Winter 2014

The Courts and National Security: The Ordeal of the State Secrets Privilege

David Rudenstine

THE COURTS AND NATIONAL SECURITY: THE ORDEAL OF THE STATE SECRETS PRIVILEGE

David Rudenstine*

INTRODUCTION

Since the end of World War II and the emergence of what are popularly termed the "Imperial Presidency"[1] and the "National Security State,"[2] the Supreme Court has, in one decision after another, shaped numerous legal doctrines that insulate the Executive from meaningful judicial oversight in cases the Executive claims implicate national security.[3] In those decisions, the courts have utilized a variety of legal techniques to restrict or totally prohibit meaningful judicial review of the Executive conduct in question.[4]

---

* David Rudenstine is the Sheldon H. Solow Professor of Law, Benjamin N. Cardozo School of Law, Yeshiva University. I wish to thank Brachah Goykadosh and Benjamin Cooper, 2014 Cardozo School of Law graduates, and Brett Bacon, Laith Hamdan, and Adam Riff, current Cardozo students, for their very helpful assistance in preparing this article for publication.

1. Arthur M. Schlesinger, Jr. gave a broad currency to the phrase the "Imperial Presidency" in his frequently cited 1973 study entitled *The Imperial Presidency*. ARTHUR M. SCHLESINGER, JR., THE IMPERIAL PRESIDENCY (1973). For a more recent study invoking the same phrase, see Charlie Savage, *Takeover: The Return of the Imperial Presidency and the Subversion of American Democracy* (2007).
2. Garry Wills utilized the popular phrase in the title of a recent book, *Bomb Power: The Modern Presidency and the National Security State*. GARRY WILLS, BOMB POWER: THE MODERN PRESIDENCY AND THE NATIONAL SECURITY STATE (2010). Dana Priest and William M. Arkin provided a slight modification of this popular term in their recent book, entitled *Top Secret America: The Rise of the New American Security State*. DANA PRIEST & WILLIAM M. ARKIN, TOP SECRET AMERICA: THE RISE OF THE NEW AMERICAN SECURITY STATE (2011).
3. *See generally* David Rudenstine, *The Irony of a Faustian Bargain: A Reconsideration of the Supreme Court's 1953* United States v. Reynolds *Decision*, 34 CARDOZO L. REV. 1283, 1287–88 & nn.13–18, 1391 & n.525 (2013) (explaining that the Supreme Court in *United States v. Reynolds* was a major pillar of the Age of Deference, which has resulted in the "insulation of the executive from meaningful judicial accountability and review, a distortion in the checks and balances governmental scheme, the denial of a judicial remedy to those allegedly harmed by executive branch conduct, and the undermining of the rule of law").
4. Justice Sutherland wrote a pre-World War II opinion of unusual importance in the development of the Age of Deference in *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 329 (1936).

For example, courts have relied upon the executive privilege,[5] the state secrets privilege,[6] standing requirements,[7] pleading rules,[8] the qualified immunity doctrine,[9] as well as the requirements for a meritorious claim for relief[10] to dismiss cases from the courts. Woven together these doctrines create a protective shield surrounding the Executive that gives rise to what I have termed the Age of Deference.[11]

Serious consequences have resulted from this seventy-year era of deference.[12] An individual arguably denied a vested right by executive branch officials is denied judicial relief.[13] Executive

---

5. The foundational case for a constitutionally based executive privilege is *United States v. Nixon*, 418 U.S. 683, 706 (1974).

6. *United States v. Reynolds*, 345 U.S. 1 (1953), announced the contemporary state secrets privilege. For two recent lower court opinions substantially extending the rule in *Reynolds*, see *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1081–84 (9th Cir. 2010) (en banc), *cert. denied*, 131 S. Ct. 2442 (2011) and *El-Masri v. United States*, 479 F.3d 296 (4th Cir.), *cert. denied*, 552 U.S. 947 (2007). The controversial state secrets privilege seems now disfavored by the Executive and the courts, which, as a result, have utilized other doctrines—such as no claim for relief, standing rules, pleading rules—to dismiss a case (or party) implicating national security. *See* Rudenstine, *supra* note 3, at 1288, 1391 n.525.

7. *See, e.g.*, Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138, 1155 (2013). On June 16, 2014, the Supreme Court distinguished *Clapper* in *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2347 (2014). In the *Susan B. Anthony List* case, the Court granted standing to a party seeking to enjoin government officials from enforcing the law, on the grounds that the law in question violated limits established by the First Amendment. *Id.* Although the case did not in any way implicate national security, it is noteworthy that the Court concluded that the plaintiffs had a sufficient injury to satisfy the constitutional requirements for standing. *Id.* at 2343.

8. *See, e.g.*, Ashcroft v. Iqbal, 556 U.S. 662, 683 (2009); Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007).

9. *See, e.g.*, Ashcroft v. Al-Kidd, 131 S. Ct. 2074, 2085 (2011).

10. *See, e.g.*, Arar v. Ashcroft, 585 F.3d 559, 563 (2d Cir. 2009), *cert. denied*, 130 S. Ct. 3409 (2010).

11. *See* Rudenstine, *supra* note 3, at 1287.

12. *Id.* at 1288.

13. *See generally* Mohamed v. Jeppesen Dataplan, Inc., 614 F.3d 1070, 1084 (9th Cir. 2010) (en banc) (affirming the dismissal of plaintiffs' claims alleging torture and degrading treatment by federal officials), *cert. denied*, 131 S. Ct. 2442 (2011); *Arar*, 585 F.3d at 627 (Pooler, J., dissenting) ("Ultimately, the majority concludes that the Constitution provides Arar no remedy for this wrong, that the judiciary must stay its hand in enforcing the Constitution because untested national security concerns have been asserted by the Executive branch."); El-Masri v. United States, 479 F.3d 296, 313 (4th Cir.) ("[T]he state secrets privilege imposes a heavy burden on the party against whom the privilege is asserted . . . . That party loses access to evidence that he needs to prosecute his action and, if privileged state secrets are sufficiently central to the matter, may lose his cause of action altogether."), *cert. denied*, 552 U.S. 947 (2007); ACLU v. NSA, 493 F.3d 644, 687 (6th Cir. 2007) (dismissing plaintiffs'

branch officials who may have committed unlawful acts that have violated an individual's constitutional rights escape judicial accountability for their actions.[14] The structural checks and balances scheme central to the constitutional distribution of power is undermined by the failure of the courts to exercise meaningful review in national security cases.[15] Because this deference encourages executive officials to expect that they will not be held accountable for their conduct, this deference permits, if not encourages, executive officials to prospectively overlook or ignore their obligation to adhere to legal norms.[16] Public confidence in the judiciary is eroded when the courts dismiss actions because of the alleged need for secrecy in actions in which a plaintiff alleges egregious violations of law.[17] The nation's fundamental ideal of preserving and strengthening the national commitment to the rule of law is betrayed by the very governing institution—the courts—primarily charged with preserving and strengthening the ideal.[18] More generally, because the constitutional order is premised not just on a doctrine of separation of powers among the three co-equal branches of government,[19] but on a

---

claims based on standing and holding that "even to the extent that additional evidence may exist, which might establish standing . . . discovery of such evidence would, under the circumstances of this case, be prevented by the States Secrets Doctrine"); Halkin v. Helms (*Halkin I*), 598 F.2d 1, 3–5 (D.C. Cir. 1978) (determining that the states secrets privilege prevents the NSA from having to admit or deny the warrantless acquisition of plaintiffs' international communications).

14. *See* cases cited *supra* note 13.

15. For cases in which the courts exercise meaningful judicial review in national security cases and thus advance the important function of checks and balances, see *Hamdi v. Rumsfeld*, 542 U.S. 507, 509 (2004), *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971) (per curiam), and *Youngstown Sheet & Tube Co. v. Sawyer* (*Steel Seizure*), 343 U.S. 579, 585 (1952). One scholar recently summed up the checks and balances dynamic built into the constitutional scheme as follows:

> [James] Madison is generally credited as the lead architect of our constitutional design. Animated by his vision of checks and balances, the founders prescribed an intricate network of new institutions, all holding the others to account through carefully distributed powers and chosen through a variety of different methods designed to prevent any one faction from dominating.

PETER M. SHANE, MADISON'S NIGHTMARE: HOW EXECUTIVE POWER THREATENS AMERICAN DEMOCRACY 2 (2009).

16. *See* SHANE, *supra* note 15, at 3.

17. *See Arar*, 585 F.3d at 630 (Calabresi, J., dissenting).

18. *See* Rudenstine, *supra* note 3, at 1370.

19. *See generally* INS v. Chadha, 462 U.S. 919, 957–58 (1983) (upholding the doctrine of separation of powers by concluding that the congressional veto that allowed one

complicated system of checks and balances[20] that assumes that the Executive will not be "above the law,"[21] this Age of Deference contributes to the potential collapse of the constitutional order.

Central to the Age of Deference is the state secrets privilege,[22] and because it is so emblematic of the entire era, a study of the contemporary state secrets privilege sheds considerable light on the broader and highly significant theme of the judicial function in national security cases since World War II.[23] This Article assesses the contemporary state secrets privilege.[24] In so doing, it outlines the

---

House of Congress to override a decision by the executive branch under the Immigration and Nationality Act was unconstitutional).

20. *See* Clinton v. Jones, 520 U.S. 681, 699 (1997) (describing the three branches of government as "a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other"); *see also* United States v. Nixon, 418 U.S. 683, 704 (1974) ("[D]eciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise . . . .") (quoting Baker v. Carr, 369 U.S. 186, 211 (1962)).

21. *See Clinton*, 520 U.S. at 696; *Nixon*, 418 U.S. at 706.

22. The state secrets privilege is a common law rule of evidence that courts have enforced to protect national security secrets. *See infra* Part I; *see also*, Rudenstine, *supra* note 3, at 1371–72. For a selection of recent law review articles on state secrets, see Robert M. Chesney, *National Security Fact Deference*, 95 VA. L. REV. 1361 (2009), for a discussion of the deference granted by courts to matters of national security; Robert M. Chesney, *State Secrets and the Limits of National Security Litigation*, 75 GEO. WASH. L. REV. 1249 (2007) [hereinafter *Limits of National Security Litigation*], for a discussion of the origin and evolution of the state secret privilege leading up to its use in 2007 by the Bush Administration; Laura K. Donohue, *The Shadow of State Secrets*, 159 U. PA. L. REV. 77 (2010), for a discussion of the practical implications of the state secrets doctrine for private and public actors in cases moving through the courts between 2001–2009; Amanda Frost, *The State Secrets Privilege and Separation of Powers*, 75 FORDHAM L. REV. 1931 (2007), for a discussion of the importance of checks and balances to limit the abuse of the state secrets privilege; Beth George, Note, *An Administrative Law Approach to Reforming the State Secrets Privilege*, 84 N.Y.U. L. REV. 1691 (2009), for a discussion of the advantages of administrative law to limiting or curbing the use of the state secret privilege; Carrie Newton Lyons, *The State Secrets Privilege: Expanding Its Scope Through Government Misuse*, 11 LEWIS & CLARK L. REV. 99 (2007), for a discussion of changes that have happened to state secret jurisprudence since *Reynolds*; Christina E. Wells, *State Secrets and Executive Accountability*, 26 CONST. COMMENT. 625, 630–31 (2010), for a discussion of the use of the state secret privilege under the Obama Administration.

23. *See* Rudenstine, *supra* note 3, at 1391.

24. *See Limits of National Security Litigation*, *supra* note 22, at 1267 n.113 (sampling of critical commentary of the state secrets privilege). For two highly controversial cases discussing the states secrets privilege, see *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070 (9th Cir. 2010) and *El-Masri v. United States*, 479 F.3d 296 (4th Cir. 2007). These cases generated very critical press commentary. *See* Editorial, *Security Secrets*

privilege announced by the Supreme Court in *United States v. Reynolds*,[25] which set forth the foundational guidelines for the contemporary privilege;[26] it maps the expansion of the robust and sweeping contemporary privilege and relates that expansion to the much narrower privilege announced in *Reynolds*;[27] it assesses the consequences of the contemporary privilege;[28] it recommends changes in the privilege and addresses the impact of those recommended changes on national security;[29] and finally, it opens a useful window on the much broader subject of the role of courts in cases implicating national security.[30]

---

and Justice; Why New Laws are Needed to Govern Sensitive Lawsuits Against the Government, WASH. POST, Sept. 13, 2010, at A14 ("The case [*Jeppesen*] again points out the need for a new law to govern cases in which national security secrets are involved."); Editorial, *The ACLU is Dismissed*, WALL ST. J., Sept. 11, 2010, at A12 ("Nor will the ACLU find much solace in the Obama Administration, which has largely preserved the antiterror legal regime established by its predecessor even as it has tinkered with some of the language."); Editorial, *Too Many Secrets*, N.Y. TIMES, Mar. 10, 2007, at A12 ("It is a challenge to keep track of all the ways the Bush Administration is eroding constitutional protections, but one that should get more attention is its abuse of the state secrets doctrine."); Editorial, *Too Much Privilege*, L.A. TIMES, Dec. 14, 2009, at A26 (stating that the Obama Administration's decision to assert the state secrets privilege was "gravely disappoint[ing]" and urging the Ninth Circuit judges to allow the *Jeppesen* "case [to] proceed so that these alleged victims of U.S. mistreatment can make their case in court"); Editorial, *Torture Gets a Free Pass*, BOS. GLOBE, Sept. 19, 2010, at K8 ("This standard is far too sweeping, because there's a way to honor both the government's need for secrecy and plaintiffs' rights to have their allegations heard."); Editorial, *Torture is a Crime, Not a Secret*, N.Y. TIMES, Sept. 9, 2010, at A30 ("The state secrets doctrine is so blinding and powerful that it should be invoked only when the most grave national security matters are at stake . . . . It should not be used to defend against allegations that if true . . . would be 'gross violations of the norms of international law.'"); *see also* Khaled El-Masri, Editorial, *I Am Not a State Secret*, L.A. TIMES, Mar. 3, 2007, at A19.

25. 345 U.S. 1 (1953).
26. *See infra* Part I.
27. *See infra* Part II.
28. *See infra* Part III.
29. *See infra* Part IV. For a review and discussion of the legislative proposals to Congress, see Jessica Slattery Karich, *Restoring Balance to Checks and Balances: Checking the Executive's Power Under the State Secrets Doctrine,* Mohamed v. Jeppesen Dataplan, Inc., 114 W. VA. L. REV. 759, 779 (2012). Karich entitles a section "Proposed Legislative Reforms to the State Secrets Doctrine." *Id.*; *see also* Emily Berman, *Executive Privilege Disputes Between Congress and the President: A Legislative Proposal*, 3 ALB. GOV'T L. REV. 741, 750 (2010).
30. *See infra* Part IV.

In summary, this Article puts forth several claims. The Supreme Court's 1953 *Reynolds*[31] decision set forth a set of doctrinal rules that still guide the application of the state secrets privilege.[32] Those rules had no antecedents in United States law[33] and thus were not a restatement of previously announced state secrets rules.[34] Instead, the Court in *Reynolds* fashioned them out of whole cloth. Moreover, the contemporary state secrets privilege is not a necessary extraction from *Reynolds,*[35] nor are the rules comprising the contemporary state secrets privilege mandated by the Constitution or statute. In other words, the robust and sweeping rules constituting the contemporary privilege are now as much a product of judicial discretion by comparison to the *Reynolds* decision as the rules announced in *Reynolds* were by comparison to earlier state secrets decisions. Thus, just as the *Reynolds* rules constituted a departure from prior state secrets cases, the contemporary state secrets rules are a departure from *Reynolds.*[36] And just as *Reynolds* both reflected and nurtured the Age of Deference, so do the rules of the contemporary state secrets privilege.

Although the Supreme Court generally initiates and charts the course of important legal doctrine,[37] this was not the case in the development of the contemporary state secrets privilege. Instead, the circuit courts chartered the boundaries of the contemporary privilege in a handful of decisions,[38] with the Supreme Court assuming a mainly passive role either because a party did not petition for certiorari or the Court denied it when review was sought.[39] But now

31. 345 U.S. 1 (1953).

32. *See, e.g.*, Fazaga v. FBI, 884 F. Supp. 2d 1022, 1035 (C.D. Cal. 2012) (applying *Reynolds* by dismissing plaintiffs' claims against the FBI based on the state secrets doctrine).

