*, 345 U.S. at 11 ("Where there is a strong showing of necessity, the claim of privilege should not be lightly accepted."). Conversely, if the necessity of the evidence has been reduced by an available alternative the Court may avert a showdown with the privilege and allow a claim to continue. *Id.*

59. Ironically, the "secret" protected by the privilege in *Reynolds* was revealed when the Air Force declassified the documents in 2000. The declassified documents were filled with evidence of negligence by the Air Force, and their straightforward conclusion that the aircraft was not considered safe for flight. Lanman, *supra* note 9. Although not directly considering the doctrine, recent Supreme Court dicta recently reaffirmed *Reynolds*. See *Tenet v. Doe*, 544 U.S. 1, 9 (2005).

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

person;<sup>61</sup> 3) there must be a judicial balancing of necessity of the evidence including any potential alternative evidence available against the invocation of the privilege;<sup>62</sup> and 4) a successful claim by the government does not require the complete dismissal of the entire complaint.<sup>63</sup> An essential element of *Reynolds* is that a complaint should not be dismissed where the necessity for the privileged evidence has been "minimized by an available alternative, which *might* have given respondents the evidence to make out their case without forcing a showdown . . . [with the] privilege."<sup>64</sup>

Several of the elements established in *Reynolds* have been clarified since the 1953 decision. Clarifications include: the court will attempt to permit discovery through a narrow review of the privilege;<sup>65</sup> the privilege is merely an evidentiary privilege;<sup>66</sup> the privilege is reviewed on a fact-specific, case-by-case basis;<sup>67</sup> the privilege extends to military secrets, state secrets, foreign affairs, intelligence sources, informant identities, and information gathering methods;<sup>68</sup> constitutional

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61. *Id.* at 7-8.

62. *Id.* at 11.

63. *See id.* In 1958 the Second Circuit held that as long as measures are taken to protect national security during trial the evidence should not be withheld. *Halpern v. United States*, 258 F.2d 36, 43-44 (2d Cir. 1958). Also, where a party does not require production of any material he does not already possess then conducting the entire trial *in camera* satisfies the government's concern. *Id.* at 44.

64. *Reynolds*, 345 U.S. at 11 (emphasis added). In 1967 the Nevada Supreme Court held that the state secrets privilege did not apply where the secret details at issue were published in several national newspapers and magazines. *Elson v. Bowen*, 436 P.2d 12, 14-15 (Nev. 1967). *Elson* suggested two limitations to the state secrets privilege: 1) "the privilege loses force once the information" purported to be secret is available to the public; and 2) the privilege may not be invoked by the government to defend unconstitutional conduct. Chesney, *supra* note 4, at 1291.

65. *See Kasza v. Browner*, 133 F.3d 1159, 1166 (9th Cir. 1998); *Kinoy v. Mitchell*, 67 F.R.D. 1, 14 (S.D.N.Y. 1975) (citing *United States v. Nixon*, 418 U.S. 683, 709-10 (1974)).

66. *See Kasza*, 133 F.3d at 1165 (noting the state secrets privilege is a common law evidentiary privilege); *Halkin v. Helms (Halkin II)*, 690 F.2d 977, 995-96 (D.C. Cir. 1982) (holding that the state secrets privilege fundamentally differs from decision to claim a [Freedom of Information Act national defense] exemption because the state secrets privilege is a decision of policy made at the highest level of the executive branch after consideration of the particular case); *Spock v. United States*, 464 F. Supp. 510, 519 (S.D.N.Y. 1978) (noting that the "state secrets privilege is only an evidentiary privilege"); *Kinoy*, 67 F.R.D. at 14 (noting evidentiary privileges are narrowly construed).

67. *Reynolds*, 345 U.S. at 11 (holding that in each case the government will have to show necessity to invoke the privilege).

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

claims do not bar the privilege,<sup>69</sup> and the privilege may be asserted through unclassified, open affidavits alone or in conjunction with classified affidavits *in camera* and *ex parte*.<sup>70</sup> When reviewing the executive's state secrets claim, the judiciary must keep in mind the executive's intent and that "his official habit and leaning tend to sway him toward a minimizing of the interest of the individual."<sup>71</sup>

#### A. STATE SECRETS PRIVILEGE USED TO DISMISS EXTRAORDINARY RENDITION CLAIMS

*"In legal and administrative proceedings where the Government makes [state secret] claims over some information, the single most important factor in trying to ensure public accountability and fairness is for the Government to limit, from the outset, the breadth of those claims to what is truly necessary."*<sup>72</sup>

##### 1. Development of Extraordinary Rendition

The U.S. concept of rendition can be traced to founding documents,<sup>73</sup> however, the CIA's modern iteration of the

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69. See *In re Sealed Case*, 494 F.3d 139, 143 (D.C. Cir. 2007).

70. See *id.* at 59–64; *El-Masri v. United States (El-Masri II)*, 479 F.3d 296, 305–06 (4th Cir. 2007), *cert. denied*, 75 U.S.L.W. 3663, 76 U.S.L.W. 3021 (U.S. Oct. 9, 2007) (No. 06-1613). It is generally up to the court to determine the extent it will examine or require additional affidavits beyond those which are unclassified. *Ellsberg*, 709 F.2d at 58–59 & n.37 (citations omitted). The government need only show a reasonable danger that harm would result from the release of the information. *Id.* at 58 (citing *Reynolds*, 345 U.S. at 10). However, the "mosaic theory" maintains that no information is truly harmless because even innocuous-seeming information may fit into a larger puzzle that could provide clues to the enemies of the United States. *Kasza*, 133 F.3d at 1166; Francisco Ferreira, *Overprivileged*, LEGAL AFFAIRS, Mar.–Apr. 2006, at 24, 24. If the seemingly innocuous evidence, when taken together, becomes a classified mosaic "the state secret may be invoked to bar its disclosure and the court cannot order the government to disentangle this [ordinary] information from other classified information." *Kasza*, 133 F.3d at 1166.

71. *Ellsberg*, 709 F.2d at 58 (citation omitted). There is a recognized incentive for an agency to claim the privilege in order to avoid embarrassment, enhance political objectives, and prevent criminal investigation. PALLITTO & WEAVER, *supra* note 6, at 90.

72. COMM'N OF INQUIRY INTO THE ACTIONS OF CAN. OFFICIALS IN RELATION TO MAHER ARAR, REPORT OF THE EVENTS RELATING TO MAHER ARAR: ANALYSIS AND RECOMMENDATIONS 304 (2006) [hereinafter *Arar Commission*], available at [http://www.ararcommission.ca/eng/AR\\_English.pdf](http://www.ararcommission.ca/eng/AR_English.pdf).

73. The Extradition Clause of the U.S. Constitution allows fugitives to be extradited to the states from which they fled by demand of executive authorities of

program began in 1995.<sup>74</sup> The program initially had two explicit goals: 1) incarcerate those who planned or executed attacks on the United States or its allies; and 2) seize documents that were on the person when arrested.<sup>75</sup> President Clinton strictly limited the program to only those individuals on whom outstanding legal process existed.<sup>76</sup> On September 18, 2001, a joint session of Congress passed the Authorization for Use of Military Force (AUMF).<sup>77</sup> The President exercised the powers granted via the AUMF to fundamentally alter and expand the CIA's rendition program to include enemy combatants<sup>78</sup> and *suspects* for questioning.<sup>79</sup>

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that state. U.S. CONST. art. IV, § 2, cl. 2. The Fugitive Slave Clause required the rendering of slaves who escaped from their owners. *Id.* cl. 3.

74. *Extraordinary Rendition in U.S. Counterterrorism Policy: The Impact on Transatlantic Relations: J. Hearing Before the Subcomm. on International Organizations, Human Rights, and Oversight and the Subcomm. on Europe of the Comm. on Foreign Affairs H.R.*, 110th Cong. 15 (2007) [hereinafter *Rendition Hearings*] (statement of Michael F. Scheuer, Former Chief, Bin Laden Unit, CIA), available at <http://www.foreignaffairs.house.gov>. Mr. Scheuer states that the program was started not as a method of interrogation, but rather as a tool to attack and dismantle Al-Qaeda. *Id.*

75. *Id.*

76. *Id.* Even though some of the countries to which the captured individuals were delivered were identified as human rights abusers, the CIA received a guarantee that each country would "treat the person according to its own laws." *Id.* Extradition of this sort is in direct contradiction to the *Valentine* decision, which held that "the power to provide for extradition . . . is not confided to the Executive in the absence of treaty or legislative provision." *Valentine v. United States ex rel. Neidecker*, 299 U.S. 5, 8 (1936). In the absence of legislative provision, there is no authority vested in any department of the government to seize a fugitive criminal for transfer to a foreign nation. *Id.* at 9 (citing 1 JOHN BASSETT MOORE, MOORE ON EXTRADITION 21 (1891)).

77. "[U]se all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons." Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (emphases added).

78. Enemy combatants are different than prisoners of war in that they are not entitled to protections afforded by the Geneva Convention concerning incarceration, treatment, and adjudication. See U.S. MILITARY, JOINT DOCTRINE FOR DETAINEE OPERATIONS, Joint Publ'n 3-63, I-9-11 (Mar. 23, 2005) (Final Coordination Draft), available at <http://hrw.org/campaigns/torture/jointdoctrine/jointdoctrine040705.pdf>. On June 29, 2006, the U.S. Supreme Court held that the Geneva Conventions do not apply to enemy combatants. *Hamdan v. United States*, 126 S.Ct. 2749, 2757 (2006).

79. See *Rendition Hearings*, *supra* note 74, at 15 (statement of Michael F. Scheuer, Former Chief, Bin Laden Unit, CIA). U.S. officials have acknowledged between 100 and 150 individuals have been seized and flown to either their home country or to another country. Gary Williams, *Indefinite Detention and*

Such an expansion of Presidential authority is not uncommon during times of crisis, and the Executive has often been granted great deference when operating within his Commander in Chief powers.<sup>80</sup> Additionally, it is commonly understood that the President acts with the maximum authority of his office when under the AUMF he targets those individuals who participated in Al-Qaeda<sup>81</sup> both before and after 9/11.<sup>82</sup>

## 2. *Arar v. Ashcroft*<sup>83</sup>

The first widely publicized rendition involves Maher Arar.<sup>84</sup> Arar is a dual-citizen of Canada and Syria who resides in Canada.<sup>85</sup> On September 26, 2002, he flew from Tunisia to Montreal with a layover in New York.<sup>86</sup> While in New York, airport officials detained and questioned him for about eight hours.<sup>87</sup> He was then transported to another site at the airport where he was placed in solitary confinement in shackles overnight.<sup>88</sup> The following day two FBI agents interrogated Arar for about five hours, and they repeatedly ignored his requests to make a phone call and see counsel.<sup>89</sup> Later that day Arar was

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*Extraordinary Rendition*, 19 L.A. LAW. 44, 47 (2006).

80. See *Korematsu v. United States*, 323 U.S. 214, 223–24 (1944) (holding that the order to relocate and inter persons of Japanese descent without probable cause was an acceptable use of military power during times of war); see also PETER M. SHANE & HAROLD H. BRUFF, *THE LAW OF PRESIDENTIAL POWER* 672–73 (1988) (discussing President Lincoln's reaction to and defiance of *Ex parte Merryman*, 17 F. Cas. 144 (C.C.D. Md. 1861) (No. 9487)). But cf. *Youngstown Sheet & Tube v. Sawyer*, 343 U.S. 579, 582–83, 588–89 (1952) (refusing to nationalize the striking steel mills during the Korean military action under the President's Commander-in-Chief power).

81. NAT'L COMM'N ON TERRORIST ATTACKS UPON THE UNITED STATES, THE 9-11 COMMISSION REPORT 326, 332 (2004), available at <http://govinfo.library.unt.edu/911/report/911Report.pdf> (declaring Al-Qaeda responsible for the 9/11 attacks and citing the resolve of the United States to punish those responsible).

82. "When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate." *Youngstown Sheet & Tube*, 343 U.S. at 635 (Jackson, J., concurring). In the capture of Al-Qaeda suspects the President acts pursuant to the Congressional Authorization for Use of Military Force and his own Commander-in-Chief powers; therefore he "personif[ies] the federal sovereignty" of the United States. See *id.* at 636.

83. *Arar v. Ashcroft*, 414 F. Supp. 2d 250 (E.D.N.Y. 2006).

84. See *Williams*, *supra* note 79, at 47–48.

85. *Arar*, 414 F. Supp. 2d at 252.

86. *Id.* at 252–53.

87. *Id.* at 253.

88. *Id.*

89. *Id.*

given an opportunity to voluntarily return to Syria but refused, citing fear of torture and instead requested a return to Canada or Switzerland.<sup>90</sup>

For the next three days Arar was detained at the Metropolitan Detention Center in Brooklyn, New York.<sup>91</sup> On October 1, 2002, the Immigration and Naturalization Service initiated removal proceedings alleging Arar was a member of Al-Qaeda.<sup>92</sup> On October 8, 2002, Arar was deported to Syria where he was detained for ten months.<sup>93</sup> Arar alleges that he was placed in a "grave" cell measuring six feet long, seven feet high, and three feet wide.<sup>94</sup> Additionally, he alleges that he was beaten and tortured into falsely confessing to having trained with terrorists in Afghanistan, even though he had never been to Afghanistan.<sup>95</sup>

The Canadian Embassy contacted the Syrian Government about Arar on October 20, 2002.<sup>96</sup> Almost a year later, on October 5, 2003, Syria released Arar to Canadian Authorities without filing any charges.<sup>97</sup> The U.S. Government argued (and the court accepted) that the alleged torture to Arar occurred while he was in Syrian custody.<sup>98</sup> Ultimately, Arar's various statutory and constitutional claims were dismissed due to lack of standing, failure to name those defendants personally involved, and the fact that he never officially entered the United States.<sup>99</sup> The Canadian government was not so quick to dismiss Arar's claim, however, forming a Commission capable of reviewing the secret elements to Arar's claim.<sup>100</sup>

### 3. *El-Masri v. United States*

El-Masri<sup>101</sup> maintains that his capture and subsequent torture were pursuant to an unlawful policy and practice known

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90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.* at 254.

94. *Id.*

95. *Id.* at 255.

96. *Id.*

97. *Id.* at 255.

98. *Id.* at 281–83; Williams, *supra* note 79, at 48.

99. See Arar, 414 F. Supp. 2d at 250.

100. See Arar Commission, *supra* note 72.

101. El-Masri is a Kuwaiti-born German citizen of ten years. Scott Pelley, *CIA Flying Suspects to Torture?*, CBS NEWS, Mar. 6, 2005, available at <http://www.cbsnews.com/stories/2005/03/04/60minutes/printable678155.shtml>.

as “extraordinary rendition.”<sup>102</sup> After his initial capture and subsequent interrogation by Macedonian agents he was turned over to U.S. agents.<sup>103</sup> El-Masri professed that he was involuntarily held by the CIA for more than four months in Afghanistan<sup>104</sup> without access to legal representation or the German embassy.<sup>105</sup> After the case was filed in district court,<sup>106</sup> the United States intervened as a defendant, claiming that the case posed an unreasonable risk of disclosing privileged state secrets.<sup>107</sup> The U.S. Court of Appeals for the Fourth Circuit

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102. *El-Masri v. United States (El-Masri II)*, 479 F.3d 296, 300 (4th Cir. 2007), cert. denied, 75 U.S.L.W. 3663, 76 U.S.L.W. 3021 (U.S. Oct. 9, 2007) (No. 06-1613). The operation described by El-Masri is known as extraordinary rendition, which is defined by the Fourth Circuit as “the clandestine abduction and detention outside the United States of persons suspected of involvement in terrorist activities, and their subsequent interrogation using methods impermissible under U.S. and international laws.” *Id.*

103. Petition for Writ of Certiorari at 3, *El-Masri II*, 479 F.3d 296 (No. 06-1613). On vacation, El-Masri was forcibly detained and interrogated concerning his suspected ties to Al-Qaeda by Macedonian border agents for three weeks. *Id.* Upon his transfer, El-Masri maintains that he was blindfolded, beaten, stripped, and sodomized with a hard object, after which he was placed in a diaper and hurried on to a plane where he was shackled spread-eagled. *Id.* El-Masri goes on to claim that between the time his blindfold was removed and when he was placed in a diaper, he saw seven or eight men dressed in black. *Id.*

104. A hair sample taken from El-Masri verified his claim that he had spent time in a South Asian country and was deprived of food for a prolonged period of time. Declaration of Manfred Gnjidic in Support of Plaintiff’s Opposition to the United States’ Motion to Dismiss or, in the Alternative, for Summary Judgment at 4, *El-Masri v. Tenet (El-Masri I)*, 437 F. Supp. 2d 530 (E.D. Va. 2006) (No. 1:05cv1417-TSE-TRJ), available at [http://www.aclu.org/pdfs/safefree/gnjidic\\_decl\\_exch.pdf](http://www.aclu.org/pdfs/safefree/gnjidic_decl_exch.pdf).

105. Petition for Writ of Certiorari at 4, *El-Masri II*, 479 F.3d 296 (No. 06-1613). A uniformed German speaker who identified himself as “Sam” refused to say whether he was sent by the German government, but El-Masri later identified his voice as a German intelligence officer. *Id.* at 4–5 n.7. Additionally, El-Masri asserts that his imprisonment was not terminated even after a U.S. agent informed him of his innocence. *Id.* at 4.

106. El-Masri alleged three separate causes of action. The first claim is brought pursuant to a cause of action recognized by the U.S. Supreme Court in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), for violations of El-Masri’s Fifth Amendment right to due process. *El-Masri I*, 437 F. Supp. 2d at 534. El-Masri’s second cause of action is brought pursuant to the Alien Tort Statute (ATS) for violations of international legal norms prohibiting prolonged arbitrary detention which was codified at 28 U.S.C. § 1350. *Id.* at 535. El-Masri’s final cause of action is also brought pursuant to the ATS for the violation of international legal norms prohibiting cruel, inhuman, or degrading treatment. *Id.* The U.S. Supreme Court has interpreted the statute as providing district courts jurisdiction over civil suits brought by aliens for violations of a limited set of well-recognized norms of international law, but has yet to identify which well-recognized norm are actionable. *Id.* at 535 n.6.

107. *El-Masri II*, 479 F.3d at 299–300.



affirmed the district court's finding that the government properly asserted a valid state secrets privilege.<sup>108</sup> The Court of Appeals' holding was implicitly affirmed on October 9, 2007 when the U.S. Supreme Court denied certiorari.<sup>109</sup>

To prove his claims against the U.S. Government, El-Masri would have had to prove that he was abducted, detained, and subjected to cruel and degrading treatment under the policies of the United States' extraordinary rendition program.<sup>110</sup> But, despite receiving several published reports<sup>111</sup> detailing both the existence and modus operandi of the CIA program, the Fourth Circuit determined that El-Masri did not plead enough facts "central to litigating his action."<sup>112</sup> El-Masri argued that the district court erroneously found that state secrets were so integrated into his claim that further litigation would threaten disclosure of those secrets—especially prior to a responsive pleading and discovery, which was likely to produce alternative evidence.<sup>113</sup>

## II. ANALYSIS

*"The use of the state secrets privilege . . . is the 'government's nuclear option when it comes to litigation.'"*<sup>114</sup>

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108. *Id.* at 300.

109. U.S. Supreme Court Orders, Oct. 9, 2007, 2, available at <http://www.supremecourtus.gov/orders/courtorders/100907pzor.pdf>. The Court's denial means that no four Justices thought that El-Masri's case merited review. See Huq, *Rendition Accountability*, *supra* note 11. The denial also exhausts every American judicial remedy for El-Masri. *Id.*

110. Williams, *supra* note 79, at 49.

111. See generally MICHAEL JOHN GARCIA, CRS REPORT FOR CONGRESS, RENDITIONS: CONSTRAINTS IMPOSED BY LAWS ON TORTURE (Oct. 2007), available at <http://www.fas.org/sgp/crs/natsec/RL32890.pdf>; David Ignatius, 'Rendition' Realities, WASH. POST, Mar. 9, 2005, at A21; Jane Mayer, *Outsourcing Torture: The Secret History of America's "Extraordinary Rendition" Program*, NEW YORKER, Feb. 14, 2005, at 106; Pelley, *supra* note 101; *Observatory on "Rendition": The Use of European Countries by the CIA for the Transport and Illegal Detention of Prisoners*, STALEWATCH, <http://www.statewatch.org/rendition/rendition.html> (last visited Feb. 8, 2007).