33. *See* Rudenstine, *supra* note 3, at 1363–65.

34. *See infra* Part I.

35. *See infra* Part II.

36. Rudenstine, *supra* note 3, at 1365; *see also infra* Part II.

37. ARTHUR SELWYN MILLER, THE SUPREME COURT: MYTH AND REALITY 6 (1978).

38. *See* Fitzgerald v. Penthouse Int'l, 776 F.2d 1236 (4th Cir. 1985); Ellsberg v. Mitchell, 709 F.2d 51 (D.C. Cir. 1983), *cert. denied*, 465 U.S. 1038 (1987); Halkin v. Helms (*Halkin II*), 690 F.2d 977 (D.C. Cir. 1982); Farnsworth Cannon, Inc. v. Grimes, 635 F.2d 268 (4th Cir. 1980); *Halkin I*, 598 F.2d 1 (D.C. Cir. 1978).

39. In addition to the circuit court decisions that initially defined the contemporary privilege, the Supreme Court has had numerous opportunities post-September 11 to revisit the state secrets doctrine. However, in these instances, the Court has either denied certiorari or no appeal has been sought after the circuit court decision. *See* United States v. El-Mezain, 664 F.3d 467, 520 (5th Cir. 2011), *cert. denied*, 133 S. Ct. 525 (2012); Mohamed v. Jeppesen Dataplan, Inc., 614 F.3d 1070, 1077 (9th Cir. 2010) (en banc), *cert. denied*, 131 S. Ct. 2442 (2011); Doe v. CIA, 576 F.3d 95, 101–

that these rules have been in place for decades with occasional Supreme Court affirmation,[40] it would seem that only the Supreme Court has the authority to modify them substantially.

Because the state secrets privilege drew intense attention after September 11 as never before,[41] it may be assumed that the

---

02 (2d Cir. 2009); Arar v. Ashcroft, 585 F.3d 559, 574–76 (2d Cir. 2009), *cert. denied*, 560 U.S. 978 (2010); United States v. Stewart, 590 F.3d 93, 131 (2d Cir. 2009), *cert. denied*, 134 S. Ct. 54 (2013); United States v. Aref, 533 F.3d 72, 79 (2d Cir. 2008), *cert. denied*, 556 U.S. 1107 (2009); El-Masri v. United States, 479 F.3d 296, 302–03 (4th Cir.), *cert. denied*, 552 U.S. 947 (2007); *In re* Sealed Case, 494 F.3d 139, 142 (D.C. Cir. 2007); Al-Haramain Islamic Found. v. Bush, 507 F.3d 1190, 1202 (9th Cir. 2007); Marriott Int'l Resorts v. United States, 437 F.3d 1302, 1305 (Fed. Cir. 2006); Sterling v. Tenet, 416 F.3d 338, 342–43 (4th Cir. 2005), *cert. denied*, 546 U.S. 1093 (2006). *See also infra* app. 3 and the summary of the Supreme Court decisions that follow in tbl.4.

40. *See, e.g.*, Gen. Dynamics Corp. v. United States, 131 S. Ct. 1900, 1906 (2011); Tenet v. Doe, 544 U.S. 1, 8–10 (2005); Webster v. Doe, 486 U.S. 592, 604 (1988).

41. *See infra* app. 1, tbls.1 & 2; app. 2, tbl.3. One scholar summarized the development as follows:

> State secrets doctrine catapulted to prominence post-2001, as the executive responded to lawsuits alleging a range of constitutional and human rights violations by refusing to disclose information during discovery and, in some cases, requesting dismissal of suits altogether on national security grounds. More than 120 law review articles followed, and media outlets became outspoken in their criticism of the privilege. In both the Senate and the House, new bills sought to codify what had previously been a common law doctrine. And in September 2009, the Attorney General introduced new procedures for review and created a State Secrets Review Committee.

Donohue, *supra* note 22, at 78–79 (footnotes omitted). This increased attention to *Reynolds* and the state secrets doctrine can be attributed to the number of national security cases reviewed by district and circuit courts post-September 11. While the amount of district court cases citing to *Reynolds* spiked in the period from the mid-1970s to early-1980s, since 2001, the number of district courts citing to *Reynolds* has been steadily rising. *See infra* app. 1, tbl.1. While in smaller amounts, the number of circuit courts citing to *Reynolds* mirrors the district courts, with slight spikes of increased citations to *Reynolds* during the late-1970s and early-1980s, but then more steady and increased attention post-2000 (in particular, the amount of circuit court citations to *Reynolds* increases most consistently after 2003). *See infra* app. 1, tbl.2. Consider also the scant scholarly commentary regarding the state secrets doctrine prior to September 11. *See infra* app. 2, tbl.3. In the 47 year period from 1953 to 2000, only approximately 250 articles were published citing to *Reynolds* (an average of 5.3 articles per year). In 1999, for instance, only 16 law review articles cited to *Reynolds*. However, following September 11, the heightened attention surrounding national security generated much more scholarly commentary on the state secrets doctrine. During the 12 year period from 2001 to 2013, approximately 315 law

contemporary privilege became what it is today only after that epoch defining moment. But such a view would be a misconception. The courts of appeals defined the contemporary privilege in the 1970s and 1980s[42] and those rules continue to form the framework for the contemporary privilege. And although a few judicial decisions in the last few decades have made some alterations in those doctrinal rules,[43] those changes were comparatively minor by comparison to the rules set forth by the courts of appeals in their earlier decisions.[44]

Nonetheless, although the contours of the state secrets privilege were in place for two decades before September 11, there is no question that the post-September 11 state secrets decisions have drawn extensive attention.[45] This is not, however, because the privilege expanded. Rather, it is because courts applied the privilege to the highly controversial extraordinary rendition cases that arose after September 11. Those cases not only created dissension among judges but attracted substantial public attention.[46]

While the national debate over extraordinary rendition did drive the state secrets privilege into the center of the stage,[47] it would be a misjudgment to assume that the privilege will become less robust and sweeping once the intensity of the War on Terror diminishes. That is so because the current privilege pre-dated September 11[48] and the same considerations that generated the privilege also generated the other doctrines that compose the Age of Deference. Thus, the

---

review articles cited to *Reynolds* (an average of 26.25 articles per year). In 2009, the amount of articles citing to *Reynolds* spiked to 45.

42. *See infra* Part II.A.

43. *Compare Tenet*, 544 U.S. at 11 (holding that *in camera* proceedings for the purpose of determining whether the privilege applies are insufficient to accord the "absolute protection" required), *with* Molero v. FBI, 749 F.2d 815, 822 (D.C. Cir. 1984) (determining validity of privilege claim based on *in camera* affidavit).

44. *See infra* Part II.A.

45. *See infra* app. 1, tbls.1 & 2; app. 2, tbl.3; *see also* Mohamed v. Jeppesen Dataplan, Inc., 614 F.3d 1070, 1093 (9th Cir. 2010) (en banc), *cert. denied*, 131 S. Ct. 2442 (2011); El-Masri v. United States, 479 F.3d 296, 313 (4th Cir.), *cert. denied*, 552 U.S. 947 (2007); Arar v. Ashcroft, 414 F. Supp. 2d 250, 287 (E.D.N.Y. 2006), *cert. denied*, 560 U.S. 978 (2010).

46. *See supra* note 24.

47. *See* Frank Askin, *Secret Justice and the Adversary System*, 18 HASTINGS CONST. L.Q. 745 (1991); Timothy Bazzle, *Shutting the Courthouse Doors: Invoking the State Secrets Privilege to Thwart Judicial Review in the Age of Terror*, 23 GEO. MASON U. CIV. RTS. L.J. 29 (2012); John P. Blanc, *A Total Eclipse of Human Rights—Illustrated by* Mohamed v. Jeppesen Dataplan, Inc., 114 W. VA. L. REV. 1089 (2012); D.A. Jeremy Telman, *Intolerable Abuses: Rendition for Torture and the State Secrets Privilege*, 63 ALA. L. REV. 429 (2012); Frost, *supra* note 22, at 1931.

48. *See supra* notes 25–26.

privilege and the Age of Deference are intertwined, and courts are unlikely to restructure the privilege before they are willing to reconsider the underpinnings of the Age of Deference, and as of now, courts have not signaled any such reconsideration.[49]

Although the scope of the privilege will not likely be altered before judges are willing to rethink the Age of Deference, the privilege will likely be invoked less frequently in future cases than it has been in the past because both the Executive and the courts, in the wake of the controversy over extraordinary rendition, seem to disfavor the privilege.[50] As a result, a favored evidentiary privilege expanded to protect the nation's security ironically has become a threat to the nation's rule-of-law ideal, thus compromising its utility and making it a legal doctrine of last resort[51] in an effort to insulate the Executive from meaningful judicial accountability.[52]

However, the disfavoring of the privilege does not mean that the judiciary will hold the Executive more accountable in national security cases in the future than it has in the past. Courts have used numerous legal doctrines[53] to construct a "balloon" that insulates the Executive from meaningful judicial review in cases the Executive asserts implicate the nation's security. When the scope of one doctrine that constitutes the balloon of insulation is diminished—or squeezed to follow through with the imagery—in the expectation of increasing meaningful judicial review of the Executive, the effect is that the displaced air merely enlarges the balloon at some other place. This broadening of some other legal doctrine—such as standing or pleading rules—thus serves to preserve the insulation of the Executive. Built into the Age of Deference is a balloon effect the consequence of which is that the Executive's insulation is more or less constant no matter what modification may be made to any one doctrine that comprises the Age of Deference.

Nonetheless, the balloon effect should not dampen efforts to reform the state secrets privilege. The current privilege denies arguably wronged individuals judicial relief, erodes checks and balances essential to the constitutional scheme, fails to hold the Executive

49. *See* cases cited *supra* notes 6 & 39.

50. *See infra* notes 107–109 and accompanying text.

51. *See infra* note 108.

52. *But see* Donohue, *supra* note 22, at 215–16 ("[T]he use of the state secrets privilege is not going to subside."). Because Professor Donohue's research for this article ceased in 2008 or 2009, it is possible that the turnabout mentioned above in the text had not yet taken hold.

53. *See supra* notes 5–10.

accountable for unlawful conduct, undermines the national commitment to the rule of law, and threatens the legitimacy of the judiciary.[54] Moreover, not only is the robust and sweeping contemporary privilege unnecessary to the preservation of the nation's security, it may well diminish that security because it compromises important national values, which are arguably vital to the "soft-power" of the United States that contributes to its influence around the globe. Accordingly, guidelines for restructuring the privilege are set forth below and the consequences of that restructuring for national security are assessed.

Lastly, this study contends that the frame of mind that has generated the state secrets privilege is the same mindset that has defined and sustained the Age of Deference. It is a mindset not only committed to deference, but one that seems profoundly certain of its correctness.[55] As a result, it is a mindset that has transformed a nuanced disposition favoring deference into an extreme one that resists intellectual engagement. Thus, the judiciary will not rethink the state secrets privilege and its overall role in national security cases until it is willing to rethink the underpinnings of deference.[56]

Although such a rethinking is theoretically possible, it is unlikely to occur in the near future because, as Circuit Judge Richard A. Posner has noted: "Conservative judges are particularly unlikely to resist claims of national security—and the federal judiciary may be more conservative today than at any other time in the last half century."[57] Until judges are intellectually open to reexamining the premises underlying deference, the state secrets privilege and the other doctrines that comprise the Age of Deference will continue to undermine the judiciary's capacity to provide relief to injured individuals, hold the Executive legally accountable, and make good on the nation's fundamental ideal—that it is a nation under law.

---

54. *See infra* notes 254–266 and accompanying text.

55. *See* Gen. Dynamics Corp. v. United States, 131 S. Ct. 1900 (2011).

56. *See infra* Part III.

57. RICHARD A. POSNER, NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY 9–10 (2006). For a report disclosing how Chief Justice John G. Roberts Jr. has exercised his authority to appoint conservative judges to the secret court established by the Foreign Intelligence Surveillance Act and, thus, has enhanced the deferential posture of the court so that, in the words of one commentator, the judges may be "unduly accommodating to government requests," see Charlie Savage, *Roberts's Picks Reshaping Secret Surveillance Court*, N.Y. TIMES (July 25, 2013), http://www.nytimes.com/2013/07/26/us/politics/robertss-picks-reshaping-secret-surveillance-court.html and Frederick A. O. Schwarz, Jr., *Access to Government Information is a Foundation of American Democracy—But the Courts Don't Get It*, 65 OKLA. L. REV. 645 (2013).

I. THE *REYNOLDS* PRIVILEGE

In order to take the full measure of the judicially engineered expansion of the state secrets privilege, it is necessary to define the baseline established by the Supreme Court's 1953 decision in *United States v. Reynolds*.[58] That decision announced for the first time in the history of the United States a set of rules that federal courts must follow in adjudicating cases in which the executive branch claims the state secrets privilege[59] and those rules continue to this day to provide a skeleton for the contemporary state secrets privilege.[60]

The Court stated that only the government may assert the privilege and that it should not be "lightly invoked."[61] Moreover, the privilege must be asserted "by the head of the department which has control over the matter" and then only after the department head has had "actual personal consideration" of the matter.[62] The Court stressed that a "court itself must determine whether the circumstances are appropriate for the claim of privilege,"[63] and that "[j]udicial control over the evidence in a case cannot be abdicated to the caprice of executive officers."[64] The Court also stated that a court must try to decide whether the privilege should be sustained "without forcing a disclosure of the very thing the privilege is designed to protect."[65] To accomplish the twin goals of the Court assuring that it does not abdicate control over the evidence to the "caprice of executive officers,"[66] while not requiring the disclosure of the sensitive information, the Court stated the following guideline:

> It may be possible to satisfy the court, from all the circumstances of the case, that there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged. When this is the case, the occasion for the privilege is appropriate, and the court should not jeopardize the security which the privilege is meant to protect by

58. 345 U.S. 1, 7–10 (1953).
59. *See* Rudenstine, *supra* note 3, at 1366–68.
60. *Id.* at 1389–91.
61. *Reynolds*, 345 U.S. at 7.
62. *Id.* at 7–8.
63. *Id.* at 8.
64. *Id.* at 9–10.
65. *Id.* at 8.
66. *Id.* at 9–10

> insisting upon an examination of the evidence, even by the judge alone, in chambers.[67]

Lastly, the Court concluded that once a judge was convinced that "military secrets are at stake,"[68] the privilege must be sustained no matter how necessary and vital the information may be to the party seeking access to it or how directly relevant the information may be to matters of general public importance.[69]

The Supreme Court in *Reynolds* characterized the privilege as "well established."[70] Though the doctrine certainly had historical roots, which supported the claim that it was well established, the privilege had been invoked only rarely and the few reported decisions concerning the privilege were commercial cases between private parties, and then mainly patent cases.[71] Thus, in support of its claim that the state secrets privilege was "well established," the Supreme Court cited only five cases,[72] only one of which was a decision of the Supreme Court—*Totten v. United States*,[73] the so-called *Totten* case—in which the government did not assert a state secrets privilege and the Supreme Court did not even mention the privilege, let alone

---

67. *Id.* at 10.
68. *Id.* at 11.
69. *Id.* See Chesney, *supra* note 22, at 1377–78, for a transcript of *Hepting v. AT&T Corp.*, 539 F.3d 1157, 1158 (9th Cir. 2008), which details an exchange between a Circuit Judge and a Deputy Solicitor General in a case involving an alleged state secret in which the line separating judicial "abdication" of its responsibility to exercise some review over the Executive's claim that certain information qualified under the privilege from judicial expressions of "utmost deference" is invisible.
70. 345 U.S. at 6–7.
71. *Id.* at 2–3, 6–7 n.11 (commercial); Cresmer v. United States, 9 F.R.D. 203, 204 (E.D.N.Y. 1949) (commercial); Bank Line, Ltd. v. United States, 68 F. Supp. 587, 588 (S.D.N.Y. 1946) (commercial), *mandamus denied*, 163 F.2d 133 (2d Cir. 1947); Pollen v. Ford Instrument Co., 26 F. Supp. 583, 583–84 (E.D.N.Y. 1939) (patent); Firth Sterling Steel Co. v. Bethlehem Steel Co., 199 F. 353, 353–54 (E.D. Pa. 1912) (patent).
72. The earlier state secrets cases did not establish the rules set forth in *Reynolds*. *See generally Cresmer*, 9 F.R.D. at 204 (granting plaintiff's motion to produce government report of air flight investigation because there was no "showing of a war secret, or secret in respect to munitions of war, or any secret appliance used by the armed force, or any threat to the National security"); *Bank Line, Ltd.*, 68 F. Supp. at 588 (rejecting the claim of privilege because there was no threat to national security involved); *Pollen*, 26 F. Supp. at 584–86 (finding the documents privileged because "disclosure would be detrimental to the national defense"); *Firth Sterling Steel Co.*, 199 F. at 353–56 (finding the evidence was privileged on the grounds of public policy since the contents contained military secrets).
73. 92 U.S. 105 (1875).

utilize it as a basis for the decision.[74] Thus, though the general idea of a privilege did have historical roots, the detailed rules the Court announced in *Reynolds* did not; those rules were crafted by the Court and announced in *Reynolds* for the first time.[75]

In thinking about the *Reynolds* rules in light of the contemporary state secrets privilege, several points are worth emphasizing. First, although the *Reynolds* rules tilted in different directions—rules emphasizing that courts must maintain control over the application of the rules of evidence and guard against Executive abuse of the privilege, and rules directing courts to be so deferential to the Executive's claims as to sustain the privilege in some cases without reviewing the disputed document—within a few decades the circuit courts effectively eliminated the doctrinal tension these opposing tilts generated by effectively granting the Executive de facto absolute control over whether disputed information or documents were covered by the privilege.[76] Second, the *Reynolds* rule made the privilege absolute in nature,[77] meaning that once a court decided that the disputed information or documents were covered by the privilege, the privilege must be sustained no matter how comparatively unimportant the threatened injury to national security might be or how significant the information might be to the allegedly injured

74. *Id.* at 107.