112. *El-Masri II*, 479 F.3d at 311.

113. *Id.* at 302.

114. Bill Conroy, *DEA Agent's Whistleblower Case Exposes the "War on Drugs" as a "War of Pretense"*, NARCO NEWS BULL., Sept. 7, 2004, available at <http://www.narconews.com/Issue34/article1063.html> (quoting Steven Aftergood, Director, Project on Government Secrecy); see also *State Secrets Privilege Gets a Workout*, SECRECY NEWS, Apr. 23, 2002, available at <http://www.fas.org/sgp/news/secrecy/2002/04/042302.html>.

Claims involving the state secrets privilege create tension between two distinct public interests.<sup>115</sup> The interest in preventing public harm that comes from the disclosure of certain documents is placed in direct tension with the public interest in preventing the frustration of justice.<sup>116</sup> The tremendous cost imposed by secrecy within an elected government undermines the legal, political, and cultural traditions of that government.<sup>117</sup>

The court's deference is allowing the government to expand the scope of the state secrets privilege.<sup>118</sup> The government has cultivated the privilege such that its successful invocation is sufficient to effectively dismiss any claim remotely connected to a unilaterally determined national secret, thereby eliminating the possibility of judicial review on the merits of the case.<sup>119</sup> By denying certiorari to *El-Masri*, the U.S. Supreme Court missed a prime opportunity to clarify and limit blatant overexpansion of the privilege. England, faced with a similar expansion of the crown privilege, limited the government's ability to invoke the privilege a mere twenty-five years after *Duncan* by requiring the judiciary to review the information.<sup>120</sup> Specifically the U.S. Supreme Court ignored two critical areas requiring further examination: 1) the existing circuit split surrounding the *Reynolds* balancing test; and 2) the developing fusion of the state secrets privilege with the *Totten* Doctrine.<sup>121</sup>

If the United States could limit its expanding use of the state secrets privilege, it would prevent further erosion of America's relationship with Europe.<sup>122</sup> As one of the most influential legal systems in the world, America must return to the legal and moral high ground by establishing a check on the executive's power to decide unilaterally what is and is not a state secret.<sup>123</sup> Clearly establishing a check on the wanton use of

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115. *Conway v. Rimmer*, [1968] 1 All E.R. 874, 880 H.L.(E.). Lord Reid states that it "is universally recognised that . . . there are two kinds of public interests which may clash." *Id.*

116. *Id.*

117. *PALLITTO & WEAVER*, *supra* note 6, at 5.

118. *Id.* at 120.

119. *See PALLITTO & WEAVER*, *supra* note 6, at 45 (explaining the executive's expansive ability to classify information as secret is combined with the inherent self-interest in preventing information from becoming publicly available).

120. *Conway*, [1968] 1 All.E.R. at 908 (Lord Pearce holding that the court has always had an inherent power to inspect and order the production of evidence).

121. *See supra* Part I.A. (discussion of *Totten* doctrine).

122. *Rendition Hearings*, *supra* note 74, at 8.

123. *Id.*

the privilege will reaffirm that no one branch of government has final authority to interpret and apply constitutional powers<sup>124</sup> and will influence how other nations handle the necessity of protecting their own state secrets. Specifically, the United States could reaffirm its dedication to a free government by adopting minor changes within the judiciary and legislature to act as that check on the potential for executive abuse of the privilege.

#### A. U.S. CIRCUIT SPLITS IN ADJUDICATING STATE SECRET CLAIMS

*"A house divided against itself cannot stand."*<sup>125</sup>

Denying certiorari to *El-Masri* bypassed an opportunity to further define the nature and scope of the state secrets privilege, specifically it leaves two significant U.S. Court of Appeals circuit splits unresolved. The first split involves the proper scope and application of the *Reynolds* balancing test. The second split concerns the procedural results and repercussions following the successful invocation of the privilege.

##### 1. *Balancing Test Application*

The proper application of the *Reynolds* balancing test specifically requires a showing of necessity by the litigant in order to determine how far the courts should probe into the appropriateness of the invocation.<sup>126</sup> According to *Reynolds*, if the party expresses a strong showing of necessity, the claim of privilege should not be lightly accepted; but if alternative methods of proving a case make the necessity dubious, the claim of privilege will likely prevail.<sup>127</sup> The court acknowledges that

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124. Gerald Gunther, *Judicial Hegemony and Legislative Autonomy: The Nixon Case and the Impeachment Process*, 22 UCLA L. REV. 30, 34 (1974) ("[T]here is nothing in *Marbury* . . . that precludes a constitutional interpretation which gives final authority to another branch.").

125. ABRAHAM LINCOLN, *Speech at Springfield, June 17, 1858*, in POLITICAL DEBATES BETWEEN ABRAHAM LINCOLN AND STEPHEN A. DOUGLAS IN THE CELEBRATED CAMPAIGN OF 1858 IN ILLINOIS 2 (1895), available at <http://galenet.galegroup.com/servlet/MOML?af=RN&ae=F102868700&srchtp=a&ste=14>.

126. *United States v. Reynolds*, 345 U.S. 1, 11 (1953); see *Tenet v. Doe*, 544 U.S. 1, 9 (2005) (reaffirming the appropriateness of the state secrets privilege balancing test).

127. *Reynolds*, 345 U.S. at 11.

even the most compelling necessity cannot overcome the privilege when the information being sought is a properly classified state secret.<sup>128</sup> The privilege is not properly invoked, however, until the court is satisfied that disclosure of the underlying documents would be dangerous.<sup>129</sup> Thus in its proper application, the balancing test is used to determine whether the privilege is properly invoked.<sup>130</sup> Once the court determines that the privilege is properly invoked by the government, it is absolute.<sup>131</sup>

The D.C. Circuit applies the *Reynolds* balancing test not to determine whether or not the privilege is properly invoked but instead as an additional inquiry *after* determining that the government has successfully invoked the privilege.<sup>132</sup> Specifically, the D.C. Circuit asks whether the actual “harm that might reasonably be seen to flow from disclosure is adequate . . . to trigger the absolute right to withhold the information.”<sup>133</sup> When applied in this manner, the balancing test is only utilized to determine whether the court should examine more than just an affidavit asserting the privilege (and perhaps an *in camera* inspection of the underlying document).<sup>134</sup> In this variant of the balancing test, the necessity of the litigant’s need for the document has no weight or role in upholding or denying the invocation of the privilege.<sup>135</sup> This effectively creates an additional bar to defeating the privilege that does not concern the actual merits of the claim.<sup>136</sup>

## 2. Results of Successful Invocation of State Secrets Privilege

A second area of circuit tension involves an inquiry as to whether the state secrets privilege requires dismissal of an entire claim if a party *might* assert issues that implicate state secrets rather than merely excluding specific evidentiary items

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128. *Id.* at 10–11; see also WIGMORE, *supra* note 56, § 2379.

129. *Reynolds*, 345 U.S. at 9.

130. *Id.* at 11. (“Where there is a strong showing of necessity, the claim of privilege should not be lightly accepted” and the necessity for the evidence is reduced by the availability of alternative evidence.”).

131. PALLITTO & WEAVER, *supra* note 6, at 93.

132. *Halkin v. Helms (Halkin II)*, 690 F.2d 977, 990 (D.C. Cir. 1982).

133. *Id.*

134. *Id.*

135. *Id.*

136. The U.S. Court of Appeals for the District of Columbia Circuit has exclusive appellate jurisdiction for military commission decisions for all detainees and enemy combatants. Military Commissions Act, 10 U.S.C. § 950g (2006).

and allowing the claim to continue.<sup>137</sup> Both the Ninth and the Fourth Circuits have expanded the scope of the state secrets privilege so that a claim will likely be dismissed if it *potentially* involves privileged evidence.<sup>138</sup> Contrast this with the D.C. Circuit, which evaluates whether the claim may be adjudicated through alternative means, with the use of alternative evidence, or by “disentangl[ing] the nonsensitive information.”<sup>139</sup>

The Fourth Circuit decided its first post-*Reynolds* state secrets claim in 1969.<sup>140</sup> It has since developed a doctrine where any successful invocation of the state secrets privilege that bars specific evidence from discovery such that a prima facie case cannot be made without *that* evidence requires dismissal of that claim.<sup>141</sup> This application extends *Reynolds* beyond its original holding that allowed parties to utilize “available alternative . . . evidence to make out their case without forcing a showdown” with the privilege.<sup>142</sup> This is in direct contrast to the intent of *Reynolds*, which held that the availability of alternative evidence is a factor in the balancing test.<sup>143</sup>

By quickly dismissing a case, simply because one of the methods available to a party involves potential state secrets, the courts are removing a barrier to the application of the privilege and allowing the government a preemptive strike.<sup>144</sup> This shift changes the privilege from a shield used to protect specific items of evidence to a sword used to preempt potential claims against

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137. *Reynolds* established the state secrets privilege as an evidentiary privilege only. See *United States v. Reynolds*, 345 U.S. 1, 6–7 (1953); see also *Tenet v. Doe*, 544 U.S. 1, 8–10 (2005).

138. See *Kasza v. Browner*, 133 F.3d 1159, 1166 (9th Cir. 1998) (dismissing the claim despite the plaintiff's ability to produce nonprivileged evidence); see also *El-Masri v. United States (El-Masri I)*, 479 F.3d 296, 311 (4th Cir. 2007), cert. denied, 75 U.S.L.W. 3663, 76 U.S.L.W. 3021 (U.S. Oct. 9, 2007) (No. 06-1613) (dismissing *El-Masri*'s claim during the pleading stage despite several published news reports and physical evidence supporting his claim).

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

140. *Heine v. Raus*, 305 F. Supp. 816, 821 (4th Cir. 1969) (holding that the government's invocation of the state secrets doctrine was sufficient to prevent a defamation suit from proceeding).

141. See *El-Masri II*, 479 F.3d at 306 (holding that when any attempt to proceed will threaten the disclosure of a state secret, dismissal is the proper remedy); see also *Farnsworth Cannon, Inc. v. Grimes*, 635 F.2d 268, 273 (4th Cir. 1980).

142. *Reynolds*, 345 U.S. at 11.