75. Professor Laura K. Donohue argues that with few exceptions, scholars, either before or after the Supreme Court's 1953 decision in *Reynolds*, have not discussed "the history of state secrets in depth," and that failure has resulted in the "proliferation of an Athena-like theory of state secrets: in 1953 it sprung from Zeus's forehead, with little or no previous articulation." *See* Donohue, *supra* note 22, at 82–83. There is an important difference between acknowledging that the common law evidentiary rule authorizing a state secrets privilege had a history to it in both the United States and the United Kingdom—a history that certainly meant that the Court in *Reynolds* did not invent the concept of a state secret—and the claim that the detailed and convoluted rules announced in *Reynolds* had no antecedents in the United States. The only prior case that seems to have influenced Chief Justice Vinson's shaping of the rules in *Reynolds* was a House of Lords decision: *Duncan v. Cammell, Laird & Co.*, [1942] A.C. 624 (H.L.), and the influence of that opinion on the Supreme Court's ruling was limited. Thus, from this perspective, and employing Professor Donohue's language, Vinson's rules in *Reynolds* did indeed spring from "Zeus's forehead, with little or no previous articulation." For a detailed discussion of the *Reynolds* decision and the relationship between the *Reynolds* and the *Duncan* cases, see Rudenstine, *supra* note 3, at 1363–66, 1381.

76. *See infra* Part II.A.

77. *See* Rudenstine, *supra* note 3, at 1371–72.

party.[78] Third, the Court in *Reynolds* applied the privilege retrospectively to specific and concrete Air Force documents—an investigation report into a plane crash and three witness statements—and although the Court sustained the privilege, it still permitted the case to move forward, which ultimately meant that the plaintiffs were given an opportunity to satisfy their evidentiary burdens with evidence otherwise available to them.[79] And lastly, the Court in *Reynolds* understood the privilege to be a common law rule of evidence and not a constitutionally mandated privilege.[80]

II. THE CONTEMPORARY PRIVILEGE

As noted, the Court in *Reynolds* gave the Executive de facto control over what information was covered by the privilege;[81] made the privilege absolute in character;[82] applied the privilege retrospectively to documents already identified;[83] and, although the Court sustained the privilege in *Reynolds*, it permitted the action to move forward, thus effectively treating the privileged evidence as if a witness had died.[84] Without doubt, the *Reynolds* outcome constituted a major victory for government efforts to expand the veil of secrecy. Nonetheless, the Court in *Reynolds* did not suggest that the privilege could be properly used to shield unlawful conduct, or information that was innocuous or harmless, or that a ruling sustaining the privilege should result in the dismissal of an action in which a plaintiff claimed that it could satisfy the evidentiary burden without relying on privileged evidence.[85] But that is what the contemporary privilege became in the 1970s and the 1980s; indeed, it became much more than that.

A. Chronological Arc of Expansion

During the years following the *Reynolds* decision the state secrets privilege attracted some, but limited, attention from the courts and

78. The *Reynolds* rules invite abuse that courts fail to perceive. Thus, not only was the privilege abused in *Reynolds* itself, but the highly influential opinion in *Halkin II* reaffirmed the error of the *Reynolds* Court and concluded that the disputed documents in *Reynolds* contained military secrets. *Halkin II*, 690 F.2d 977, 990 n.53 (D.C. Cir. 1982) ("Reynolds itself involved a military secret.").

79. *United States v. Reynolds*, 345 U.S. 4–5, 11–12 (1953).

80. *Id.* at 6–7.

81. *See* Rudenstine, *supra* note 3, at 1371.

82. *Id.*

83. 345 U.S. at 3–5.

84. *Id.* at 11–12.

85. *See supra* Part I.

legal scholars until the presidency of Richard Nixon,[86] at which point several factors combined to bring about a change.[87] The executive branch began to assert the state secrets privilege more frequently in cases in which individuals claimed that government officials had violated their constitutional rights and, perhaps, federal criminal law.[88] In seeking protection from legal claims based on alleged misconduct by executive officials, the executive branch argued for a much broader state secrets privilege than previously authorized by the Supreme Court.[89] Lower federal courts favorably responded to such assertions of the privilege and expanded the scope of the state secrets privilege well beyond the narrower parameters set forth by the Supreme Court in *Reynolds*,[90] and that expanded privilege provided a springboard for the executive branch to assert the state secrets privilege even more frequently than it previously had and to request a still broader and more robust state secrets privilege. This dynamic provided courts with opportunities to expand the privilege even further. As they did so, the privilege became a more potent weapon for the Executive to utilize[91] and, as the cases expanding the privilege increased in number and scope, the mounting precedent made it that much more difficult for judges to rule against the Executive's assertion of the privilege. That pattern continued until the end of the twentieth century[92] and then intensified after September 11.[93]

The result is a sweeping privilege, which vastly expanded the boundaries of the privilege so that what was initially an evidentiary privilege with limited boundaries became a dynamic and powerful weapon that the executive branch could use to dismiss lawsuits

---

86. This claim is supported by the number of case citations to *Reynolds* and the number of law review articles devoted to the state secrets privilege during the almost two decades following the 1953 Supreme Court decision in *Reynolds*. *See infra* apps. 1–2.

87. *See Limits of National Security Litigation*, *supra* note 22, at 1291, 1315–32 app.

88. *See, e.g.*, Ellsberg v. Mitchell, 709 F.2d 51 (D.C. Cir 1983), *cert. denied, sub nom.* Russo v. Mitchell, 484 U.S. 870 (1987); *Halkin I*, 598 F.2d 1 (D.C. Cir. 1978).

89. The Court authorized a relatively narrow state secrets privilege in *Reynolds*. *See Ellsberg*, 709 F.2d at 56; Farnsworth Cannon, Inc. v. Grimes, 635 F.2d 268, 276 n.1 (4th Cir. 1980) (Phillips, J., concurring and dissenting); *Halkin I*, 598 F.2d at 9.

90. *See infra* Part II.A.

91. *See infra* Part II.A.

92. *See generally* app. 3, tbl.4 (showing a timeline of state privilege cases).

93. Some scholars have debated whether the administration of President George W. Bush asserted the privilege more frequently than other administrations and/or whether its assertion of the privilege was of a different character. *See Limits of National Security Litigation*, *supra* note 22, at 1271 (concluding that the administration of George W. Bush did not break with "past practice in asserting the privilege, either in quantitative or qualitative terms").

before the submission of a responsive pleading.[94] In other words, a privilege that began as a surgical incision that excised from litigation carefully defined evidence but otherwise left the action to proceed forward has been transformed into an objection that the Executive may assert at the very earliest stages of legal proceedings and which may be the basis for dismissing an action altogether.

The vigorous expansion of the state secrets privilege was mainly defined and implemented by the circuit courts, as opposed to the Supreme Court,[95] and more specifically, it was the Courts of Appeals for the District of Columbia[96] and the Fourth Circuit[97] that primarily pioneered the developments.[98] Not only did these two courts give the privilege a breathtaking sweep[99] in their decisions, but they did so quickly in a handful of cases decided within only a few years of one another. And the judges who engineered the expansion wrote opinions that presented the developments as if the reasoning and

94. *See* Mohamed v. Jeppesen Dataplan, Inc., 614 F.3d 1070, 1080–81 (9th Cir. 2010) (en banc), *cert. denied*, 131 S. Ct. 2442 (2011); El-Masri v. United States, 479 F.3d 296, 308 (4th Cir. 2007).

95. *See* Fitzgerald v. Penthouse Int'l, Ltd., 776 F.2d 1236, 1242–43 (4th Cir. 1985); Ellsberg v. Mitchell, 709 F.2d 51, 63–64 (D.C. Cir. 1983), *cert. denied, sub nom.* Russo v. Mitchell, 484 U.S. 870 (1987); *Halkin II*, 690 F.2d 977, 995–96 (D.C. Cir. 1982); Farnsworth Cannon, Inc. v. Grimes, 635 F.2d 268, 270–72 (4th Cir. 1980); *Halkin I*, 598 F.2d 1, 9 (D.C. Cir. 1978).

96. *See, e.g.*, *Ellsberg*, 709 F.2d at 51; *Halkin II*, 690 F.2d at 977; *Halkin I*, 598 F.2d at 1.

97. *See, e.g.*, *Fitzgerald*, 776 F.2d at 1236; *Farnsworth Cannon, Inc.*, 635 F.2d at 268.

98. For example, in 1978, the Court of Appeals for the District of Columbia relied upon a 1972 Fourth Circuit decision, which did not involve the state secrets privilege at all, to dismiss an action. *Halkin I*, 598 F.2d at 8–9 (citing United States v. Marchetti, 466 F.2d 1309, 1318 (4th Cir. 1972)). The court stated the state secrets privilege barred a plaintiff from having the executive branch confirm or deny whether the government had intercepted its communications on the basis of a "mosaic" theory, which posited that "[t]housands of bits and pieces of seemingly innocuous information can be analyzed and fitted into place to reveal with startling clarity how the unseen whole must operate." *Id.* at 8. Two years later, the Fourth Circuit provided no authority whatsoever for its order dismissing an action on the ground that plaintiff "would have every incentive to probe as close to the core secrets as the trial judge would permit," and since the plaintiff and the other trial lawyers "would remain unaware of the scope of exclusion of information determined to be state secrets," such probing presented an unacceptable risk that state secrets would be disclosed. *Farnsworth Cannon, Inc.*, 635 F.2d at 281. In these two cases, two leading courts of appeals with jurisdiction over territory, including the White House, the CIA, and the Pentagon, redefined the state secrets privilege giving it a sweep that gave the Executive a major weapon in litigation in which the privilege was implicated.

99. *See supra* notes 77–78 and accompanying text.

outcomes in the cases were obvious, inevitable, and required by prior decisions.[100]

During the expansion of the privilege, very few circuit courts narrowed the potential scope of the privilege, but to the extent that there was such a narrowing, those opinions were reversed either after an en banc hearing[101] or by the Supreme Court.[102] Moreover, in the years following these early decisions, judges continued to apply and occasionally expand the privilege[103] even beyond the boundaries demarked by the initial circuit court decisions. But, as important as these subsequent expansions were, their scope was modest by comparison to the expansion that occurred in the 1970s and the early 1980s.[104]

During this development of the privilege, the Supreme Court mainly limited itself to endorsing what the circuit courts did without providing even a thoughtful discussion assessing the privilege in general or in the particular case at hand.[105] Furthermore, although this dynamic expansion of the state secrets privilege defines a contemporary privilege that is well beyond the boundaries and scope of the privilege's guidelines set forth in *Reynolds*, the Court has not reconsidered the *Reynolds* decision in light of the expansion.[106]

The consequence of this expansion is that the state secrets privilege has come into sharp focus and legal scholars and commentators have become intensely critical of the doctrine. In particular, these critics have focused on the judiciary's failure to provide a remedy for possibly wronged individuals in cases involving the state secrets

100. *See supra* notes 77–78 and accompanying text.

101. Mohamed v. Jeppesen Dataplan, Inc., 579 F.3d 943, 957–58, 962 (9th Cir. 2009), *rev'd en banc*, 614 F.3d 1070 (9th Cir. 2010).

102. *See, e.g.*, Doe v. Tenet, 329 F.3d 1135 (9th Cir. 2003), *rev'd*, 544 U.S. 1 (2005).

103. *See, e.g.*, Molerio v. FBI, 749 F.2d 815 (D.C. Cir. 1984).

104. *See supra* notes 95–100 and accompanying text.

105. Since *Reynolds*, the Court has cited *Reynolds* only twenty-three times. *See infra* app. 3, tbl.4.

106. The Supreme Court had the opportunity to address the state secrets privilege numerous times since the *Reynolds* decision; however, it denied certiorari in many instances. *See* United States v. El-Mezain, 664 F.3d 467 (5th Cir. 2011), *cert. denied*, 133 S. Ct. 525 (2012); Mohamed v. Jeppesen Dataplan, Inc., 614 F.3d 1070 (9th Cir. 2010) (en banc), *cert. denied*, 131 S. Ct. 2442 (2011); United States v. Aref, 533 F.3d 72 (2d Cir. 2008), *cert denied*, 559 U.S. 1107 (2009); El-Masri v. United States, 479 F.3d 296 (4th Cir.), *cert. denied*, 552 U.S. 947 (2007); Sterling v. Tenet, 416 F.3d 338 (4th Cir. 2005), *cert. denied*, 546 U.S. 1093 (2006); Kasza v. Browner, 133 F.3d 1159 (9th Cir.), *cert. denied*, 525 U.S. 967 (1998); *In re* United States, 872 F.2d 472 (D.C. Cir.), *cert. dismissed*, 493 U.S. 960 (1989); Ellsberg v. Mitchell, 709 F.2d 51 (D.C. Cir. 1983), *cert. denied*, 484 U.S. 870 (1987).

privilege and to fashion a set of rules that checked the executive branch's use of the doctrine so as to minimize the risk of the executive branch's "caprice" and abuse of the privilege.[107] Indeed, there is now evidence that the privilege is in such disfavor that the Department of Justice characterizes it as a doctrine of last resort,[108] and that judges prefer other doctrines to the state secrets privilege in shielding the Executive.[109]

B. Shielding Unlawful Conduct

It is central to the American creed that the United States is committed to a government ruled by law.[110] When John Marshall wrote over two centuries ago that the United States is a "government of laws, and not of men,"[111] he penned words that not only set forth a national aspiration at the time but words that have echoed across the eras of American history as setting forth one of the nation's most fundamental commitments that has become part of America's identity

---

107. *See generally Limits of National Security Litigation*, *supra* note 22, at 1249–50 (discussing Congressional reformation of the state secrets privilege to ameliorate its impact); Frost, *supra* note 22, at 1931–32 (discussing plaintiffs' primary arguments against the use of the state secrets privilege); Lyons, *supra* note 22, at 111–12 (arguing that the state secrets privilege is misused).

108. The brief filed on behalf of the United States in *Al-Aulaqi v. Obama* states, "Consistent with the judicial admonition that the state secrets privilege be 'invoked no more often or extensively than necessary,' the Court should not reach the privilege issue if the case can be resolved on the preceding grounds . . . ." Opposition to Plaintiff's Motion for Preliminary Injunction and Memorandum in Support of Defendants' Motion to Dismiss at 43, Al-Aulaqi v. Obama, 727 F. Supp. 2d 1 (D.D.C. 2010) (No. 10-CV-1469), 2010 WL 3863135 at *20 (citation omitted). Also, in *Arar v. Ashcroft*, 585 F.3d 559 (2d Cir. 2009), the trial judge relied upon the state secrets privilege as a reason to dismiss the complaint, whereas the majority opinion in the en banc decision narrowly construed the *Bivens v. Six Unknown Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 411 (1971), line of cases to preclude authorizing a claim for relief based on *Bivens*, in the circumstances presented by *Arar*. *But see* Charlie Savage & David E. Sanger, *White House Tries to Prevent Judge From Ruling on Surveillance Efforts*, N.Y. TIMES (Dec. 21, 2013), http://www.nytimes.com/2013/12/22/us/white-house-tries-to-prevent-judge-from-ruling-on-surveillance-efforts.html.