143. *Id.*

144. The increased use of *potential* evidence results in the dismissal of the case during the pleading stage. See *El-Masri II*, 479 F.3d at 311; see also *Huq, Dangerous Discretion*, supra note 9 (explaining that *El-Masri* was dismissed before any evidence was presented or *El-Masri* could show evidence other than what the government proscribed as secret).

the government. For example, in *Reynolds* the privilege was asserted to prevent the disclosure of evidence after the evidence was requested—i.e., during the discovery stage.<sup>145</sup> But, while still in the pleading stage, the government asserted that El-Masri's claim "seeks to place at issue . . . activity that may neither be confirmed nor denied," but could not give more details because "even stating precisely the harm that may result from further proceedings in this case is contrary to the national interest."<sup>146</sup> Modifying the privilege in such a manner, provides an opportunistic government greater incentive to invoke the privilege before the merits of the case are clearly established, thereby preventing discovery of a potentially embarrassing act.<sup>147</sup> By showing that *a method* of proving the claim involves state secrets the government can quash the issue during the pleading stage of litigation and prevent discovery for that claim.<sup>148</sup>

Alternatively, following the successful invocation of the state secrets privilege, the D.C. Circuit poses a second inquiry to determine "whether the case is to proceed as if the privileged matter had simply never existed . . . or instead should proceed under rules that have been changed to accommodate the loss of the otherwise relevant evidence."<sup>149</sup> This application is not only a more honest interpretation of *Reynolds*; it also allows the court to compensate the affected parties in the interest of the individual's right to a judicial remedy rather than simply dismissing the case.<sup>150</sup> For example the court could alter the burden of persuasion upon particular issues or utilize

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145. *Reynolds*, 345 U.S. at 3.

146. Memorandum of Points and Authorities in Support of the Motion by Intervenor United States to Dismiss or, in the Alternative, for Summary Judgment at 11–12, *El-Masri v. Tenet (El-Masri I)*, 437 F. Supp. 2d 530 (E.D. Va. 2006), available at [http://www.aclu.org/pdfs/safefree/govt\\_mot\\_dismiss.pdf](http://www.aclu.org/pdfs/safefree/govt_mot_dismiss.pdf).

147. See Shayana Kadidal, *The State Secrets Privilege and Executive Misconduct*, JURIST, May 30, 2006, available at <http://jurist.law.pitt.edu/forumy/2006/05/state-secrets-privilege-and-executive.php> (asserting that "[p]revious invocations of the privilege by the government have most commonly been at the discovery stage, asking the courts to deny private litigants access to documents or witnesses, but more recently the government has moved to dismiss a spate of cases . . . at the pleading stage").

148. See *El-Masri II*, 479 F.3d at 311 (dismissing El-Masri's claim because the government showed that one method of defending the claim would involve state secrets despite the existence of public reports).

149. *Halkin v. Helms (Halkin II)*, 690 F.2d 977, 991 (D.C. Cir. 1982).

150. *Reynolds* expressly stated that the availability of alternative evidence affects the balancing test. *Reynolds*, 345 U.S. at 11.

presumptions or presumptive inferences to obtain lost proofs.<sup>151</sup>

#### B. *EL-MASRI*: CREATING A *REYNOLDS-TOTTEN* FUSION

*“For the rule proposed here, the victim is more likely to be some individual who is prevented from proving a valid claim—or (worse still) prevented from establishing a valid defense. The latter is particularly unpalatable for those who love justice, because it causes the courts of law not merely to let stand a wrong, but to become themselves the instruments of wrong.”*<sup>152</sup>

The state secrets privilege is not intended to be a complete bar on the adjudication of claims by the courts.<sup>153</sup> Charts 1 and 2, however, clearly show the government increasingly invoking the privilege as a motion to dismiss the entire claim rather than a motion limiting discovery of specific evidence within a claim.<sup>154</sup>

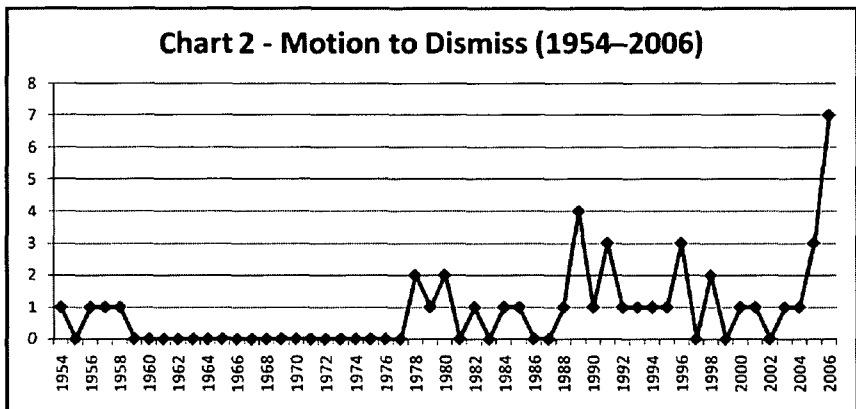
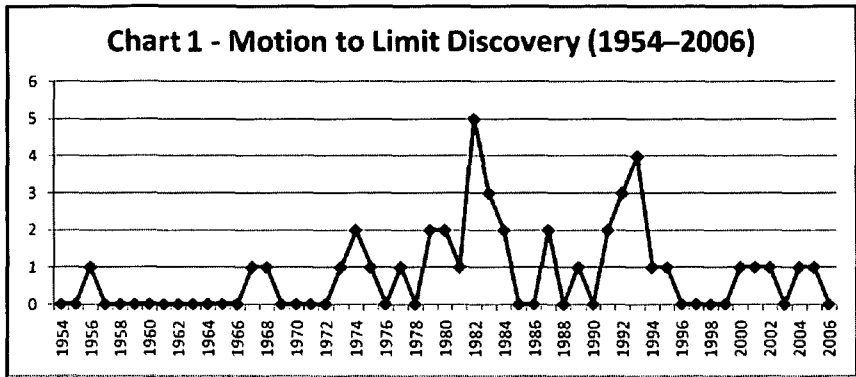
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151. *Halkin II*, 690 F.2d at 991.

152. *Jaffee v. Redmond*, 518 U.S. 1, 19 (1996) (Scalia, J., dissenting) (explaining why privileges must be narrowly construed and also the danger in establishing a new privilege that when validly asserted chooses as its victim an individual who is prevented from making a valid claim).

153. *Tenet v. Doe*, 544 U.S. 1, 9 (2005) (distinguishing the *Totten* doctrine from the state secrets privilege by stating that the state secrets privilege does not forever close the door to a party's claim). When the state secrets privilege is properly invoked the result is “simply that the evidence is unavailable, as though a witness had died, and the case will proceed accordingly, with no consequences save those resulting from the loss of evidence.” *In re Sealed Case*, 494 F.3d 139, 145 (D.C. Cir. 2007).

154. Chesney, *supra* note 4, at 1298–99 (charts changed from bar to line graph). These numbers provide additional evidence that “the administration is now well on its way to transforming [the state secrets privilege] from a narrow evidentiary privilege into something that looks like a doctrine of broad government immunity.” Lanman, *supra* note 9. *But cf.* Chesney, *supra* note 4, at 1252–54 (citing reasons why using published opinions for determining frequency of assertions of the state secrets privilege is problematic).



The first American use of the state secrets privilege occurred in *United States v. Burr*<sup>155</sup> and involved an *in camera* inspection of a letter from General Wilkinson to President Jefferson allegedly containing information exculpating the accused.<sup>156</sup> Justice Marshall determined that it was within the court's power to review the letter and determine if the matter should be disclosed, noting that "if it be not immediately and essentially applicable to the point, [it] will, of course, be suppressed."<sup>157</sup> Although it is often cited that the privilege was founded on the chief executive's official duties,<sup>158</sup> at its founding

155. *United States v. Burr*, 25 F. Cas. 30, 37–38 (C.C.D. Va. 1807) (No. 14692d).

156. *Id.* at 32. The letter was requested as evidence for the defense, but the prosecution objected to the production because the evidence contained matters which "ought not be disclosed." *Id.* at 37.

157. *Id.* at 37.

158. WIGMORE, *supra* note 56, § 2371 (noting that under common law it was clear that the chief executive held the privilege, but it was less clear if the privilege



it was an evidentiary privilege, subject to judicial review.<sup>159</sup> State secrets are distinguished from official information and are explicitly excluded from the freedom of information laws.<sup>160</sup> But many doubt the court's ability to have a better perspective or greater knowledge of a given matter than that of the executive in weighing the risks.<sup>161</sup>

Based on the government's success in asserting the privilege and the post-9/11 desire for secrecy, there is a significant incentive to invoke the privilege as a blanket protection over every item of potential evidence (documents and witnesses) concerning the claim.<sup>162</sup> This incentive has the potential of effectively barring the courthouse doors for those who have suffered fundamental harms by the government.<sup>163</sup> For example, dismissing El-Masri's claim based on the state secrets privilege blocks almost every formal channel for government accountability over the practice of "extraordinary rendition," and public accountability for any errors occurring within that program.<sup>164</sup> The net result is that the government now has the necessary tools "to seize people and hold them based on evidence that would not and could not permit criminal prosecution."<sup>165</sup> It is possible that in some cases, every potential item of evidence could be individually privileged; though such a situation is understandably rare. Equally disturbing, courts have begun to accept the privilege extremely early in the proceedings—often before the government has answered the complaint and before receiving requests for discovery that could lead to alternative methods of proving the claim.<sup>166</sup> The U.S.

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extended to subordinate executive officials).

159. *Id.* § 2379 ("In the United States . . . the court determines the claim."). A court abdicating the "inherent function of determining the facts upon which the admissibility of evidence depends will furnish the bureaucratic officials too ample opportunities for abusing the privilege." *Id.*

160. The Freedom of Information Act (FOIA), 5 U.S.C. § 552(b)(1)(A) (as amended 2002), exempts items "specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy." FOIA Section 552(b)(7) also exempts information compiled for law enforcement purposes but leaves several "outs" where the police are required to provide the information or forfeit the case.

161. See MUELLER & KIRKPATRICK, *supra* note 8, § 5:54.

162. See PALLITTO & WEAVER, *supra* note 6, at 117.

163. See Arar v. Ashcroft, 414 F. Supp. 2d 250, 274 (E.D.N.Y. 2006) (finding that the harms inflicted upon Arar clearly meet the "shocks the consciousness" test of the Due Process Clause).