109. *See supra* cases cited in notes 6–10.

110. Marbury v. Madison, 5 U.S. 137, 163 (1803); Barack Obama, President of the United States, Speech at the National Defense University (May 23, 2013), *available at* http://www.nytimes.com/2013/05/24/us/politics/transcript-of-obamas-speech-on-drone-policy.html ("So after I took office, we stepped up the war against al Qaeda but we also sought to change its course . . . . We unequivocally banned torture, affirmed our commitment to civilian courts, worked to align our policies with the rule of law, and expanded our consultations with Congress.").

111. *Marbury*, 5 U.S. at 163.

among the nations of the world. Nonetheless, during the last four decades, courts—the very governing institution most responsible for assuring that Marshall's admonition is respected throughout the realm—have undermined this tenet by sustaining the state secrets privilege to shield executive conduct that is arguably unlawful.

Two cases, separated by three decades, illustrate this point. In 1978, the U.S. Court of Appeals for the District of Columbia Circuit utilized the privilege to dismiss an action in which individuals and organizations opposed to the United States military involvement in Vietnam claimed that former federal officials as well as private corporations acted in concert to conduct "warrantless interceptions of their international wire, cable and telephone communications."[112] The meaning of the dismissal meant—in the words of former Chief Judge of the U.S. Court of Appeals for the District of Columbia Circuit David L. Bazelon who submitted a dissent—that the state secrets privilege "immunize[d] conduct that appears to be proscribed by the Fourth Amendment,"[113] and thus "becomes a shield behind which the government may insulate unlawful behavior from scrutiny and redress by citizens who are the target of the government's surveillance."[114]

In a post-September 11 case—*Mohamed v. Jeppesen Dataplan, Inc.*,[115] decided by the Ninth Circuit in 2010—five individuals claimed that the CIA, working in concert with other government agencies and officials of foreign governments, "operated an extraordinary rendition program to gather intelligence by apprehending foreign nationals suspected of involvement in terrorist activities and transferring them in secret to foreign countries for detention and interrogation by United States or foreign officials"[116] by "methods that would [otherwise have been] prohibited under federal or international law."[117] The plaintiffs alleged that Jeppesen Dataplan, Inc., a U.S. corporation, had "provided flight planning and logistical support services to the aircraft and crew on all of the flights transporting each of the five plaintiffs among the various locations where they were detained and allegedly subjected to torture."[118] In relying upon the privilege to dismiss the complaint, Circuit Judge

112. *Halkin I*, 598 F.2d 1, 3 (D.C. Cir. 1978).
113. *Id.* at 13 (Bazelon, J., dissenting).
114. *Id.* at 13–14.
115. 614 F.3d 1070 (9th Cir. 2010) (en banc).
116. *Id.* at 1073.
117. *Id.* (alteration in original) (internal quotation marks omitted).
118. *Id.* at 1075.

Raymond C. Fisher framed the issue as a collision in fundamental values between government under law and a secure government:

> This case requires us to address the difficult balance the state secrets doctrine strikes between fundamental principles of our liberty, including justice, transparency, accountability and national security. Although as judges we strive to honor *all* of these principles, there are times when exceptional circumstances create an irreconcilable conflict between them.[119]

The use of the state secrets privilege to shield arguably unlawful executive conduct is a remarkable doctrinal development. After all, if Congress is to pass statutes that establish the nation's laws, it behooves the courts to make law that permits or even encourages the Executive to violate those laws with impunity.

What explains this development? There was nothing in the *Reynolds* decision and the early state secret cases cited in *Reynolds* that authorized the use of the privilege to shield unlawful conduct.[120] Rather, in those early cases the state secrets privilege was applied in tort, commercial, or patent cases,[121] and, in the *Reynolds* case itself, the privilege was applied to protect Air Force documents in a tort action authorized by the Federal Tort Claims Act[122] against the United States.[123] And while *Reynolds* did not explicitly prohibit the extension of the privilege to shield unlawful executive conduct, it surely did not mandate or invite the extension of the privilege and there is nothing in the opinion that even suggests that the *Reynolds* Court anticipated such a development.[124]

---

119. *Id.* at 1073. Judge Fisher's frank acknowledgement that the state secrets privilege shielded unlawful conduct is unusual. What is more common is the approach taken by Judge Edwards in the *Ellsberg* case and Judge Scalia in the *Moliero* case—to just ignore the issue.

120. *E.g.*, United States v. Reynolds, 345 U.S. 1 (1953).

121. *See* Cresmer v. United States, 9 F.R.D. 203, 204 (E.D.N.Y. 1949); Bank Line Ltd. v. United States, 68 F. Supp. 587, 588 (S.D.N.Y. 1946); Pollen v. Ford Instrument Co., 26 F. Supp. 583, 583–84 (E.D.N.Y. 1939); Firth Sterling Steel Co. v. Bethlehem Steel Co., 199 F. 353, 353–54 (E.D. Pa. 1912). *But see* Totten v. United States, 92 U.S. 105, 105–08 (1875) (holding state secrets barred an action for breach of contract stemming from a contract made during the Civil War).

122. 28 U.S.C. § 1346(b)(1) (2012).

123. *See Reynolds*, 345 U.S. at 2–3.

124. Apart from a few opinions written in the 1970s and the dissent in *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070 (9th Cir. 2010) (en banc) (Hawkins J., dissenting), there are not many published judicial objections to the use of the privilege to shield unlawful Executive conduct. Robert M. Chesney concluded similarly in

Moreover, no one claims in defense of the judicially crafted privilege that United States officials have a right to violate the law to protect the national security. Obviously, there may well be a dispute as to whether specified conduct does or does not violate the law, or whether a particular defendant has a defense such as qualified immunity.[125] But no one challenges the underlying premise that the law must be obeyed. Nor have recent presidential administrations taken the widely criticized position insisted upon by President Nixon that an act that might otherwise be a violation of the law is not a violation when the President orders it to guard the national security,[126] nor do they espouse a utilitarian rationale that maintains that the protection of national security justifies breaking the law.

Furthermore, it must be acknowledged that there are important differences between the Executive and the judiciary on this matter. Federal judges who sustain the privilege to shield unlawful conduct are not themselves committing an unlawful act, nor are they responsible for directing such conduct. There is a difference between courts not requiring the executive branch to disclose certain information or documents that might be evidence of such unlawful conduct and courts actually approving of unlawful executive conduct. Nonetheless, these distinctions are not absolutions. The state secrets privilege is a judge-made rule,[127] allegations of unlawful executive conduct are not new or even rare, and judges who sustain the privilege in such cases do so knowing that they are shielding arguably unlawful conduct and creating a dynamic that encourages

---

State Secrets and the Limits of National Security Litigation, *supra* note 22, at 1252 ("[T]he survey indicates that post-*Reynolds* efforts to categorically exclude application of the privilege to suits alleging government misconduct did not gain traction.").

125. The Supreme Court discussed qualified immunity in *Ashcroft v. al-Kidd*, 131 S. Ct. 2074 (2011).

126. *Great Interviews of the 20th Century*, THE GUARDIAN (Sept. 7, 2007, 5:18 AM), http://www.theguardian.com/theguardian/2007/sep/07/greatinterviews1 (Interview with Richard Nixon and David Frost on May 20, 1977). For two recent examples of presidential administrations not following in President's Nixon's footsteps, see Charlie Savage, *Obama Tests Limits of Power in Syrian Conflict*, N.Y. TIMES (Sept. 8, 2013), http://www.nytimes.com/2013/09/09/world/middleeast/obama-tests-limits-of-power-in-syrian-conflict.html, and Secretary of State Colin Powell's speech to the United Nations Security Council seeking affirmation for the attack on Iraq because of the alleged threat presented by the regime's possession of weapons of mass destruction, Colin Powell, Sec'y of State, Address to the United Nations Security Council (Feb. 5, 2003), *available at* http://www.theguardian.com/world/2003/feb/05/iraq.usa.

127. *E.g.*, *Jeppesen Dataplan, Inc.*, 614 F.3d at 1094 (Hawkins, J., dissenting) ("The state secrets doctrine is a judicial construct without foundation in the Constitution . . . .").

future unlawful conduct. In other words, what the courts have knowingly done is to build into the functioning of the national security state an insulating dynamic that permits, if not invites, public officials to violate the law with impunity.[128] The consequence is that courts have expanded the privilege—a privilege whose purpose was to protect the nation and its ideals, including a commitment to a rule of law—to the point where the privilege has become dangerous not only to aggrieved individuals, but to the constitutional order, as well as the moral legitimacy of the judiciary.[129]

Against these considerations, it is difficult to do anything more than to speculate about why courts not only expanded the state secrets privilege to shield alleged unlawful conduct but why no member of the Supreme Court has ever written a public opinion criticizing the development or suggesting ways to minimize such use of the privilege. But with that important caveat in mind, it does seem that the use of the privilege to shield unlawful conduct is a direct outgrowth of the mindset that generated the entire Age of Deference itself; a mindset so deferential to the Executive in national security matters that it not only has converted the federal courts into acting as if they were an extension of the executive branch—and not an independent and co-equal branch of government—but has also persuaded the very judges whose primary mission is to uphold the rule of law to betray that obligation for reasons the very same judges decide are more significant.[130]

---

128. *See id.* at 1073 (majority opinion).

129. *See Limits of National Security Litigation*, *supra* note 22, at 1268.

130. In his memoir, William Colby recounts an incident that may shed some light on the zeitgeist in Washington, D.C. when *Halkin I* was decided as well as other later cases in which the state secrets privilege was used to shield unlawful conduct. WILLIAM COLBY & PETER FORBATH, HONORABLE MEN: MY LIFE IN THE CIA 389–400 (1978). Colby tells of an exchange with Vice-President Nelson Rockefeller, who co-chaired a blue-ribbon commission,—which became known as the Rockefeller Commission—investigating public claims that the CIA had violated federal law. Although Colby maintained that the "CIA was not engaged in domestic spying or any other illegal activity," *id.* at 393, as of 1975, the content of his statements to the commission were "too open and candid for some people's tastes," *id.* at 400, and, as a result, after giving testimony on one occasion:

> Vice President Rockefeller[] drew me aside into his office . . . and said in his most charming manner, "Bill, do you really have to present all this material to us? We realize that there are secrets that you fellows need to keep and so nobody here is going to take it amiss if you feel that there are some questions you can't answer quite as fully as you seem to feel you have to.

Id. Colby wrote in his memoir that he understood Rockefeller disapproved of his "approach to the CIA's troubles," and that he would have preferred Colby to "take the

C. A Sweeping Privilege

During the last forty years, many distinct doctrinal developments[131] have combined to create a robust and sweeping expansion of the state secrets privilege. The themes that compose the expansion are theoretically distinct from one another,[132] but in practice they are interrelated, reinforce each other, and create a chain of thinking that constitutes a dynamic and breathtakingly expansive state secrets privilege.[133]

1. Unacceptable Risks

The most threatening doctrinal theme to a party arguably wronged by executive officials is the idea that the privilege must be sustained and the entire action dismissed to avoid an "unacceptable risk"[134] that

---

traditional stance of fending off investigators by drawing the cloak of secrecy around the Agency in the name of national security." *Id.*

In his study, *Bomb Power: The Modern Presidency and the National Security State*, Gary Wills places Colby's forthrightness in a political context that may well have filtered through the judiciary and helped shape a perspective that made the use of the state secrets privilege in such cases seem legitimate. Wills wrote that the "secret subversions," which included sabotage, economic pressure and invasion, "were guarded so carefully that their nickname in the Agency was 'the family jewels,'" and that when Colby revealed secrets, "Agency loyalists and their right-wing supporters treated this as an act of treason" for in so doing Colby "betrayed the protectors of the nation." WILLS, *supra* note 2, at 177. Indeed, just to polish the point a bit more, Wills wrote: "When Richard Helms defied Congress, and when William Casey lied to Congress, they were considered the true patriots." *Id.*

131. See *supra* Part II.A for a chronological analysis of developments contributing to a more expansive state secrets privilege post-*Reynolds*.

132. See *infra* Part III for examples of the themes: unacceptable risks, mosaic doctrine, entanglement, and acknowledging, confirming, denying.

133. *See generally* Kasza v. Browner, 133 F.3d 1159, 1166 (9th Cir. 1998) ("[I]f the 'very subject matter of the action' is a state secret, then the court should dismiss the plaintiff's action based solely on the invocation of the state secrets privilege."); Bareford v. Gen. Dynamics Corp., 973 F.2d 1138, 1143–44 (5th Cir. 1992) (noting that even if the plaintiff could establish a prima facie case without resorting to privileged information, allowing the case to proceed would pose such a threat to state secrets as to warrant dismissal).

134. *See generally* Mohamed v. Jeppesen Dataplan, Inc., 614 F.3d 1070, 1087–89 (9th Cir. 2010) (en banc) (dismissing the action because of the "unacceptable risk" of disclosing state secrets no matter what "protective procedures" might be employed); El-Masri v. United States, 479 F.3d 296, 308 (4th Cir. 2007) ("[T]he state secrets doctrine protects sensitive military intelligence information from disclosure in court proceedings, and that dismissal at the pleading stage is appropriate if state secrets are so central to a proceeding that it cannot be litigated without threatening their disclosure."); *Bareford*, 973 F.2d at 1144 (dismissing case because privileged and

the litigation will inadvertently expose state secrets. By this reasoning, the privilege is sustained not to guard against the *inevitable* or even the highly likely disclosure of information that satisfies the conditions of the privilege, but to guard against the *possibility* that such information may be disclosed. Thus, it is reasoned that an inquiry during litigation into non-sensitive information, that itself does not disclose national security information, but which is on the "periphery"[135] of sensitive information, may invite lawyers "to probe as close to the core secrets as the trial judge would permit,"[136] and that during such probing, the trial judge, seeking to prevent unintentional disclosure by a witness under aggressive examination, may be so disadvantaged because the boundary separating sensitive from non-sensitive information may be so blurred that highly sensitive information is disclosed.[137] Because of this risk of inadvertent disclosure, a judge may dismiss an action before a responsive pleading is filed or discovery is commenced.[138]

The unacceptable risk analysis requires a judge to make a predictive decision regarding how lawyers and a judge will conduct themselves during the course of a trial. Although predictive decisions are vulnerable to the risk of error, judicial rulings applying the unacceptable risk doctrine make little effort to reduce that error by refining the concept of an "unacceptable risk," which leaves open the possibility that any risk to any harm is unacceptable.[139] The result is that judges possess broad, unstructured discretion in making these decisions, and because those decisions involve undisclosed information and are predictive in nature, the soundness of the judicial decisions cannot be evaluated.[140]

---

non-privileged material was inextricably linked); Fitzgerald v. Penthouse Int'l, Ltd., 776 F.2d 1236, 1241–43 (4th Cir. 1985) (dismissing case based on the potential danger of exposing state secrets when necessary expert witness had personal knowledge of military secrets).

135. Farnsworth Cannon, Inc. v. Grimes, 635 F.2d 268, 281 (4th Cir. 1980) ("Information within the possession of the parties on the periphery of the suppression order would not readily be recognized by counsel, unaware of the specific contents of the affidavit, as being secret or as clearly having been suppressed by the general order of the district court.").

136. *Id.*

137. *See Jeppesen Dataplan, Inc.*, 614 F.3d at 1082–83.

138. *See id.* at 1081.

139. *See id.* at 1083; *El-Masri*, 479 F.3d at 304–05 (indicating that the state secret privilege should be upheld when there is any "reasonable danger" that secrets will be exposed).

140. *See supra* note 134 and accompanying text; *see also In re* Sealed Case, 494 F.3d 139, 153 (D.C. Cir. 2007) ("It remains for the district court on remand to determine what procedures would be required to safeguard against disclosure of privileged materials and then to determine whether [the] lawsuit can proceed."); Bareford v. Gen.