164. Huq, *Rendition Accountability*, *supra* note 11.

165. *Id.*

166. See Kasza v. Browner, 133 F.3d 1159, 1166 (9th Cir. 1998) (dismissing the

Government has mastered the formal procedures required to invoke the privilege, but has been increasingly ignoring the “not to be lightly invoked” mandate.<sup>167</sup>

As recently as February 10, 2000, the executive has acknowledged the judiciary as the proper branch to determine admissibility of evidence.<sup>168</sup> Despite this very specific charge, the courts have been hesitant to inspect material or check executive claims where there is potentially a high risk of disclosure.<sup>169</sup> Of course, the judiciary is not currently in a position to determine the level of security required for particular information without review; this entices the executive to claim that a risk of unintentional disclosure is high with judicial review.<sup>170</sup> This shift has moved what was once a purely evidentiary privilege to one that parallels the *Totten* Doctrine and essentially bars the whole claim at the pleading stage rather than specific evidence.<sup>171</sup>

The *Totten* claim is different in its scope from that of other claims involving the state secrets privilege.<sup>172</sup> *Totten* voluntarily entered into a contract with President Lincoln to provide

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claim despite the plaintiff's ability to produce nonprivileged evidence); see also *El-Masri v. United States (El-Masri II)*, 479 F.3d 296, 313 (4th Cir. 2007), cert. denied, 75 U.S.L.W. 3663, 76 U.S.L.W. 3021 (U.S. Oct. 9, 2007) (No. 06-1613) (dismissing *El-Masri's* claim during the pleading stage despite several published news reports and physical evidence supporting his claim).

167. *United States v. Reynolds*, 345 U.S. 1, 7 (1953).

168. LOUIS FISHER, CRS REPORT FOR CONGRESS ON THE NATIONAL SECURITY WHISTLEBLOWERS 36 (2005), available at <http://www.fas.org/sgp/crs/natsec/RL33215.pdf>. CIA Director Tenet signed a declaration and formal claim of state secrets privilege stating that it would not be possible to redact or sanitize the evidence in any meaningful way. This declaration did not automatically block access to the evidence; rather it acknowledged that “it is the Court's decision rather than mine to determine whether the requested material is relevant[.]” FISHER, *supra*, at 36 (quoting Declaration and Formal Claim of State Secrets Privilege and Statutory Privilege by George J. Tenet, Director of Central Intelligence at 9, *Barlow v. United States*, No. 98-887X (Fed. Cl. Feb. 10, 2000), available at <http://www.fas.org/sgp/jud/statesec/barlow-tenet.pdf>).

169. See PALLITTO & WEAVER, *supra* note 6, at 107.

170. Despite the power of the state secrets privilege, there are no policies or guidelines concerning the proper use of the privilege within the executive. *Id.* at 119. A Department of the Navy memorandum espouses that “there is nothing but good news about the state secrets privilege” when used to prevent the disclosure of information. *Id.* (quoting MEMORANDUM FROM THE DEP'T OF THE NAVY, OFFICE OF THE JUDGE ADVOCATE GEN., ASSERTING THE STATE SECRETS PRIVILEGE IN UNITED STATES CLAIMS COURT AND BOARD OF CONTRACT APPEALS CASES (1992)).

171. See Amanda Frost, *The State Secrets Privilege and Separation of Powers*, 75 FORDHAM L. REV. 1931, 1941 (2007).

172. See *Tenet v. Doe*, 544 U.S. 1, 3 (2005); see also Frost, *supra* note 171, at 1941.

espionage services.<sup>173</sup> By its very nature the services contracted for were secret and the parties knew or should have known that the “lips of the other were to be for ever [sic] sealed respecting the relation of either to the matter.”<sup>174</sup> Because *Totten* voluntarily entered into a secret agreement, he breached the contract by bringing the very claim for which he sought relief, thus defeating his chances of recovery.<sup>175</sup> *Tenet v. Doe* recently held that the *Totten* doctrine applies only to a claim based on covert agreements to engage in espionage for the United States.<sup>176</sup>

The government raised both the state secrets claim and the *Totten* doctrine as intervenors against El-Masri.<sup>177</sup> Unlike *Totten*, El-Masri was not voluntarily detained by the CIA nor did he *voluntarily* subject himself to the secret proceedings.<sup>178</sup> Because U.S. District Judge T.S. Ellis ruled in favor of the government’s state secrets claim he did not rule whether or not the *Totten* doctrine applied to extraordinary rendition claims.<sup>179</sup> Judge Ellis’ failure to clarify the differences and distinctions between the state secrets privilege endangers the blurring of the two distinct privileges.<sup>180</sup> Judge Ellis wrote that even though the government was successful in its state secrets claim, thus making the *Totten* claim nonjusticiable, *Totten* claims apply whenever a party’s “success depends upon the existence of [a] secret espionage relationship with the government.”<sup>181</sup>

### C. GLOBAL REACTION AND THE EAST EUROPEAN AND CANADIAN MODELS

*“The protection [of national security-related information] must be limited in scope, reasonable, and balanced with the need*

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173. *Totten v. United States*, 92 U.S. 105, 105–06 (1875).

174. *Id.* at 106.

175. *Id.*

176. *See Tenet*, 544 U.S. at 3.

177. *El-Masri v. Tenet (El-Masri I)*, 437 F. Supp. 2d 530, 540 (E.D. Va. 2006).

178. *El-Masri v. United States (El-Masri II)*, 479 F.3d 296, 300 (4th Cir. 2007), *cert. denied*, 75 U.S.L.W. 3663, 76 U.S.L.W. 3021 (U.S. Oct. 9, 2007) (No. 06-1613).

179. *El-Masri I*, 437 F. Supp. 2d at 540.

180. Judge Ellis blurs the distinction between the two privileges and threatens to expand the *Totten* doctrine by holding that “[i]t is true that El-Masri’s allegations here concern the existence of several ‘secret espionage relationships’ between the United States and both certain foreign governments and the corporate defendants.” *Id.*

181. *Id.* (quoting *Tenet*, 544 U.S. at 7).

for public access to information to ensure a free and democratic society.”<sup>182</sup>

### 1. Global Reaction to United States' Validation of Extraordinary Rendition

The relationship of the United States and Europe, long considered one of the strongest in the world, has been declining steadily.<sup>183</sup> The United States has begun a shift from a society where information is distributed on the basis of a “right to know” to one where information is distributed on the basis of a “need to know.”<sup>184</sup> A recent study found that citizens of Great Britain, Spain, and France believe the U.S.-led war in Iraq is a greater threat to world peace than Iran and its reported nuclear program.<sup>185</sup> The people of Europe believe that there is a gap between America’s stated policies and actions.<sup>186</sup> The extraordinary rendition allegation, specifically sending suspects to Syria, is one of the strongest elements undermining the United State’s moral authority in Europe.<sup>187</sup> Expanding the state secrets privilege beyond its evidentiary roots to effectively prevent a valid recourse for those who are captured unlawfully or inadvertently will only further undermine international relations.<sup>188</sup> As the U.S. Supreme Court has held “international

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182. DAVID BANISAR, COMMENTS ON THE CROATIAN DRAFT BILL ON DATA SECURITY 1 (2007), available at <http://www.privacyinternational.org/countries/Croatia/pi-osce-croatia-07-eng.pdf>.

183. *Rendition Hearings*, *supra* note 74, at 8 (statement of Julianne Smith, Director and Senior Fellow, Europe Program, Center for Strategic and International Studies).

184. GUP, *supra* note 13, at 9.

185. PEW GLOBAL ATTITUDES PROJECT, AMERICA’S IMAGE SLIPS, BUT ALLIES SHARE U.S. CONCERNS OVER IRAN, HAMAS 3 (2006) [hereinafter *Global Attitudes*], available at <http://pewglobal.org/reports/display.php?ReportID=252>; see also U.S. ‘Biggest Global Peace Threat’, B.B.C. NEWS, June 14, 2006, <http://news.bbc.co.uk/2/hi/5077984.stm>.

186. *Rendition Hearings*, *supra* note 74, at 8 (statement of Julianne Smith, Director and Senior Fellow, Europe Program, Center for Strategic and International Studies).

187. *Id.* at 8–10. Fourteen countries have now admitted to allowing the CIA to operate secret prisons or carry out rendition operations within their territories. *Id.*

188. The ability of other countries to stand shoulder to shoulder with the United States without committing political suicide in their home country is important not only for a successful international anti-terrorism front but also for solving other global issues. The political elite in other countries will distance themselves from the United States if they feel that cooperation will be a political liability. See generally *id.*

law is founded upon mutuality and reciprocity."<sup>189</sup>

According to the International Covenant on Civil and Political Rights the right to adjudicate wrongs through the court is a fundamental right.<sup>190</sup> Often the European Court of Human Rights views the state secrets privilege as interfering with this right and requires an *in camera* inspection of the evidence in question when the formal elements of the privilege are satisfied.<sup>191</sup> The European Court of Human Rights implied that the state secrets privilege could be successfully challenged in the international court if challenges against the privilege were unsuccessful under domestic law and another domestic remedy does not exist.<sup>192</sup>

On April 19, 2007 the Parliamentary Assembly of the Council of Europe (PACE) adopted a resolution (Resolution 1551) on espionage and divulging state secrets.<sup>193</sup> PACE made it clear that the need to protect sensitive national information is important to any government, but poorly defined or overly broad authorizations allowing the executive to define what constitutes a "secret" undermine government openness.<sup>194</sup> PACE also specifically mentioned the United States among the countries who have recently threatened freedom of information.<sup>195</sup>

Resolution 1551 calls on judicial authorities of all countries to find the appropriate balance between protecting state secrets and society's interest in exposing government wrongs.<sup>196</sup> PACE reinforces "the importance of freedom of expression and of

189. *Hilton v. Guyot*, 159 U.S. 113, 259 (1895).

190. The United States became a signatory to the ICCPR on September 8, 1992, but did so with several Reservations, Understandings, and Declarations (RUD). S. REP. NO. 23, at 1 (1992), *as reprinted in* 31 I.L.M. 645 [hereinafter, *ICCPR Senate Report*].

191. *See Matyjek v. Poland*, [2007] ECHR 38184/03, Apr. 24, 2007, ¶ 20.

192. *Id.* ¶ 64.