The unacceptable risk doctrine is a substantial expansion of the state secret rules set forth in *Reynolds*. As noted, the Court in *Reynolds* protected specifically defined and particularized information during the discovery stage of the case and left the action otherwise intact to proceed until such time that it became unequivocally plain that the plaintiff was unable to establish a prima facie case without the information covered by the privilege.[141] In contrast, the unacceptable-risk-of-disclosing-state-secrets line of argument is predictive in character and it results in the dismissal of the entire action.[142]

Courts explain the early dismissal remedy—the limiting or cutting off of litigation "to protect state secrets, even before any discovery or evidentiary requests have been made"—by claiming that "waiting for specific evidentiary disputes to arise would be both unnecessary and potentially dangerous."[143]

The idea that a case should be dismissed to avoid the "unnecessary" taxing of limited judicial resources and to avoid wasteful expenses associated with litigation seems on its face totally reasonable.[144] In general, there would be little justification for a judge to indulge litigation that was truly "unnecessary." But whether a legal action in which a state secrets privilege is asserted is "unnecessary" depends entirely—at least in this context—on the capacity of a judge to predict whether the litigation of the claims will

---

Dynamics Corp., 973 F.2d 1138, 1144–45 (5th Cir. 1992) (affirming the dismissal of an action in the absence of a record of in camera proceedings in the district court); Fitzgerald v. Penthouse Int'l, Ltd., 776 F.2d 1236, 1241–42 (4th Cir. 1985) ("Due to the nature of the question presented in th[e] action and the proof required by the parties to establish or refute the claim, the very subject of this litigation is itself a state secret."); *Farnsworth Cannon, Inc.*, 635 F.2d at 281 (affirming the dismissal upon review of an in camera affidavit).

141. 345 U.S. 1, 11–12 (1953).

142. *See, e.g.*, *Jeppesen Dataplan, Inc.*, 614 F.3d at 1079. As the Ninth Circuit has stated "the assertion of privilege will require dismissal because . . . litigating the case to a judgment on the merits would present an unacceptable risk of disclosing state secrets." *Id.* The Fourth Circuit echoed those words in *El-Masri*: "a proceeding in which the state secrets privilege is successfully interposed must be dismissed if the circumstances make clear that privileged information will be so central to the litigation that any attempt to proceed will threaten that information's disclosure." 479 F.3d at 308.

143. *Jeppesen Dataplan Inc.*, 614 F.3d at 1081. The Court in *Jeppesen* also cites to *Sterling v. Tenet*, 416 F.3d 338, 344 (4th Cir. 2005) to support this proposition. *Id.*

144. *See generally Jeppesen Dataplan Inc.*, 614 F.3d at 1081 (indicating that when it becomes certain that state secrets would be divulged in an action, further litigation would be "unnecessary.").

risk the inadvertent disclosure of information injurious to national security. Given that a judge would be in a far better position to assess whether additional litigation of a particular action is unnecessary by permitting the action to proceed,[145] judges should dismiss cases to reduce litigation costs only when the circumstances make it certain that further litigation would be wasteful.

But conserving adjudicatory resources is not the major consideration underlying the unacceptable risk doctrine. The primary concern is that any further litigation will present an unacceptable risk that sensitive information will be inadvertently disclosed.[146] While this is an understandable consideration, the fear of inadvertent disclosure seems greatly exaggerated since it is difficult to understand how a mere submission of interrogatories or a request for documents could be so "potentially dangerous" as to warrant dismissal of a complaint in which an individual alleges kidnapping and torture. It is equally difficult to understand how a witness being deposed with an attorney (or several attorneys) in the room could inadvertently disclose security information.[147] Moreover, given that judges take almost as hallowed ground the assumption that the judicial function is best performed in a concrete factual context,[148] it is peculiar for the courts to have fashioned a rule which puts a judge

145. *See id.* at 1095 (Bea, J., concurring) ("[W]hen responsive pleading is complete and discovery under way, judgments as to whether secret material is essential to Plaintiffs' case or Jeppesen's defense can be made more accurately.").

146. *Id.* at 1087 (majority opinion). In *Jeppesen*, the court, sitting en banc, stated that plaintiffs' prima facie case and the defendant's defense "may not inevitably depend on privileged evidence." *Id.* Or, to put the matter in a positive mode, the plaintiff may be able to prove a prima facie case without relying upon information covered by the state secrets privilege and the defendants may be able to mount complete defenses relying on information not covered by the state secrets privilege. Nonetheless, the court dismissed the complaint before a responsive pleading was filed on the ground that "there is no feasible way to litigate [the defendant's] alleged liability *without creating an unjustifiable risk of divulging state secrets*." *Id.* (emphasis added).

147. But see *General Dynamics Corp. v. United States*, 131 S. Ct. 1900, 1904 (2011), in which Justice Scalia stated that a former Navy official "revealed military secrets neither side's litigation team was authorized to know," and that "[c]opies of the unclassified deposition were widely distributed and quoted in unsealed court filings until Government security officials discovered the breach a month later." The reliability of Justice Scalia's factual assertions has been called into question by a nationally prominent circuit judge. *See* Richard A. Posner, *The Incoherence of Antonin Scalia*, THE NEW REPUBLIC (Aug. 24, 2012), http://www.newrepublic.com/article/magazine/books-and-arts/106441/scalia-garner-reading-the-law-textual-originalism.

148. *See* Raines v. Byrd, 521 U.S. 811, 819–20 (1997); Lujan v. Defenders of Wildlife, 504 U.S. 555, 581 (1992); Valley Forge Christian Coll. v. Am. United, 454 U.S. 464, 472 (1982); Poe v. Ullman, 367 U.S. 497, 528–30 (1961).

in a disadvantaged position by requiring a predictive decision in a comparatively abstract context.[149] But that is precisely what the courts have done.[150]

2. Mosaic Doctrine

What is now termed the Mosaic theory had modest origins.[151] In 1972, the Fourth Circuit decided a dispute between a former Central Intelligence Agency (CIA) agent, Victor Marchetti, and the CIA over the applicability of a secrecy agreement the former agent had signed as a condition of his employment to a book Marchetti had written—*The CIA and the Cult of Intelligence*—that was scheduled to be published by Knopf.[152] The court concluded that the secrecy agreement, which barred Marchetti from disclosing "classified information obtained during the course of [his] employment," which was not already in the public domain, was valid.[153] Moreover, Circuit Judge Haynsworth claimed that the courts should defer to executive branch judgments regarding confidential information; he explained:

> There is a practical reason for avoidance of judicial review of secrecy classifications. The significance of one item of information may frequently depend upon knowledge of many other items of information. What may seem trivial to the uninformed, may appear of great moment to one who has a broad view of the scene and may put the questioned item of information in its proper context. The courts, of

149. *See supra* text accompanying notes 139–140. A dissent by Circuit Judge Francis D. Murnaghan, Jr. of the Fourth Circuit makes plain the hazards of the unacceptable risk analysis:

> > Any litigant in the Fourth Circuit whose proof is hampered by the invocation of state secrets can hereafter be turned away from his efforts to obtain justice on the questionable grounds that, for reasons as to which he must remain uninformed, he might stumble intrusively into a protected area. The opportunities for unexplicated imposition of arbitrary fiat under the rule the majority adopts are potentially frightening.
>
> Farnsworth Cannon, Inc. v. Grimes, 635 F.2d 268, 282–83 (4th Cir. 1980) (Murnaghan, J., dissenting).

150. *See* George, *supra* note 22, at 1697–99, for a discussion of this development.

151. United States v. Marchetti, 466 F.2d 1309, 1318 (4th Cir. 1972); *see also Halkin I*, 598 F.2d 1, 8 (D.C. Cir. 1978) for a court's first use of the term "mosaic" to describe the state secrets theory.

152. *Marchetti*, 466 F.2d at 1311–12; VICTOR MARCHETTI & JOHN D. MARKS, THE CIA AND THE CULT OF INTELLIGENCE (1974).

153. *Marchetti*, 466 F.2d at 1317.

> course, are ill equipped to become sufficiently steeped in foreign intelligence matters to serve effectively in the review of secrecy classifications in that area.[154]

Thus, Haynsworth cautioned that judges should defer because they were not competent to assess the sensitivity of tidbits of information that arguably formed a mosaic.[155]

Contemporary cases expanding the state secrets doctrine have used Haynsworth's statements as a jumping off point to expand the state secrets privilege by importing the mosaic theory into the privilege,[156] thus giving rise to the question of the degree to which the mosaic theory should expand the privilege. By comparison to the *Reynolds* decision—which was limited to information that itself presented an allegedly unmistakable threat to national security—the utilization of the mosaic theory by the state secrets privilege constitutes an enormous expansion of the scope of the information protected by the privilege.[157] Moreover, as it is now construed by the courts, the idea of the theory—that only experienced individuals steeped in national security can know if seemingly harmless tidbits of information can be disclosed without causing harm—profoundly disables judges from exercising meaningful review over executive judgments.[158] The result is that the inclusion of the mosaic rationale into the state secrets privilege greatly expands the scope of information that is potentially protected by the privilege.

3. Entanglement

Circuit Judge Harry Edwards gave early expression to the entanglement theme when he explained that the Supreme Court had

---

154. *Id.* at 1318.

155. *See id.*

156. *See, e.g.*, Kasza v. Brown, 133 F.3d 1159, 1166 (9th Cir. 1998) (holding that RCRA claims against the Air Force risked exposing military secrets); CIA v. Sims, 471 U.S. 159, 178 (1985) (stating that the CIA director has the power to withhold superficially innocuous information to protect the identity of an intelligence source); *Halkin I*, 598 F.2d at 8–9 (holding that the NSA does not need to release the identification of the individuals or organizations whose communications the agency may have acquired).

157. *Compare* United States v. Reynolds, 345 U.S. 1, 10 –11 (1953) (holding that the state secrets privilege may only be used when there is a "strong showing of necessity"), *with Kasza*, 133 F.3d at 1170 (affirming the dismissal of plaintiff's claim because proceeding on the merits may have revealed military secrets), *Sims*, 471 U.S. at 173–74 (applying the mosaic theory to prevent the release of innocuous information to protect intelligence sources), and *Halkin I*, 598 F.2d at 9 (holding that where plaintiffs' action must be dismissed based on the mosaic theory).

158. *See* George, *supra* note 22, at 1700–01, for a discussion of this development.

stated that the state secrets privilege "is not to be lightly invoked," and thus "may not be used to shield any material not strictly necessary to prevent injury to national security," which in turn imposes an obligation on a court to disentangle "nonsensitive information" from "sensitive information" to permit the public release of the nonsensitive information.[159]

Courts have fallen considerably short of that aspiration. Judge Rymer of the Ninth Circuit voiced the practical reality he thinks judges confront in seeking to disentangle sensitive from non-sensitive information: "The government may use the state secrets privilege to withhold a broad range of information. Although 'whenever possible, sensitive information must be disentangled from nonsensitive information to allow for the release of the latter,' courts recognize the inherent limitations in trying to separate classified and unclassified information."[160] Judge Rhymer's despairing point was made in even sharper language by Judge Higginbotham of the Fifth Circuit:

> *Fitzgerald* and *Farnsworth Cannon* recognize the practical reality that in the course of litigation, classified and unclassified information cannot always be separated. In some cases, it is appropriate that the courts restrict the parties' access not only to evidence which itself risks the disclosure of a state secret, but also those pieces of evidence or areas of questioning which press so closely upon highly sensitive material that they create a high risk of inadvertent or indirect disclosures.[161]

The perspective cautioning disentanglement rests on two lines of analysis.[162] One is the mosaic approach. Pursuant to this perspective, because innocuous information may unintentionally disclose missing pieces of a mosaic that result in insights not previously understood, judges must be mindful not to disentangle for fear of making an error.[163] The second line of analysis concedes that non-sensitive information may be identified, but maintains that because this information may be on the "periphery" of sensitive information,

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

160. Kasza v. Browner, 133 F.3d 1159, 1166 (9th Cir. 1998) (quoting *Ellsberg*, 709 F.2d at 57).

161. Bareford v. Gen. Dynamics Corp., 973 F.2d 1138, 1143–44 (5th Cir. 1992).

162. *See supra* note 98.

163. *See Halkin I*, 598 F.2d 1, 8 (D.C. Cir. 1978).

judges may err in disentangling the information thus creating an unacceptable risk.[164]

The judicial paralysis arising from the entanglement theme assumes that judges are not competent to distinguish sensitive from non-sensitive information—even assuming they can distinguish between them—and to police the boundary between these two categories. In short, judicial incompetence stymies judges.[165] However, as discussed below, the judicial incompetence theme that streaks through the state secrets privilege is exaggerated to the point of being unpersuasive.

4. Acknowledging, Confirming, Denying

It is one thing for a court to sustain the executive branch's assertion of the state secrets privilege to protect information that is quintessentially military, diplomatic, or intelligence in character, and it is quite another for a court to sustain the privilege so that the executive branch is relieved from merely acknowledging the validity or invalidity of information already in the public domain, which is itself not a military, diplomatic, or intelligence secret, which does not form part of a mosaic, and which is not implicated in the examination of a witness in a public trial and does not create an unacceptable risk. Nonetheless, that is what contemporary courts have done.[166] Thus, although in a 1992 opinion Judge Higginbotham was plainly concerned by the "troubling sweep" of the Executive's argument based on an "acknowledgment" consideration, he sustained the position: "The government maintains that, even if the data is available from non-secret sources, acknowledgement of this information by government officers would still be damaging to the government, because the acknowledgement would lend credibility to the unofficial data."[167]

The previously discussed *Halkin I*[168] case provides a concrete illustration of the "acknowledgment" development and, to appreciate the extraordinary reach of the acknowledgment rationale, it is necessary to examine the *Halkin I* opinion in detail. In that case, the plaintiffs claimed that the National Security Agency (NSA) violated their rights under the Constitution when it conducted warrantless

164. *See supra* note 139 and accompanying text.

165. *See infra* notes 325–326 and accompanying text.

166. *See Bareford*, 973 F.2d at 1144 ("These cases stand for the proposition that disclosure of information by government officials can be prejudicial to government interests, even if the information has already been divulged from non-government sources.").

167. *Id.* (citing Fitzgibbon v. CIA, 911 F.2d 755, 765–66 (D.C. Cir. 1990)).

168. *See supra* text accompanying notes 112–114.

interceptions of their international wire, cable, and telephone communications.[169] "The Secretary of Defense avers that admitting or denying the acquisitions would reveal important military and state secrets respecting the capabilities of the NSA for the collection and analysis of foreign intelligence."[170] More specifically, he claimed that "if he were required to identify whose foreign communications were acquired, or to disclose the dates or contents of the acquired communications," the NSA's capabilities would be "jeopardized."[171] The plaintiffs responded, "that the state secrets privilege cannot extend to the 'mere fact of interception' of their communications," and argued that "admission or denial of the fact of acquisition of their communications without identification of acquired messages would not reveal which circuits NSA has targeted or the methods and techniques employed."[172]

The Court of Appeals sustained the Secretary of Defense's position, and it did so by labeling the plaintiffs' position as "naïve," and asserting that a "number of inferences flow from the confirmation or denial of acquisition of a particular individual's international communications."[173] At that point, the court made a series of claims to support its assertion that "[a] number of inferences flow from the confirmation."[174] The court stated that:

> [T]he individual himself and any foreign organizations with which he has communicated would know what circuits were used . . .[175] any foreign government or organization that has dealt with a plaintiff whose communications are known to have been acquired would *at the very least* be alerted that its communications *might* have been compromised or that it *might* itself be a target . . .[176] [the] identification of which plaintiffs' communications were and which were not acquired *could* provide valuable information[177] as to what circuits were monitored and what methods of acquisition were employed . . . [and the disclosures] of the identities of

169. *Halkin I*, 598 F.2d 1, 3 (D.C. Cir. 1978).
170. *Id.* at 3–4.
171. *Id.* at 8.
172. *Id.*
173. *Id.*
174. *Id.*
175. *Id.*
176. *Id.* (emphasis added).
177. *Id.* (emphasis added). Notice that the court did not state that the disclosure "would" provide such information.