193. Resolution on Fair Trial Issues in Criminal Cases Concerning Espionage or Divulging State Secrets, EUR. PARL. DOC. 1551 (2007) [hereinafter *Resolution 1551*], available at <http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta07/ERES1551.htm>.

194. For example, the failure to define state secrets in Tajikistan has resulted in information concerning the death penalty and economic growth being classified a state secret. PRIVACY INT'L, LEGAL PROTECTIONS AND BARRIERS ON THE RIGHT TO INFORMATION, STATE SECRETS AND PROTECTION OF SOURCES IN OSCEP PARTICIPATING STATES 16 (2007), available at <http://www.privacyinternational.org/foi/osce-access-analysis.pdf>. In Turkmenistan cases of the plague have been defined as a state secret. *Id.* In the United States the executive and his officials have almost unlimited power to classify material. PALLITTO & WEAVER, *supra* note 6, at 45.

195. *Resolution 1551*, *supra* note 193, ¶ 8.

196. *Id.* ¶ 9.

information in a democratic society, in which it must be possible to freely expose corruption, human rights violations, environmental destruction and other abuses of authority."<sup>197</sup> In the words of Patrick Henry "[t]o cover with the veil of secrecy the common routine of business, is an abomination in the eyes of every intelligent man and every friend to his country."<sup>198</sup>

Once information is classified, there is virtually no incentive for the government to declassify that information. In fact, when an individual risks his or her career by improperly disseminating information, the safest path is to classify even ordinary information at the highest level possible.<sup>199</sup> Excessive secrecy lends credibility to conspiracy theorists and may be used by terrorist organizations to drive a wedge between allies, or used to cover up illegal acts or simple negligence. Finally, excessive secrecy may lead to a weakening of more important information, general disregard of procedural systems, and more common leaks.<sup>200</sup>

## 2. Canada and the State Secrets Privilege

The Canadian Supreme Court has often stated that the exclusion of specific evidence is justified on the ground of state secrets when there is a greater public interest in excluding the evidence than in its admission.<sup>201</sup> This determination is made by the Canadian Federal Court pursuant to Section 38 of the Canadian Evidence Act in cases of national defense or security.<sup>202</sup> Even when a state secrets objection is properly put forward, the Canadian courts may order disclosure.<sup>203</sup> Prior to

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197. *Id.* ¶ 2.

198. PALLITTO & WEAVER, *supra* note 6, at 84 (quoting Patrick Henry).

199. *Id.* at 48.

200. GUP, *supra* note 13, at 10 (finding that people have become desensitized by the increased number of classified documents and the recognition that many are undeserving of the designation). U.S. Supreme Court Justice Potter Stewart stated that "when everything is classified then nothing is classified, and the system becomes one to be disregarded by the cynical or the careless, and to be manipulated by those intent on self-protection or self-promotion." *New York Times Co. v. United States*, 403 U.S. 713, 729 (1971) (Stewart, J., concurring); *see also Arar Commission*, *supra* note 72, at 9 (finding that the information given to the media concerning Arar came from government leaks with access to classified information).

201. *R. v. Guenke*, [1991] 3 S.C.R. 263, 283 (Can.).

202. FED. PROSECUTION SERV., DEPT OF JUSTICE CAN., THE FEDERAL PROSECUTION SERVICE DESKBOOK § 37.4.2 (2000), available at <http://www.justice.gc.ca/en/dept/pub/fps/fpd/ch37.html>.

203. Canada Evidence Act § 38.06; FED. PROSECUTION SERV., *supra* note 202, § 37.5.

ordering disclosure, the court will investigate the extent of the potential harm caused by the disclosure and attempt to minimize that harm.<sup>204</sup> In extreme cases where the harm cannot be mitigated, the court may stay the proceedings.<sup>205</sup>

In January 2004, an *Ottawa Citizen* reporter was threatened with prosecution under the Security of Information Act and her office was searched after she published an article concerning the transfer of Arar to Syria.<sup>206</sup> Certain information in the article was considered state secret and she was investigated for alleged offenses under Section 4 of the Security of Information Act covering leaks of secret government information.<sup>207</sup> The Ontario Court of Justice ruled in 2006 that the Act violated the Canadian Charter of Rights and Freedoms.<sup>208</sup>

Following *O'Neil*, the Canadian Government<sup>209</sup> appointed a commission to make a factual inquiry into the "actions of Canadian officials in relation to Maher Arar" for national security confidentiality concerns.<sup>210</sup> The Arar Commission determined that they had a duty to be independent and impartial to satisfy the public's desire for the truth.<sup>211</sup> In addition to impartiality, the Arar Commission found that in order to realize their duty of independence and impartiality, they had to be thorough and examine all relevant issues.<sup>212</sup> Although the Arar Commission was a public inquiry, the commissioner was allowed to balance the interests of the public with the need to protect national security confidentiality information.<sup>213</sup> He did this through *in camera* review of all available information related to Arar's disappearance, including

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204. FED. PROSECUTION SERV., *supra* note 202, § 37.5.

205. *Id.*

206. *O'Neil v. Canada* (Attorney General), [2006] 272 D.L.R. (4th) 193 (Can.).

207. *Id.* ¶ 4.

208. *Id.* ¶¶ 65, 79–82 (finding the Security of Information Act overly broad and overly vague to such an extent that it violated the Canadian Charter of Rights and Freedoms).

209. The Arar Commission acted pursuant to Order of Council P.C. 2004-0048 of February 5, 2004, available at <http://www.pco-bcp.gc.ca/oic-ddc/OIC-DDC.asp?lang=EN&txtOICID=&txtFromDate=&txtToDate=&txtPrecis=Arar&txtDepartment=&ctoDepartment=&txtAct=&txtChapterNo=&txtChapterYear=&txtBillNo=&rdoComingIntoForce=&DoSearch=Search+%2F+List&OICKey=67710&viewattach=15494>.

210. *Arar Commission*, *supra* note 72, at 280. The Commission was headed by former Canadian Supreme Court Justice Dennis O'Conner. Huq, *Rendition Accountability*, *supra* note 11.

211. *Arar Commission*, *supra* note 72, at 282.

212. *Id.*

213. *Id.*

classified material.<sup>214</sup>

During this independent review the Arar Commission found that there was a good deal of information that could be disclosed without harm to national security.<sup>215</sup> Examples include information that is rightly classified but has already come into the public domain, and information that, though secret, may be disclosed if the public interest in disclosure outweighs the potential injury.<sup>216</sup>

Based on the Arar Commission's precedent and recommendations, the Canadian Government has relaxed its national security confidentiality claims to a "significant degree."<sup>217</sup> The Commission specifically determined that the prospect of litigating questionable claims concerning secrets is in no one's interest and the government's temptation to utilize the state secrets shield to prevent embarrassing or criminal activity from public scrutiny should always be avoided.<sup>218</sup> The process employed by the Arar Commission is an example of how separation of powers provides a check to the executive's ability to invoke the state secrets privilege, thereby ensuring public accountability for an overreaching government.<sup>219</sup>

### 3. *Eastern Europe and the State Secrets Privilege*

Those who have been historically prevented from access to information tend to be more aware of the ability of an individual to gain that access.<sup>220</sup> The Constitutional Court of the Republic of Hungary holds that "[f]reedom of information, the openness of

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214. *Id.* at 10–11.

215. *Id.* at 284.

216. *Id.* This is also congruent with PACE's determination that information already in the public domain cannot be considered a state secret. *Resolution 1551*, *supra* note 193, ¶ 10.1.

217. *Arar Commission*, *supra* note 72, at 302.

218. *See id.*

219. *Id.* at 304.

220. *See* Konstitutsiia Rossiiskoi Federatsii [Konst. RF] [Constitution] arts. 29.4, 29.5 (protecting the individual's right to access information and the protection of the media through federal law); *see also* Federal'nyi Zakon [FZ RF] [Law of the Russian Federation on Mass Media] art. 38.2, *available at* [http://www.medialaw.ru/e\\_pages/laws/russian/massmedia\\_eng/massmedia\\_eng.html](http://www.medialaw.ru/e_pages/laws/russian/massmedia_eng/massmedia_eng.html) (requiring state officials to inform the media about their activities to ensure transparency in governance); *id.* art. 40.2 (restricting refusals to provide information be clearly communicated and restricted to those cases of state, commercial or other law-protected secrets). *But cf.* Hedwig de Smaele, *Mass Media and the Information Climate in Russia*, 59 EUROPE-ASIA STUD. 1299, 1301 n.8 (2007) (finding that despite the law information restriction is still de facto common practice).



exercising public power, transparency and control of the activities of the state and executive power are prerequisites for the right to criticize, the freedom of criticism, the freedom of expression.<sup>221</sup> The Court then held the freedom to access information is a fundamental right that enjoys at least as much constitutional protection as its "mother" right, the freedom of expression.<sup>222</sup> The open, transparent, and accountable activity of the public combined with the public operation of the executive power is a fundamental requirement of democracy.<sup>223</sup> Without the public's ability to access the government's inner workings the state would become an "alienated mechanism."<sup>224</sup> The Court claimed that in its alienation the state would become incalculable and expressly dangerous, since the non-transparency of the operations of the state poses an increased danger to constitutional liberties.<sup>225</sup>

The Organization for Security and Cooperation in Europe (OSCE) has developed model bills on freedom of information, information protection, state secrets, and access to environmental information, and it evaluates currently existing information accessibility.<sup>226</sup> Estonia's States Secrets Act specifically defines each type of information that may be classified, the different categories of state secret classification,<sup>227</sup> and the length of time each category may remain classified.<sup>228</sup> Additionally, the legislation allows the court to access privileged information when required "to perform duties which have been assigned to them by the Constitution or Acts of the Republic of Estonia[.]"<sup>229</sup> This type of legislation establishes clearly defined legislative and judicial checks on the executive's power to declare information privileged and prevent the disclosure of

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221. HUNG. HELSINKI COMM., HUNGARY FREEDOM OF EXPRESSION AND ACCESS TO INFORMATION 26 (2001), available at <http://www.helsinki.hu/docs/expression010607.pdf> (quoting the Constitutional Court of the Republic of Hungary, Decision No. 60/1994 (XII. 24)).