> the intercepted parties "would enable foreign governments or organizations to extrapolate the focus and concerns of our nation's intelligence agencies.[178]

The circuit court then stated that "[a] number of inferences flow from the confirmation or denial."[179] The language of this claim—that a "number of inferences flow from the confirmation or denial" of the intercepts[180]—plainly means that the court has concluded that the "inferences" will in fact result from the acknowledgement. But the certainty of that general claim is not supported by the analysis that follows, which is conjectural in character. Moreover, the harm described in the other two sentences is almost identical to the harm that would result if the plaintiffs merely disclosed how they communicated with whom and when. As for the harm described in the two sentences written in conjectural terms, that harm is also identical to the harm that would result from plaintiffs' actual disclosure, except for revealing what the court terms the "methods of acquisition,"[181] and then it is not at all clear why acknowledgment would in fact disclose "methods."

The court also incorrectly assumed that the information that it identified as harmful would be disclosed only if the government was required to confirm or deny the alleged interceptions.[182] The plaintiffs could disclose those facts. The plaintiffs knew how it had communicated, with whom it had communicated, and when it had done so.[183] Thus, while only some of plaintiffs' communications might have been intercepted, plaintiffs' disclosure of this information would have alerted foreign governments and organizations that at least some communications were being intercepted, and it would have identified the means of communications that were subject to interception. Thus, the importance of the government's confirmation or denial of the interceptions boils down to the difference between what information would be disclosed if, on the one hand, the

178. *Halkin I*, 598 F.2d at 8 (emphasis added).

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.* Other courts have made this assumption as well, focusing not on the ability of the plaintiff to disclose harmful information but on the harm caused by government acknowledgment of potentially sensitive information. *See, e.g.*, Bareford v. Gen. Dynamics Corp., 973 F.2d 1138, 1144 (5th Cir. 1992) ("The government maintains that, even if the data is available from non-secret sources, acknowledgment of this information by government officers would still be damaging to the government, because the acknowledgment would lend credibility to unofficial data.").

183. *Halkin I*, 598 F.2d at 8.

government was required to confirm and deny, and on the other hand, the plaintiff disclosed what information it possessed. Whatever the totality of this information may be, it is certainly much less than the totality of information described by the circuit court.[184]

The Executive consistently claims that confirming, denying, or acknowledging certain information will compromise national security.[185] That may well be correct with regard to some information in some contexts, but it certainly is not a convincing position in all contexts. Yet out of deference to the Executive, courts do seem very willing to defer to such Executive assertions. And when this dynamic is combined with the other three themes—unacceptable risk, mosaic and entanglement—the sweeping character of the modern state secrets privilege is apparent.

5. Allocation of Burdens

In the last decades, courts have extended the *Reynolds* rule from a privilege that keeps information from a plaintiff to a privilege pertinent to information sought by the defendant.[186] By itself, such an extension is an appropriate application of the *Reynolds* rule. But courts have construed this extension so that the burdens of the privilege fall exclusively on the plaintiff.[187]

The baseline rule for assigning the burden of the privilege when the information in dispute is pertinent to the defendant was set forth by Circuit Judge Max Rosenn: "If . . . the information related not to the plaintiff's claim, but rather to the defense, summary judgment against the plaintiff is proper if the district court decided that the privileged information, if available to the defendant, would establish a valid defense to the claim."[188] Circuit Judge Higginbotham characterized the basic rule this way: with few but notable exceptions, most courts have concluded that if the state secrets privilege "would establish a valid defense, then the court ought to dismiss the plaintiffs' case,"[189] or if the state secrets privilege would "deprive[] the *defendant* of information that would otherwise give the defendant a valid defense

184. *Id.*

185. *See, e.g.*, United States v. Nixon, 418 U.S. 683, 705 (1974).

186. *See, e.g.*, *Bareford*, 973 F.2d at 1143; Molerio v. FBI, 749 F.2d 815, 825 (D.C. Cir. 1984).

187. *See, e.g.*, *Bareford*, 973 F.2d at 1143.

188. *In re* United States, 872 F.2d 472, 476 (D.C. Cir.), *cert. denied sub nom.*, United States v. Albertson, 493 U.S. 960 (1989).

189. *Bareford*, 973 F.2d at 1143.

to the claim, then the court may grant summary judgment to the defendant."[190]

Some courts have expanded the application of the rule.[191] These courts have decided that a defendant may benefit from a summary judgment or a dismissal ruling even if the information in dispute will only "hamper" a defendant in establishing a defense or curtail a cross examination of a plaintiff's witness as opposed to denying a party of a complete and valid defense.[192] Thus, Judge Winter of the Second Circuit wrote in *Zuckerbraun v. General Dynamics Corp.*: "Similarly, it has been held that, if the court determines that the privilege *so hampers* the defendant in establishing a valid defense that the trier *is likely* to reach an erroneous conclusion, then dismissal is also proper."[193] More recently, an en banc Ninth Circuit opinion further stretched these already extended rules.[194] There, the majority reasoned:

> [W]e do not hold that any of the documents plaintiffs have submitted are subject to the privilege; rather, we conclude that even assuming plaintiffs could establish their entire case *solely* through nonprivileged evidence—unlikely as that may be—any effort by Jeppesen to defend *would unjustifiably risk disclosure* of state secrets.[195]

Sustaining the state secrets privilege imposes a serious burden, and as is apparent, courts do not parcel out the burdens between the plaintiff and the defendant. Thus, a plaintiff who claims that it can establish a prima facie case relying only on information in the public domain may have its complaint dismissed because litigation pertinent to the defense may result in an unacceptable risk of disclosing national security information, and, a defendant, whose capacity to cross examine a witness may be hampered by the privilege, may be entitled to have plaintiff's case dismissed. Either way the defendant

190. *Id.* at 1141 (citing *In re* United States, 872 F.2d at 476; *Molerio*, 749 F.2d at 825).

191. *See, e.g.*, Zuckerbraun v. Gen. Dynamics Corp., 935 F.2d 544, 547 (2d Cir. 1991); *Molerio*, 749 F.2d at 825.

192. *See Bareford*, 973 F.2d at 1138; *Zuckerbraun*, 935 F.2d at 547.

193. *Zuckerbraun*, 935 F.2d at 547 (emphasis added) (citing *Molerio*, 749 F.2d at 825).

194. Mohamed v. Jeppesen Dataplan, Inc., 614 F.3d 1070 (9th Cir. 2010) (en banc).

195. *Id.* at 1090 (second emphasis added). The *Jeppesen* majority at this point *cited El-Masri v. United States*, 479 F.3d 296, 310 (4th Cir. 2010) for the proposition that "virtually any conceivable response [by government defendants to claims based on factual allegations materially identical to this case's] . . . would disclose privileged information." (alteration in the original). *Id.*

prevails.[196] Thus, while the extension of the privilege to information sought by a defendant is appropriate, the allocation of the burden resulting from the privilege solely to the plaintiff is at odds with basic fairness.

6. A New Justiciability Twist

In two opinions, one in 1981[197] and one in 2005,[198] Justice William Rehnquist linked the state secrets privilege to a new justiciability grounds. In the 1981 decision, *Weinberger v. Catholic Action of Hawaii/Peace Education Project*, the Supreme Court concluded that neither the National Environmental Policy Act nor any regulatory provisions required the Navy to prepare and release an environmental impact statement resulting from the construction of several weapons storage structures capable of storing nuclear weapons.[199] The Court argued that the Act's public disclosure requirements were governed by provisions of the Freedom of Information Act which generally subordinated the public's interest in ensuring that federal agencies comply with the Act to the Executive's need to protect national security secrets.[200] Furthermore, because national security considerations prevented the Navy from confirming or denying that it proposed to store nuclear weapons at the facility, it had not been and it could not be established that the Navy proposed an action that required it to file solely for "internal purposes" an environmental impact statement.[201]

Although those reasons constituted sufficient grounds on which to base the result in the case, Justice Rehnquist took a doctrinal step that enlarged the potential scope of the state secrets privilege by turning it from an evidentiary privilege that protected specified information into a new justiciability doctrine.[202] The relevant doctrinal footwork occurred in a short paragraph in which Rehnquist quoted from a nineteenth century opinion—*Totten v. United States*[203]—involving a claim by the estate of a Civil War spy against the United States for unpaid compensation and then cited to the state secrets *Reynolds*

196. The seeming unfairness of this result is rarely acknowledged by the courts. *But see* Farnsworth Cannon, Inc. v. Grimes, 635 F.2d 268, 271–73 (4th Cir. 1980).
197. Weinberger v. Catholic Action of Haw./Peace Educ. Project, 454 U.S. 139 (1981).
198. Tenet v. Doe, 544 U.S. 1 (2005).
199. *Weinberger*, 454 U.S. at 146–47.
200. *Id.* at 145–47.
201. *Id.* at 146.
202. *See id.* at 146–47.
203. *Id.* (quoting Totten v. United States, 92 U.S. 105, 107 (1876)).

opinion as if it were in accord with the quotation from the *Totten* decision:

> Ultimately, whether or not the Navy has complied with [National Environmental Policy Act (NEPA)] "to the fullest extent possible" is beyond judicial scrutiny in this case. In other circumstances, we have held that "public policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential, and respecting which it will not allow the confidence to be violated." *Totten v. United States*, 92 U.S. 105, 107, 23 L.Ed.605 (1876). See *United States v. Reynolds*, 345 U.S. 1, 73 S. Ct. 528, 97 L.Ed. 727 (1953). We confront a similar situation in the instant case.[204]

A quarter century later, Chief Justice Rehnquist pushed this doctrinal opening forward one more step in *Tenet v. Doe*.[205] In reversing the Ninth Circuit in an espionage case, he argued that the Circuit Court was "quite wrong" in concluding that the *Totten* ruling did not require the dismissal of the action.[206] Claiming that the Ninth Circuit had construed *Totten* to announce "merely a contract rule,"[207] Rehnquist asserted that "*Totten* was not so limited"[208] because it had included a statement that provided: "'[P]ublic policy forbids the maintenance of *any suit* in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential.'"[209] Rehnquist sought to support such a drastic ruling by arguing that the state secrets privilege and the "more frequent use of *in camera* judicial proceedings simply cannot provide the absolute protection we found necessary in enunciating the *Totten* rule."[210]

Rehnquist's opinion in the *Tenet* case blurred the *Reynolds* state secrets privilege with the *Totten* justiciability ruling. Thus, according to Rehnquist, dismissal—as opposed to protecting the confidentiality of national security information—was required in espionage cases not to prevent the disclosure of state secrets but because of the nature of

204. *Id.*
205. Tenet v. Doe, 544 U.S. 1, 10–11 (2005).
206. *Id.* at 8.
207. *Id.*
208. *Id.*
209. *Id.* (alteration in original) (quoting Totten v. United States, 92 U.S. 105, 107 (1875)).
210. *Id.* at 11.

the subject matter.[211] In *Tenet*, Rehnquist surely did not state that all cases involving state secrets were henceforth non-justiciable, but he opened the door to that development, and some years later, two circuit courts walked through that opening and further blurred the distinction between an evidentiary and justiciability ruling.[212]

7. Constitutional Basis for the Privilege

The brief filed on behalf of the United States in the Supreme Court in the *Reynolds* case strenuously argued in favor of a broad constitutionally mandated executive privilege.[213] Accordingly, it is not possible that the high court overlooked the main argument put forward by the Executive, and yet, the *Reynolds* opinion did not state that what it terms "the privilege against revealing military secrets" was constitutionally mandated.[214] It does, however, state that both parties make claims that have "constitutional overtones,"[215] a phrase that, while having no definite meaning, certainly does not mean that the positions of each party is constitutionally based, for if it did, Chief Justice Vinson would not have resorted to the ambiguous and unconventional word "overtones."[216]

More importantly, the Vinson opinion makes it perfectly plain that the evidentiary rule it announced in *Reynolds* was not constitutionally based.[217] It did that in the very sentence it used the amorphous phrase "constitutional overtones" when it stated that, "we find it unnecessary to pass upon" the parties arguments that have constitutional overtones because there was "a narrower ground for decision."[218] Thus, given

211. *See id.* at 9–10.

212. *See id.* at 3; Mohamed v. Jeppesen Dataplan, Inc., 614 F.3d 1070, 1077–78 (9th Cir. 2010) (en banc); El-Masri v. United States, 479 F.3d at 310–11 (4th Cir. 2007). For two circuit court decisions rendered between *Weinberger* and *Tenet* blurring a rule of evidence with a justiciability ruling, see *Kasza v. Browner*, 133 F.3d 1159, 1166–67 (9th Cir. 1998), and *Weston v. Lockheed Missiles & Space Co.*, 881 F.2d 814, 815–16 (9th Cir. 1989). *See also* Bareford v. Gen. Dynamics Corp., 973 F.2d 1138, 1144 (5th Cir. 1992); Bowles v. United States, 950 F.2d 154, 156 (4th Cir. 1991); Guong v. United States, 860 F.2d 1063, 1064 (Fed. Cir. 1988); Frost, *supra* note 22, at 1939–40; Wells, *supra* note 22, 637–40; Christopher D. Yamaoka, Note, *The State Secrets Privilege: What's Wrong with It, How It Got That Way, and How the Courts Can Fix It*, 35 HASTINGS CONST. L. Q. 139, 149–50 (2007).

213. Brief for Petitioner at 53, United States v. Reynolds, 345 U.S. 1 (1953) (No. 21), 1952 WL 82378, at *53.

214. United States v. Reynolds, 345 U.S. 1, 6 (1953).

215. *Id.*

216. *Id.*

217. *Id.* at 7–10.

218. *Id.* at 6.

that the *Reynolds* majority considered the Executive's argument as having only "constitutional overtones," and thus something less than a constitutionally based argument, it stands to reason that the Court's reference to a "narrower ground" was a reference to a ground based on the common law.[219] This position is further supported a few sentences later in the opinion when the Court stated that the privilege it was assessing was "well established in the law of evidence."[220] Putting the matter this way was clearly intended by the Court to distinguish the common law character of the privilege from the constitutionally based character of a privilege that was rooted in "inherent executive power"[221] and "protected in the constitutional system of separation of power,"[222] which is how Vinson characterized the executive branch's description of a recordkeeping statute.[223] Moreover, although Vinson did cite to the *Totten* case, the result in *Totten* was not based on the Constitution, and the other cases cited by Vinson to support the claim that the privilege was "well established" were all common law based opinions.[224]

After *Reynolds*, the next judicial development that in any way related to the common law basis of the state secrets privilege was the Supreme Court decision, *United States v. Nixon*,[225] involving the special prosecutor's *subpoena duces tecum* of President Nixon's Oval Office tape recordings in the famous Watergate scandal tapes case that resulted in President Nixon's resignation of the presidency.[226] In that opinion, the Court rejected President Nixon's claim that the President was immune from judicial process, or, in the alternative, that the President's claim of executive privilege was an absolute privilege.[227] But the Court concluded for the first time that the President's claim of an executive privilege was constitutionally based and it reached that conclusion even though the Constitution itself was silent on the matter.[228]

The Court based its conclusion on two grounds. First, the Court concluded that presidential communications in the exercise of Article

219. *See id.*
220. *Id.* at 6–7.
221. *Id.* at 6, n.9.
222. *Id.*
223. *Id.*
224. *Id.* at 6–7, n.11.
225. 418 U.S. 683 (1974).
226. *Id.* at 687–88; *see also* K.A. McNeely-Johnson, United States v. Nixon, *Twenty Years After: The Good, The Bad and The Ugly—An Exploration of Executive Privilege*, 14 N. ILL. U. L. REV. 251, 278 (1993).
227. *Nixon*, 418 U.S. at 705–07, 709–11.
228. *See id.* at 705–06.

II powers were constitutionally protected because each of the three branches of government was supreme "within its own assigned area of constitutional duties,"[229] and, as a result, "certain powers and privileges flow from the nature of enumerated powers,"[230] and the "protection of the confidentiality of Presidential communications has similar constitutional underpinnings."[231] Second, the Court suggested, without explicitly concluding, that the President's claim of executive privilege was also rooted in the doctrine of separation of powers.[232]

It was against these conclusions that the Court then made comments with regard to military and diplomatic secrets, the role of the courts in matters that may involve such secrets, and the state secrets privilege, which gave fresh vitality to an expansive use of the controversial doctrine.[233] The Court did this by first noting that President Nixon did not "place his claim of privilege on the ground"[234] that the communications in dispute involved "military or diplomatic secrets."[235] If the President had made such a claim, the Court reasoned that "the courts have traditionally shown the utmost deference to Presidential responsibilities"[236] and, in support of such "utmost deference," the Court quoted from an opinion by Justice Robert Jackson, who actually dissented in the *Reynolds* case.[237] The Court then followed that quote with one from the *Reynolds* case emphasizing the importance, in matters affecting national security, for the disputed information not to be reviewed even by a judge alone in chambers.[238]

---

229. *Id.* at 705.
230. *Id.*
231. *Id.* at 705–06.
232. *See id.* at 706.
233. *Id.*
234. *Id.* at 710.
235. *Id.*
236. *Id.*
237. *Id.* (citing C & S. Air Lines v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948)). The referenced quote reads:

> The President, both as Commander-in-Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports neither are nor ought to be published to the world. It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret.

Waterman S.S. Corp., 333 U.S. at 111.
238. *Nixon*, 418 U.S. at 710–11 (1974) (quoting United States v. Reynolds, 345 U.S. 1, 10 (1953)).

As important as statements in the *Nixon* case may be for indicating that the Executive, as a matter of constitutional authority, may in some circumstances withhold certain information from the judiciary, the import of that ruling does not constitutionalize the state secrets evidentiary rules. Those rules encompass much more than the Executive's authority merely to withhold information; they encompass a range of doctrines reviewed above, such as the unacceptable risk doctrine, the mosaic doctrine, the entanglement analysis, the resistance to having the Executive confirm or deny, remedial expansion, as well as the rules set forth by Chief Justice Vinson in the *Reynolds* opinion.[239] Those aspects of the contemporary state secrets privilege are part and parcel of the common law evidentiary privilege.[240]

Nonetheless, that has not kept the Fourth Circuit from seeking to root the state secrets rules in the Constitution.[241] In *El-Masri v. United States*, the panel stated: "Although the state secrets privilege was developed at common law, it performs a function of constitutional significance, because it allows the executive branch to protect information whose secrecy is necessary to its military and foreign-affairs responsibilities."[242]

This is no academic debate. If the state secrets privilege is a common law privilege, Congress may regulate it; if it is a constitutionally based privilege, Congress may only regulate that part of the privilege that courts conclude are not constitutionally based.[243] In the struggle between those wishing to protect the privilege as currently defined from congressional regulation and those seeking to curtail the privilege, the character of the privilege—whether it is a common law privilege or constitutionally based—makes all the difference.

***

The expansion of the state secrets privilege beyond the boundaries of the *Reynolds* paradigm was sweeping and swift, and resulted from judicial discretion. Moreover, even assuming that courts in the 1970s and 1980s were strongly inclined to be deferential towards the Executive, they were not required to give the privilege the broad

239. *See supra* Part II.C.1–4.

240. *See supra* Part II.C.1–4.

241. 479 F.3d 296, 303–05 (4th Cir. 2007).

242. *Id.* at 303.

243. *See supra* text accompanying notes 217–224.

sweep they did.[244] Indeed, if the courts had placed emphasis on the Supreme Court's admonitions in the *Reynolds* opinion that the privilege not be invoked "lightly,"[245] that "[t]he court itself must determine whether the circumstances are appropriate for the claim of privilege,"[246] and that "[j]udicial control over the evidence in a case cannot be abdicated to the caprice of executive officers,"[247] the expansion of the privilege would have been modest by comparison to what it has become. Thus, there was nothing inevitable or pre-ordained about the extensive expansion of the state secrets privilege during the last four decades; it resulted solely from the exercise of judicial discretion.[248]

D. Consequences of the Contemporary Privilege

The sweeping contemporary state secrets privilege generates many harmful consequences.[249] To begin with, the idea that an individual may seek relief for a legal wrong in a court is a bedrock principle of a modern civilized society.[250] And in the United States, as one judge has stated, "for better or worse,"[251] courts are central to granting relief to individuals seeking redress.[252] Woodrow Wilson paid tribute to these values in his classic study *Constitutional Government in the United States*: "So far as the individual is concerned, a constitutional government is as good as its courts; no better, no worse. Its laws are only its professions. It keeps its promises, or does not keep them, in its courts."[253] Thus, the courts' creation and construction of the state secrets privilege undermines this promise and places a wedge between the nation's practice and its aspiration.

Next, as reviewed above,[254] the state secrets privilege may shield executive officials who have not only violated the rights of an

244. *See* United States v. Marchetti, 466 F.2d 1309, 1315 (4th Cir. 1972); Dep't of Navy v. Egan, 484 U.S. 518, 527 (1988).
245. United States v. Reynolds, 345 U.S. 1, 7 (1953).
246. *Id.* at 8.
247. *Id.* at 9–10.
248. *See id.* at 7–10.
249. *See supra* text accompanying notes 12–27.
250. Marbury v. Madison, 5 U.S. 137, 163 (1803).
251. Arar v. Ashcroft, 585 F.3d 559, 638 (2d Cir. 2009) (Calabresi, J., dissenting).
252. *Marbury*, 5 U.S. at 163.
253. WOODROW WILSON, CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES 17 (Columbia Univ. Press 1908).
254. *See supra* Part II.B.

individual, but may have violated the federal criminal law.[255] The consequence of such rulings is to permit such officials to escape accountability to the injured individual, and perhaps to permit the same officials to escape any liability for violating the criminal law.[256] Indeed, it is even possible that the elimination of accountability creates a dynamic that may invite executive officials who are charged with enforcing the law to ignore legal norms in the future.

Furthermore, central to the constitutional plan is the idea that unaccountable concentrated power invites abuse and that such abuse undermines democratic processes and threatens individual liberty.[257] By itself, the state secrets privilege does not constitute a major threat to the complicated constitutional structure that rests on the three co-equal branches of government checking and balancing the exercise of power. But the sweep of the contemporary privilege does make its own distinct contribution to this harmful trend.

When a court utilizes the privilege to dismiss an action in which a party asserts egregious claims—as in an extraordinary rendition case—not only do the courts seem as if they are washing their hands[258] of the matter, but they may well seem as if they are bowing to Executive authority,[259] if not complicit in the underlying conduct.[260] Although it is uncertain the degree to which such outcomes undermine the public's trust in the courts and erode their legitimacy, it is worth recalling Justice John Paul Stevens' observation regarding the confrontation between the Supreme Court and President Nixon over whether the courts had the authority to

255. For an example of instances where federal criminal law may have been violated due to the state secrets privilege, see cases cited *supra* note 13.

256. *See supra* note 13.

257. *See, e.g.*, Boumediene v. Bush, 553 U.S. 723, 742 (2008); *Steel Seizure*, 343 U.S. 579 (1952); *Ex parte* Milligan, 71 U.S. 2 (1866); *see also* SHANE, *supra* note 15.

258. The allusion is to Pontius Pilate, who, in response to demands that Jesus be crucified, "took water and washed his hands before the crowd, saying, 'I am innocent of this man's blood: see to it yourselves.'" *Matthew* 27:24. Judge Fisher's majority opinion in *Jeppesen* dismissing a complaint alleging extraordinary rendition, although surely intended to be constructive, brings to mind the Pontius Pilate Biblical episode when he wrote: "Our holding today is not intended to foreclose—or to pre-judge—possible *nonjudicial* relief, should it be warranted for any of the plaintiffs." Mohamed v. Jeppesen Dataplan, Inc., 614 F.3d 1070, 1091 (9th Cir. 2010) (en banc).

259. See *Korematsu v. United States*, 323 U.S. 214 (1944) and *Ex parte Quirin*, 317 U.S. 1 (1942), for examples in which the judiciary is thought to have bowed to Executive authority.

260. *See supra* Part II.B.

require Nixon to "produce the tape recordings that eventually led to his resignation."[261] He wrote:

> The decision not only had a [sic] historic effect on American politics and society but also powerfully illustrated the integrity and independence of the Court. It may well have done more to inspire the confidence in the work of judges that is the true backbone of the rule of law than any other decision in the history of the Court.[262]

If Justice Stevens is correct, the Court gains public trust when it takes its independence seriously and holds the Executive legally accountable. The courts' sweeping utilization of the state secrets privilege runs directly counter to Justice Steven's counsel.

More generally, there is a fundamental inconsistency between the privilege and the idea that the President is not "above the law" as well as the national commitment to the rule of law. A little more than two centuries after Chief Justice Marshall penned his famous opinion in *Marbury v. Madison*,[263] President Barack Obama told the nation:

> In all that we do, we must remember that what sets America apart is not solely our power—it is the principles upon which our union was founded. We're a nation that brings our enemies to justice while adhering to the rule of law, and respecting the rights of all our citizens.[264]

And ten months after that, in a speech at Harvard Law School, the General Counsel of the Central Intelligence Agency, Stephen W. Preston, stated that "the President has made clear that ours is a nation of laws, and that an abiding respect for the rule of law is one of our country's greatest strengths, even against an enemy with only contempt for the law."[265] To emphasize that the CIA too was under that national mandate to be a nation committed to the rule of law,

---

261. JOHN PAUL STEVENS, FIVE CHIEFS: A SUPREME COURT MEMOIR 114 (2011). See *supra* note 24 for the critical commentary on the state secrets doctrine.

262. STEVENS, *supra* note 261, at 114.

263. 5 U.S. 137 (1803).

264. Press Release, President Barack H. Obama, Statement by the President on the Way Forward in Afghanistan (June 22, 2011), http://www.whitehouse.gov/the-press-office/2011/06/22/remarks-president-way-forward-afghanistan.

265. Stephen W. Preston, Gen. Counsel, Cent. Intel. Agency, CIA and the Rule of Law, Speech at Harvard Law School (Apr. 10, 2012), *in* 6 J. NAT'L SECURITY L. & POL'Y 1, 1 (2012).

Preston stated that "This is so for the Central Intelligence Agency no less than any other instrument of national power engaged in the fight against al Qaeda and its militant allies," and that the "CIA is an institution of laws, and the rule of law is integral to Agency operations."[266]

Over decades the Supreme Court translated these ideals into legal norms. Thus, the Court has ruled that evidence obtained by an unconstitutional search must be suppressed in criminal cases, even if that results in the release of the criminal, on the ground that "[n]othing can destroy a government more quickly than its failure to observe its own laws . . . ."[267] Similarly, the Court ruled that a defendant must be given "Miranda Rights" and that a confession must be suppressed if not procured in compliance with the *Miranda* rules.[268] The Court also requires the state to provide a lawyer to an indigent charged with a felony at the state's expense to give meaning to the ideal of the rule of law.[269] In civil cases, the Court provides a remedy against state and local officials, as well as private parties, acting under color of law, for the deprivation of federal rights.[270] The Court has fashioned a remedy against federal officials that deters future conduct that violates individual constitutional rights, because, as Justice Harlan wrote: "[I]t is important, in a civilized society, that the judicial branch of the Nation's government stand ready to afford a remedy in these circumstances."[271]

The state secrets privilege stands in contradiction to this tradition, and its use threatens to undermine the legitimacy not only of the courts but the Executive.[272] Indeed, both governmental branches'

---

266. *Id.*

267. Mapp v. Ohio, 367 U.S. 643, 659 (1961). In an earlier opinion, Justice Brandeis wrote: "Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example . . . . If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy." Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting).

268. Miranda v. Arizona, 384 U.S. 436, 444–45 (1966).

269. Gideon v. Wainwright, 372 U.S. 335, 339–40 (1963).

270. Monroe v. Pape, 365 U.S. 167 (1961), *overruled in part by* Monell v. Dep't of Soc. Servs. of the City of New York, 436 U.S. 658, 663 (1978) ("[I]nsofar as it holds that local governments are wholly immune from suit under § 1983.").

271. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 411 (1971) (Harlan, J., concurring); Carlson v. Green, 446 U.S. 14, 18–20 (1980); Davis v. Passman, 442 U.S. 228, 233–34 (1979).

272. *See Limits of National Security Litigation*, *supra* note 22, at 1252 (examining the lack of published opinions involving allegations of government misconduct where the privilege has been employed).

reluctance to rely on the privilege seems to signal recognition of the privilege's corrosive effect.[273]

III. RESTRUCTURING THE PRIVILEGE

Before reviewing recommended guidelines for restructuring the privilege, it is important to emphasize that it is entirely possible for courts to be responsibly deferential to the Executive without becoming a "rubberstamp"[274] for executive judgments and without supplanting executive judgments supported by concrete evidence and reasonable considerations. That is so because the concept of judicial deference is elastic and fluid and the various constructs of deference fall out along a spectrum that runs from extreme deference to no deference with many reasonable stopping points in between.[275] The guidelines set forth below for restructuring the privilege are intended to define a state secrets privilege courts may enforce without being inappropriately deferential or intrusive.[276]

A. Defining the Scope of the Privilege

The current rules guiding the privilege have vested the Executive with de facto absolute authority to decide what information should be covered by the privilege.[277] If the privilege is to be brought under responsible judicial authority, judges must define the phrase "state secrets," and that definition should include three elements.

---

273. *See* Chesney, *supra* note 22, at 1315–32 (outlining published opinions adjudicating assertions of the privilege post-*Reynolds*).

274. *Id.* at 1377 (quoting Judge Harry Pregerson in an argument before the Ninth Circuit in Hepting v. AT&T Corp., 539 F.3d 1157 (9th Cir. 2008)).

275. Although this approach to the idea of deference may be obvious, it is not always acknowledged. Thus, even a highly respected scholar is capable of turning the elastic concept of deference into an either/or dichotomy—that is, a court is either deferential or it is not deferential. *See id.* at 1363 ("Ultimately, I conclude that many arguments in favor of deference are unpersuasive, but that deference nonetheless may be justified in limited circumstances.").

276. On September 23, 2009, the Obama Administration announced new "Policies and Procedures Governing Invocation of the State Secrets Privilege" that would be administered by the Department of Justice. *See Memorandum for Heads of Executive Departments and Agencies, Memorandum for the Heads of Department Components*, OFFICE OF THE ATTORNEY GEN. (Sept. 23, 2009), http://www.justice.gov/opa/documents/state-secret-privileges.pdf. The initiative effectively acknowledges the abuse of the privilege and the need for the Executive to impose some control over its invocation in the courts. As constructive as that step is, the new policies do not change the rules and procedures courts follow in adjudicating conflicting claims over the Executive's assertion of the privilege in a particular case.

277. *See* WILLS, *supra* note 2, at 138.

First, the definition must address what kind of information constitutes a state secret.[278] A state secret should protect information such as the development and location of weapons, the location of troops, bases and military equipment, current military contingency plans, important on-going intelligence operations and methods of securing intelligence, and current diplomatic relations pertaining to significant national security matters.[279] In contrast, the term state secret should not privilege information merely because it is classified,[280] discloses information that would be embarrassing to a department, agency or one or more officials,[281] discloses conduct by executive branch officials that violated federal criminal law, or discloses information that would create an alleged risk of injury to the nation's security where that risk is insignificant, improbable and unlikely to occur in the foreseeable future.[282]

Second, the privilege should be sustained only when evidence establishes that there is at least a reasonable possibility, given all of the relevant considerations, that the threatened disclosure will in fact result in the predicted injury.[283] Such a linkage may seem obvious, but current case law permits sustaining the privilege without any finding regarding the probability that the alleged injury will in fact result from the threatened disclosure.[284]

---

278. *See* United States v. Reynolds, 345 U.S. 1, 10 (1953) (explaining that information should be protected when "there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged.").

279. *See* El-Masri v. United States, 479 F.3d 296, 305 (4th Cir. 2007); MORTON H. HALPERIN & DANIEL N. HOFFMAN, TOP SECRET: NATIONAL SECURITY AND THE RIGHT TO KNOW 34 (1977).

280. Many reports have criticized the practice of over-classification by the federal government. *See* WILLS, *supra* note 2; DANIEL PATRICK MOYNIHAN, SECRECY: THE AMERICAN EXPERIENCE (1998); HALPERIN & HOFFMAN, *supra* note 279. The result of this practice is that many documents are classified as confidential, secret, or top-secret, even though they contain no information that bears on national security. Moreover, the classification system has been criticized because of the enormous delay in declassifying documents that perhaps should never have been classified in the first place. Consequently, tying the state secrets privilege to the classification system would lead to a wholesale application of the privilege, which would not be justified.