222. *Id.*

223. *Id.*

224. *Id.*

225. *Id.*

226. PRIVACY INT'L, *supra* note 194, at 12–21, 34.

227. Estonia State Secrets Act, RT I, 1999, § 3, available at [http://www.era.int/domains/corpus-juris/public\\_pdf/estonia\\_state\\_secrets\\_act.pdf](http://www.era.int/domains/corpus-juris/public_pdf/estonia_state_secrets_act.pdf) (establishing three categories of classification: confidential, secret, and top secret).

228. *Id.* § 3.

229. *Id.* § 17<sup>1</sup>, subdiv. 1. Section 17<sup>1</sup> was added by Section 36. *Id.* § 36 (Amendment of Code of Criminal Procedure).

duly classified material.<sup>230</sup>

Another example of Eastern European legislative and judicial control of state secrets is embodied in Romanian Law no. 182.<sup>231</sup> Romanian law limits who may declare information a state secret,<sup>232</sup> allows individuals a judicial redress for disputes of information classification,<sup>233</sup> and prohibits activating the privilege “for the purpose of hiding law infringements, administrative errors, limitation of access to information of public interest, illegal restriction of exercising the rights of any person or harming other legitimate interests.”<sup>234</sup> Also, Romania prohibits the classification of basic scientific information with no connection to national security.<sup>235</sup>

Some OSCE countries impose time limits on their secrets, while others require that the information remain classified only as long as necessary to protect the interests involved.<sup>236</sup> Macedonia’s Law on Classified Information limits state secrets to ten years, highly confidential information to five years, confidential information to three years, and internal information to two years.<sup>237</sup> Albania, like the United States, limits secret classifications to ten years, but unlike Albania, the United States can extend the limit if it can be shown that it needs a longer duration.<sup>238</sup> Time limitations are not useful to individuals who are unable to bring their claim unless the statute of limitations on their claim is sufficiently long to outlast the privilege *and* there exists some independent review process prior to the classification of the contested information being extended.<sup>239</sup>

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230. See *Resolution 1551*, *supra* note 193, ¶ 9.

231. Romanian Law no. 182 of Apr. 12, 2002 on the protection of classified information, available at <http://www1.worldbank.org/publicsector/civilservice/epublishdocs/FreedomOfInformation/Legislation/RomaniaLaw182.pdf>.

232. *Id.* ch. II, art. 19.

233. *Id.* art. 20.

234. *Id.* art. 24, § 5.

235. *Id.* § 6.

236. PRIVACY INT’L, *supra* note 194, at 17.

237. *Id.* at 17–18.

238. *Id.* at 18. This is not an independent review as it is conducted under the direction of the Archivist, acting in consultation with the Assistant to the President for National Security Affairs. See Exec. Order No. 13,292, 3 C.F.R. 196 (2003), reprinted in 50 U.S.C.A. § 435 (West 2008).

239. See generally Gregor Peter Schmitz, *US Supreme Court Rejects El-Masri Case*, SPIEGEL ONLINE INT’L, Oct. 10, 2007, <http://www.spiegel.de/international/world/0,1518,510523,00.html>.

#### D. PROPOSED CHANGES

*"The great privilege of the Americans does not consist in being more enlightened than other nations, but in being able to repair the faults they may commit."*<sup>240</sup>

The continued expansion of the state secrets privilege from a mere evidentiary privilege to an executive privilege that serves to unilaterally dismiss claims not only violates the individual right to redress a wrong, but also sets an example for the rest of the world that democracy does not equal individual rights.<sup>241</sup> Although it is important to understand the role of the executive in assuring the security of the nation, the courts and legislature need to recognize that secret evidence is harmful to the proper adjudication of legitimate legal claims.<sup>242</sup> Returning the state secrets privilege back to its evidentiary roots may be accomplished by several different methods that protect both the government interest in securing privacy and the individual liberty interests in adjudicating a valid claim for government misconduct. Such methods are often varied according to the given set of circumstances but would always contain a combination of *in camera* inspection/adjudication, legislative boundaries for the privilege, and independent legislative review committees.

##### 1. Judicial Review

The courts could present the government with the option of either surrendering the requested document for an *in camera* inspection by the judge or losing the case.<sup>243</sup> This option would apply to all civil litigation whether the government is a plaintiff

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240. 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 317 (Francis Bowen ed., Henry Reeve trans., 1862), available at <http://galenet.galegroup.com/servlet/MOML?af=RN&ae=F3702400701&srchtp=a&ste=14>.

241. For example, Croatia in redefining its state secrets privilege broadened their definition to include information not traditionally considered a state secret and with no distinct boundaries between state secrets and non-state secrets. BANISAR, *supra* note 182, at 2.

242. Ellen C. Yaroshesky, *The Slow Erosion of the Adversary System: Article III Courts, FISA, CIPA and Ethical Dilemmas*, 5 CARDOZO PUB. L. POL'Y & ETHICS J. 203, 232 (2006).

243. CONSTITUTION PROJECT, *REFORMING THE STATE SECRETS PRIVILEGE* 12 (2007), available at [http://www.constitutionproject.org/pdf/Reforming\\_the\\_State\\_Secrets\\_Privilege\\_Statement2.pdf](http://www.constitutionproject.org/pdf/Reforming_the_State_Secrets_Privilege_Statement2.pdf); see also Yaroshesky, *supra* note 242, at 229–30 (finding that there should be a presumption that a party with the appropriate security clearances should have access to the evidence).

or a defendant, as in *El-Masri*. The *in camera* inspection would still rely upon the balancing test outlined in *Reynolds* but would apply that test solely to the admission of that specific evidence and not to determining the validity of the claim or the admission of potential evidence.<sup>244</sup>

In criminal cases the defendant has a right to access documents needed to establish innocence.<sup>245</sup> It is improper for the judiciary to allow suppression of documents that might tend to exculpate.<sup>246</sup> When the government “institutes criminal proceedings in which evidence, otherwise privileged under a statute or regulation, becomes importantly relevant, it abandons the privilege.”<sup>247</sup> If the government refuses to produce the required documents, the court may dismiss the case.<sup>248</sup>

This option would allow an independent judiciary to determine the merits of the privilege and not the party claiming the privilege.<sup>249</sup> Such a system would also place a critical decision in the hands of a judge who may not have the knowledge, or skills to determine the appropriate classification of the evidence presented.<sup>250</sup> If the judiciary lacks such requisite knowledge they may appoint nonparties with expertise to assist in assessing the risks of disclosure.<sup>251</sup> Ultimately the judiciary must “find an appropriate balance between the state interest in preserving official secrecy on the one hand . . . and society’s interest in exposing abuses of power on the other hand.”<sup>252</sup>

## 2. Legislative Oversight and Review

The legislature has limited capacities for oversight and

244. See generally *Conway v. Rimmer*, [1968] 1 All E.R. 874 (H.L.) (U.K.).

245. See generally *United States v. Burr*, 25 F. Cas. 30 (C.C.D. Va. 1807) (No. 14692d).

246. *Id.*

247. *United States v. Beekman*, 155 F.2d 580, 584 (2d Cir. 1946).

248. *NLRB v. Capitol Fish Co.*, 294 F.2d 868, 875 (5th Cir. 1961). The government “cannot hide behind a self-erected wall [of] evidence adverse to its interest as a litigant.” *Id.*

249. See *Arar Commission*, *supra* note 72, at 282 (requiring that the inquiry be independent to satisfy the public desire for the truth).

250. See *United States v. Marchetti*, 466 F.2d, 1309, 1318 (4th Cir. 1972) (determining that courts are too ill-equipped to become steeped in covert and foreign intelligence matters to effectively review and establish proper secrecy classification where improper disclosure could result in harm to the government). A private in the U.S. Army with a security clearance is considered more trustworthy to handle classified information than a judge. *PALLITTO & WEAVER*, *supra* note 6, at 103.

251. *Chesney*, *supra* note 4, at 1311.

252. *Resolution 1551*, *supra* note 193, ¶ 9.

often transfers this responsibility to the judiciary.<sup>253</sup> Such limited capability includes legislative control over the judiciary's jurisdiction to oversee specific claims and indirectly affect government programs through funding.<sup>254</sup> For example, the Lithuanian Constitutional Court's guarantee of public access<sup>255</sup> did not reach certain state secrets.<sup>256</sup> It was up to the legislature to determine the categories of information that the executive could withhold.<sup>257</sup> This is similar to a recent Canadian proposal to establish an independent review board for national security activities.<sup>258</sup>

Although legislative oversight may not have allowed El-Masri to continue his immediate claim, it would provide a separate check on the executive's power.<sup>259</sup> U.S. scholars recommended that Congress create a code for the judiciary to follow in cases involving the state secrets privilege when the Federal Rules of Evidence were passed in 1975.<sup>260</sup> Congress declined to implement legislative limits to the privilege, preferring instead to allow the judiciary to determine the limits via case law.<sup>261</sup>

Many other nations have created similar independent legislative checks and restrictions upon the state secrets privilege to ensure that the privilege is available to protect actual secrets and limit the potential for abuse.<sup>262</sup> PACE, in

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253. PALLITTO & WEAVER, *supra* note 6, at 106–07.

254. Frost, *supra* note 171, at 1952–53.

255. See Lietuvos Respublikos Konstitucija [Constitution] art. 25, para. 5 (Lith.) (granting citizens the right to “available information which concerns them”).

256. See Constitutional Court of Lithuania, Case 3/96, §§ 1.2, 1.4 (Dec. 19, 1996), available at <http://www.lrkt.lt/dokumentai/1996/n6a1219a.htm>. See generally Nida Gelazis, *Defending Order and Freedom: The Lithuanian Constitutional Court in Its First Decade*, in CONSTITUTIONAL JUSTICE, EAST AND WEST: DEMOCRATIC LEGITIMACY AND CONSTITUTIONAL COURTS IN POST-COMMUNIST EUROPE IN A COMPARATIVE PERSPECTIVE 395 (Wojciech Sadurski ed., 2002).

257. Law on State Secrets and Official Secrets, No. VIII-1443, arts. 4–5 (Lith.), available at <http://www3.lrs.lt/cgi-bin/getfmt?c1=w&c2=157736> (defining the scope of state secrets).

258. Arar Commission, *supra* note 72, at 277.

259. See Frost, *supra* note 171, at 1953.

260. See CONSTITUTION PROJECT, *supra* note 243, at 8–9.

261. *Id.*

262. Conway reversed the United Kingdom's interpretation that the state secrets privilege is absolute as described by *Duncan*. Conway v. Rimmer, [1968] 1 All E.R. 874 (H.L.) (U.K.); cf. Constitutional Court of Czech Republic, Case No. Pl. US 11/2000 (July 12, 2001) (as summarized in <http://codices.coe.int>, indexed as CZE-2001-2-012) (striking down portions of the Protection of Classified Information Act involving administrative discretion concerning access to secret information via security clearance absent of independent of judicial review); Military Secret Leakage

recognizing the importance of trials concerning state secrets, has outlined several principles for the judiciary to follow.<sup>263</sup> These legislative restrictions are vital to ensuring a fair trial for all involved.<sup>264</sup> Ultimately PACE recognized that the “freedom of expression and information are fundamental components of a democratic society.”<sup>265</sup>

### 3. Pseudonyms

Yet another option would be to assign pseudonyms to individuals in cases where identities need to be kept secret.<sup>266</sup> Unfortunately, in extreme cases where the government is the defendant or the issue involves a government action, this is not a viable option.<sup>267</sup>

## III. CONCLUSION

“[T]here are more instances of the abridgement of the freedom of the people, by gradual and silent encroachments of those in power, than by violent and sudden usurpations[.]”<sup>268</sup>

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case, 4 KCCR 64, 89Hun-Ka104 (Feb. 25, 1992) (S. Korea) (holding that even though the protecting of military secrets is of great importance the scope of military secrets should not be so broad as to reduce the people’s right to know) (as described in CONSTITUTIONAL COURT OF S. KOREA, THE FIRST TEN YEARS OF THE KOREAN CONSTITUTIONAL COURT (2001), available at [http://www.ccourt.go.kr/home/english/decision\\_etc/decision10year.htm](http://www.ccourt.go.kr/home/english/decision_etc/decision10year.htm)).

263. *Resolution 1551*, *supra* note 193, ¶ 10.

264. *Id.*

265. Eur. Parl. Ass., *Recommendation on Fair Trial Issues in Criminal Cases Concerning Espionage or Divulging State Secrets*, DOC. NO. 11457 (2007), available at <http://assembly.coe.int/main.asp?Link=/documents/workingdocs/doc07/edoc11457.htm>; see also Constitutional Court of the Republic of Hungary, Decision No. 60/1994 (XII.22) AB (points 1 & 5), reprinted in 2 E. Euro. Case Rptr. of Const. L. 159, 169 (1995).

266. See *Tilden v. Tenet*, 140 F. Supp. 2d 623, 624 (E.D. Va. 2000). A female covert CIA employee was assigned a pseudonym to protect her identity in a claim of sex discrimination against Tenet. *Id.* at 624 n.1. The case was dismissed after the government successfully invoked the state secrets privilege which the court treated as a motion for summary judgment and dismissed the case. *Id.* at 626. The court held that it was not its place to second guess the proper invocation of the privilege, and the only question to consider was whether the case could proceed at all. *Id.*

267. See *El-Masri v. United States (El-Masri II)*, 479 F.3d 296, 299–300 (4th Cir. 2007), *cert. denied*, 75 U.S.L.W. 3663, 76 U.S.L.W. 3021 (U.S. Oct. 9, 2007) (No. 06-1613).

268. 5 JAMES MADISON, THE WRITINGS OF JAMES MADISON 126 (Gaillard Hunt ed., 1904), available at <http://books.google.com/books?id=sGGGs3reve0C>.

It is imperative that the U.S. Supreme Court re-evaluate the shifting balance struck by increased application of the state secrets privilege during the pleading stage and return this doctrine to its common law foundation as an evidentiary rule. Additional judicial clarification and legislative definition of the state secrets privilege is required to return to the proper balance between the need for an individual redress for wrongs and the protection of valid national secrets.

The state secret privilege has often been described as “rarely invoked,” but recent history belies this claim.<sup>269</sup> During the four years following September 11, 2001, the U.S. Government has successfully claimed the state secrets privilege twenty-three separate times.<sup>270</sup> Additionally, it is unknown how many times the claim has been invoked or threatened to deter an otherwise valid claim from being filed.<sup>271</sup> It has become increasingly clear, however, that recent cases show the government is using the privilege with greater abandon and with little danger of reprisal.<sup>272</sup> The increased use of the privilege is significant because a successful invocation of the state secrets privilege is rarely defeated.<sup>273</sup> A search of legal databases turn up just one case where the court refused to

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269. See Dana Priest, *Secrecy Privilege Invoked in Fighting Ex-Detainee's Lawsuit*, WASH. POST, May 13, 2006, at A3 (reporting that between 1954 and 2001 the privilege was asserted fifty-five times). The state secrets privilege has been invoked more times during President George W. Bush's tenure than during any other presidency. PALLITTO & WEAVER, *supra* note 6, at 117.

270. Priest, *supra* note 269, at A03.

271. It is inherently difficult to accurately capture qualitative data concerning the assertion of the state secrets privilege. Chesney, *supra* note 4, at 1301. However, it is clear that the government threatens to use the privilege without following the formal requirements of *Reynolds*. *Stillman v. Dep't of Defense*, 209 F. Supp. 2d 185, 222–23 (D.D.C. 2002).

272. The government recently invoked the privilege 245 times in a single case without meeting the formal criteria required by *Reynolds*. PALLITTO & WEAVER, *supra* note 6, at 117. The government also raised the claim to prevent adjudication of alleged violations of privacy—specifically the release of banking records—for a program that was once secret, but has since been disclosed. Dan Bilefsky, *Belgians Say Banking Group Broke European Rules in Giving Data to U.S.*, N.Y. TIMES, Sept. 29, 2006, available at <http://www.nytimes.com/2006/09/29/world/europe/29swift.html>.

273. Andrew Zajac, *Bush Wielding Secrecy Privilege to End Suits: National Security Cited Against Challenges to Anti-Terror Tactics*, CHI. TRIB., Mar. 3, 2005, at 1 (stating that the privilege “has been stymied only five times”). However, it is difficult to determine if this number is accurate as the government often re-invokes the privilege during the appeal. See *Halkin v. Helms (Halkin I)*, 598 F.2d 1, 11 (D.C. Cir. 1978) (overturning the lower court's rejection of the privilege).

accept the government's asserted privilege.<sup>274</sup>

To allow the executive branch to continue to expand the scope of the state secrets privilege would not only allow the government's self-serving assertions to usurp the authority of the court,<sup>275</sup> but would also further remove the United States from its already eroding legal and moral high ground.<sup>276</sup> The United States cannot let another fifty years pass while its executive branch is so brazenly utilizing the privilege to prevent disclosure of illegal or potentially embarrassing actions.<sup>277</sup> By declining to grant certiorari to *El-Masri* the U.S. Supreme Court failed to set a proper limit on the application of the state secrets privilege. Without a judicial or legislative check on the privilege, the U.S. Government will continue to intentionally harm individuals while denying them a right to redress wrongs or challenge government overreaching. As a result, America's standing in the global community will continue to deteriorate.<sup>278</sup>

When the government raises the state secrets privilege, the judiciary must have the ability to ask if the claim is meant not to keep information from the nation's enemies, but to keep it from the hands of its citizens.<sup>279</sup> Otherwise, suspects will continue to be extradited under claims shrouded in secrecy with

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274. The Clinton administration detained a Palestinian in an immigration proceeding for nineteen months based on hearsay evidence. *Kiareldeen v. Reno*, 71 F. Supp. 2d 402, 419 (D.N.J. 1999). The government claimed that he was a threat to national security and a member of a terrorist organization. *Id.* At no point was he provided any details of the alleged threats or of the associations and relationships he supposedly had with terrorist organizations. *Id.* The trial court ruled in his favor, and on appeal, the court ruled that the reliance on secret evidence violated his due process rights because it deprived him of meaningful notice and an opportunity to confront the evidence against him, and exclusively hearsay evidence could not be tested for reliability. *Id.*

275. See *Fisher*, *supra* note 57.

276. Barring the doors to a legitimate forum for those who have a genuine claim against the U.S. Government fuels the fire of foreign enemies who claim that the United States is not a true democracy and increases cries that the United States abuses individual rights. See *Global Attitudes*, *supra* note 185.

277. In *Reynolds v. United States*, the seminal state secrets privilege case, the documents which the government contained state secrets did not in fact contain state secrets. After their declassification the documents were reviewed and were found to contain no obviously sensitive material and show that the cause of the accident was due to a failure of the Air Force to complete necessary modification in the airframe. Hampton Stephens, *Supreme Court Filing Claims Air Force, Government Fraud in 1953 Case*, INSIDE THE AIR FORCE, Mar. 14, 2003, available at <http://www.fas.org/sgp/news/2003/03/iaf031403.html>.

278. See *Global Attitudes*, *supra* note 185.

279. GUP, *supra* note 13, at 50.



no recourse to challenge government missteps and mistakes.<sup>280</sup> “[T]he Constitution diffuses power the better to secure liberty . . . . It enjoins upon its branches separateness but interdependence, autonomy but reciprocity.”<sup>281</sup> The state secrets privilege must be returned to its evidentiary privilege<sup>282</sup> roots such that either the judiciary or legislature acts as a check on the executives power to classify information as secret, lest the U.S. Constitution become a mere “parchment barrier.”<sup>283</sup>

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280. See generally *Ahmad v. United States*, [2006] EWHC 2927 (Admin.), 2006 WL 3427663 (U.K.). The Queen’s Bench held that when determining whether or not to extradite suspects to the United States determined that there was no proof of extraordinary renditions by the U.S. Government leading to torture. *Id.*

281. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (Jackson, J., concurring).

282. Justice Vinson recognized that the privilege was integrated into the production of evidence, writing that “[j]udicial control over the evidence in a case cannot be abdicated to the caprice of the executive officers.” *United States v. Reynolds*, 345 U.S. 1, 9–10 (1953).

283. THE FEDERALIST NO. 48 (James Madison). Knowing that power is of an encroaching nature, Madison warned that without limitations on each branch of government’s exercise of that power, the U.S. Constitution would become a mere “parchment barrier” to tyranny. *Id.* Later Madison explained how the rights granted in the U.S. Constitution gave each branch the means for “keeping each other in their proper places” through a system of checks and balances. THE FEDERALIST NO. 51 (James Madison).