281. The prime example of using the state secrets privilege to keep confidential documents that would otherwise embarrass the Executive is *Reynolds*. *See generally* Rudenstine, *supra* note 3, at 1285 (examining the implications of the *Reynolds* decision).

282. *See* WILLS, *supra* note 2, at 139.

283. *See* Mohamed v. Jeppesen Dataplan, Inc., 614 F.3d 1070, 1081 (9th Cir. 2010) (en banc).

284. *Id.*; *El-Masri*, 479 F.3d at 307.

Third, the privilege should be sustained only when evidence establishes that the disclosure of the information will cause the predicted injury within the foreseeable future as opposed to some undetermined, remote, and indefinite time in the distant future.[285] Presently, there is no such requirement.[286]

B. Reviewing Disputed Documents

In cases in which documents are alleged to contain state secrets, courts should review the actual documents in dispute—as opposed to an affidavit summarizing them—to guard against what Chief Justice Vinson termed executive "caprice"—a caprice dramatically illustrated in the *Reynolds* case itself.[287] Such a change in procedure requires discarding the rule set forth in the *Reynolds* case[288] because under that rule, as a practical matter, a judge will rarely if ever review a disputed document to assess the legitimacy of the Executive Branch's claim that it falls within the privilege.[289]

Many unpersuasive arguments are offered in support of the idea that judges should review only a summary of the documents in dispute, as opposed to the documents themselves.[290] First, it is feared that a judge, or someone in the judge's chambers or the courthouse, will intentionally or inadvertently disclose a sensitive document.[291] While such a security breach is conceivable, diligent research has disclosed no instance of such an improper disclosure.[292] Second,

---

285. *See* United States v. Reynolds 345 U.S. 1, 10 (1953).

286. *See supra* Part I; *supra* notes 58–80 and accompanying text.

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

288. That rule provides that a court should sustain the executive branch's claim of privilege without forcing the actual disclosure of the disputed information to a judge when that judge is able to conclude from the overall circumstances of the case that there is a reasonable danger that the disputed information contains a state secret that would, if publicly disclosed, injure the nation's security. *Id.*

289. *Id.* ("[T]he court should not jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence, even by the judge alone, in chambers.").

290. *See id.* at 8 ("Too much judicial inquiry into the claim of privilege would force disclosure of the thing the privilege was meant to protect . . . .").

291. *See supra* note 134 and accompanying text.

292. *See* Examining the State Secret's Privilege: Protecting National Security While Preserving Accountability: Hearing Before the Comm. on the Judiciary, 110th Cong. 5 (2008) (statement of Sen. Edward M. Kennedy) (quoting statement submitted by William Webster) ("[A]s a former Federal judge, I can confirm that judges can, and should, be trusted with sensitive information. They are fully competent to perform an independent review of executive branch assertions of the state secrets privilege."). In contrast, improper disclosures by members of the executive branch are frequent.

there was once a concern that courthouses lacked the facilities to retain top-secret documents.[293] But that consideration seems no longer valid since federal judges routinely review sensitive documents in criminal cases[294] and in Freedom of Information Act cases.[295] Third, it is claimed that *in camera, ex parte* disclosure of disputed documents to a judge will prompt the opposing party to insist on also having access to the documents.[296] Putting aside for a moment whether opposing counsel should have access to a disputed document, the argument is unconvincing because a judge may simply deny the request for access and there is no reason to think that merely raising a claim of access will compel it.[297] Indeed, it is clear that in some situations, judges now have access to some information not shared with all parties.[298]

C. Opposing Counsel

As just noted, when the Executive currently submits documents to a judge in support of its claim for a state secrets privilege, opposing

---

David E. Pozen, *The Leaky Leviathan: Why the Government Condemns and Condones Unlawful Disclosures of Information*, 127 HARV. L. REV. 512, 530 (2013).

293. A dramatic example of the lack of security in a courthouse occurred during the frenetic litigation between the United States and the *New York Times* over the newspaper's publication of what became popularly known as the Pentagon Papers. *See* DAVID RUDENSTINE, THE DAY THE PRESSES STOPPED: A HISTORY OF THE PENTAGON PAPERS CASE 112 (1996).

294. *See, e.g.*, Classified Information Procedures Act, 18 U.S.C. app. §§ 1–16 (2012).

295. *See, e.g.*, Freedom of Information Act (FOIA), 5 U.S.C. § 552 (2012); Operational Files of the National Security Agency, 50 U.S.C.A. § 3144(f)(1) (2012) ("[W]henever any person who has requested agency records under section 552 of title 5 alleges that the National Security Agency has withheld records improperly because of failure to comply with any provision of this section, judicial review shall be available under the terms set forth in section 552(a)(4)(B) of title 5."); *see generally* Christina E. Wells, *"National Security" Information and the Freedom of Information Act*, 56 ADMIN. L. REV. 1195, 1205–08 (2004) (discussing FOIA's de novo judicial review provision in regard to claims of (b)(1) exemption).

296. The House of Lords cited a similar contention in its World War II *Duncan* opinion in support of its conclusion that a British judge should not review disputed documents *in camera* and *ex parte*. Duncan v. Cammell, Laird & Co., [1942] A.C. 624 (H.L.) at 640–41 (appeal taken from Eng.). This argument obscures the reality that the probable alternative to judges exercising *ex parte* review is judges exercising no review at all of the disputed information. Such a stance would grant to the Executive sole authority for deciding what information is or is not privileged, and such an outcome would put the opposing party at a considerable disadvantage by comparison to a procedure that included *ex parte* judicial review of the disputed material.

297. *See* United States v. Reynolds, 345 U.S. 1, 8 & n.21 (1953) (emphasizing that the judge controls the trial, rather than the executive).

298. *See supra* notes 294–295.

counsel is denied access to them.[299] As a result, only a judge and the Executive's representatives are present at *in camera* proceedings.[300] This procedure should be changed. The available evidence suggests that judges are extremely deferential to the Executive's judgment on national security matters.[301] When that inclination is combined with a procedure in which the Executive's judgment is unchallenged by an adversarial process, judges generally defer to the Executive's judgment.[302] The presence of opposing counsel who has secured the appropriate security clearances would assist judges in assessing the merits of the Executive's claims. The procedures used in other settings in which opposing counsel has access to sensitive information to assure against improper disclosure can be utilized here to safeguard confidentiality and security.[303]

D. In Camera Hearing

Under current law, when a trial judge is unable to determine from all the circumstances of the case that a reasonable danger exists that disclosure of the information in dispute would injure national security, that judge has the authority to conduct an *ex parte* evidentiary hearing in which a government officer testifies as to why a judge should sustain the asserted claim of privilege.[304] Nonetheless, research has identified not one case in which a judge has exercised that authority.[305] If judges are to retain meaningful control of the evidence in a case, they must, in appropriate circumstances, be willing to conduct an evidentiary hearing on the application of the privilege to the information in dispute.[306]

---

299. Ellsberg v. Mitchell, 709 F.2d 51, 61 (D.C. Cir. 1983).

300. *Id.*

301. *See* Mohamed v. Jeppesen Dataplan, Inc., 614 F.3d 1070, 1079 (9th Cir. 2010) ("The Court also provided guidance on how claims of privilege should be analyzed and held that, under the circumstances, the district court should have sustained the privilege without even requiring the government to produce the report for in camera review." (citing United States v. Reynolds, 345 U.S. 1, 10–11 (1953))).

302. *See* Rudenstine, *supra* note 3, at 1395–97.

303. The State Secrets Protection Act of 2009, S. 417, 111th Cong. (1st. Sess. 2009) was introduced by Senator Patrick Leahy and would have permitted opposing counsel access to the disputed documents.

304. Classified Information Procedures Act, 18 U.S.C. § 6(a) (2012).

305. *See generally* Donahue, *supra* note 22.

306. Even the remarkably deferential position adopted by Chief Justice Vinson in the *Reynolds* decision left open the possibility of such a hearing. *See supra* Part I.

E. A Qualified Privilege

The contemporary state secrets privilege is an absolute privilege.[307] Accordingly, once a judge decides from the overall context that there is a reasonable probability that the disputed information or document would endanger the national security if disclosed, the judge must sustain the privilege no matter how insignificant or remote the danger or how important the information may be to a party claiming injury.[308] Thus, the contemporary state secrets privilege permits no balancing or weighing of the importance of the information to national security against the vindication of an individual's legal claims, or even to the public's interest in knowing of the Executive's conduct.

The absolute character of the privilege is supported by two claims. First, the judiciary has made a policy decision that any threatened injury to national security warrants sustaining the privilege, no matter how important the disputed information may be to a party alleging serious injury.[309] There is no doubt that national security must be protected. But the absolute character of the privilege—combined with the executive's de facto authority to decide what information is or is not covered by the privilege—permits the protection of information that may present only an insignificant and improbable threat to the nation's security. Second, the absolute character of the privilege seems to rest on a distrust of the judiciary's competence to resolve questions implicating national security without seriously harming it.[310]

However, the privilege can be qualified without harming national security. A party seeking access to the disputed documents or information could be required to establish that such documents or information contain evidence central to establishing liability, that the evidence could not be obtained in any other way,[311] and that the party seeks the vindication of important rights. For its part, the Executive would have an opportunity to establish the significance of the alleged national security injury, and the likelihood that the injury would in fact follow from the disclosure and would occur within some

307. *See supra* Parts I–II.

308. *See* United States v. Reynolds, 345 U.S. 1, 10 (1953).

309. *See supra* notes 134–148 and accompanying text.

310. *See infra* Part IV.

311. The Court in *Reynolds* sought to justify its judgment on the assumption that the plaintiffs had "an available alternative, which might have given [them] the evidence to make out their case without forcing a showdown on the claim of privilege." 345 U.S. at 11. But this assumption seems extremely doubtful. *See* Rudenstine, *supra* note 3, at 1375–78.

foreseeable time frame as opposed to some undefined moment in the future. In weighing these competing factors, a court would uphold the privilege, regardless of its significance to the injured party, if the government established with concrete evidence that the threatened injury was significant, that it would likely follow upon disclosure, and that it would occur within some reasonable time frame following disclosure. Such an approach would qualify the privilege while still protecting legitimate national security considerations.

F. Restraining the Dismissal Remedy

The "unacceptable risk" analysis requires a case to be dismissed before discovery is commenced or a responsive pleading is filed.[312] As already noted, that remedial approach requires judges to engage in predictive decision-making long before issues are sharply defined and the relevant evidence is inventoried.[313] This is an excessively harsh outcome for a party alleging serious injury. In privilege cases, courts should not abandon their traditional and strong preference for deciding issues in a concrete and specific factual context, which, in privilege cases, would mean that courts should delay considering the dismissal of an action until the parties have concretely defined the issues in dispute and identified with some specificity the evidence arguably covered by the privilege.[314]

G. Party Parity

The extension of the privilege from information sought by the plaintiff to information sought by the defendant was consistent with *Reynolds*.[315] But the burdens of the extension fell entirely on the

312. *See supra* Part II.C.1.

313. *See supra* Part II.C.1.

314. Amanda Frost has a novel but impractical suggestion for restraining the dismissal of actions: "The judge could issue a stay and inform the parties that she will continue to abstain only if she is convinced that Congress will take back the oversight role that it delegated to the courts when it granted jurisdiction over cases challenging the legality of executive action." Frost, *supra* note 22, at 1963.

315. "[B]ut in substance it is agreed that the court must be satisfied from all the evidence and circumstances, and 'from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result.'" *Reynolds*, 345 U.S. at 9 (quoting Hoffman v. United States, 341 U.S. 479, 486–87 (1951)).

plaintiff.[316] Surely a defendant deserves a fair day in court; but then, so does a plaintiff. While it would be a "mockery"[317] of justice to impose a judgment on a defendant in a case in which plaintiff's essential allegations were false, it is also a mockery of justice to dismiss a plaintiffs' complaint merely because a defendant may be hampered in establishing a valid defense.[318] There are powerful reasons for avoiding both mockeries, but for now courts are only focused on protecting defendants from an injustice.[319]

Judges should balance out the burdens of the privilege in two ways. They could reduce the hardship on the plaintiff by reforming the privilege so that it functioned in accord with the considerations set forth in this section. In privileged cases involving information helpful to a defendant, they could limit the dismissal remedy to cases in which it was evident that the allegations essential to plaintiffs' claims were false. In other cases, the presumption would be that the privileged information potentially helpful to a defendant is treated as if a witness had died, which would impose the burden on a defendant to offer a defense based on other available information. That presumption could be overcome, but only in unusual cases, and only if a judge set forth convincing reasons for imposing the burdens triggered by the privilege solely on the plaintiff.

IV. CONSEQUENCES AND POSSIBILITIES OF RESTRUCTURING

Given that the arguments favoring the restructuring of the state secrets privilege are powerful,[320] and given that the privilege is already in disfavor,[321] why is it that a dominant body of judges today will not restructure the state secrets privilege or modify their posture on deference? The explanation of this dynamic must be the character of the juristic mind that endorses the idea that courts should exhibit the "utmost deference"[322] in all matters affecting national security, including the state secrets privilege.

Attempting to penetrate a juristic mind that has shaped an era of deference is hazardous. Such an inquiry will not portray the thinking

316. *See* Molerio v. FBI, 749 F.2d 815, 824–25 (D.C. Cir. 1984) (affirming summary judgment against plaintiff when privileged information provided a complete defense to plaintiff's claim).

317. *Id.* at 825.

318. *See* Zuckerbraun v. Gen. Dynamics Corp., 935 F.2d 544, 546–47 (2d Cir. 1991).

319. *See id.* at 547.

320. *See supra* Part III.

321. *See supra* notes 87–89 and accompanying text.

322. United States v. Nixon, 418 U.S. 683, 709–10 (1974).

of all judges favoring the current degree of deference, and it will not describe the thinking of judges who have criticized the contemporary state secrets privilege or the general perspective of deference. Nonetheless, attempting to penetrate the judicial mind that has generated the state secrets privilege as part of the broader Age of Deference is essential if the development is to be understood and the possibilities of change are to be appreciated. To be sure, any legal mindset is composed of entangled variables—precedent, values, pragmatic considerations, prejudices, aspirations, expectations—that may bleed into one another, reinforce one another, and vary over time and with context.[323] Thus, in seeking to disentangle the variables that comprise the juristic mindset of deference, some distortion may be committed on the integrity of the whole.[324] Nonetheless, disentanglement is required if there is any possibility of understanding the whole.

The deferential juristic mindset has three pivotal poles. The first concerns judicial competence. From this perspective, judges are not competent to decide matters implicating national security because, as Justice Jackson wrote, these matters are "political, not judicial," in nature, they are "delicate, complex, and involve large elements of prophecy," and they are decisions for which the "[j]udiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry."[325] From this vantage point, no matter how

323. *See* Yao Wu & Olga Yevtukhova, *Influences on Judicial Decision-Making in Federal and Bankruptcy Courts*, SOCIAL LAW LIBRARY, *available at* http://socialaw.com/docs/default-source/slbook/judgeyoung09/16wu-yevtukhova-paper.pdf?sfvrsn=2 (last visited Nov. 17, 2014).

324. *See* Eric Berger, *Deference Determinations and Stealth Constitutional Decision Making*, 98 IOWA L. REV. 465, 468–69 (2013).

325. Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948). The views that Justice Jackson expressed in his opinion for the Court in *Chicago & South Air Lines, Inc.* were in accord with those in his dissent in *Korematsu v. United States*, 323 U.S. 214, 244–46 (1945). *But see United States v. Reynolds*, 345 U.S. 1 (1953), *rev'g* 192 F.2d 987 (3d Cir. 1951), in which Jackson dissented for the reasons expressed by the Third Circuit, 192 F.2d at 997—that is, he supported an *in camera, ex parte* review by an Article III judge of the information that the Executive asserted must be protected by the state secrets privilege. Most recently, Eric A. Posner's review of Rahul Sager's *Secrets and Leaks: The Dilemma of State Secrecy* (2013) is just one indication that the competency claim continues to be vital and current in the discussion of the court's role in national security cases. Eric A. Posner, *Before You Reboot the NSA, Think About This: The Paradox of Secrecy*, THE NEW REPUBLIC (Nov. 6, 2013), http://www.newrepublic.com/article/115291/rahul-sagars-secret-

much evidence is presented, how many experts testify, or how many days a hearing may last, judges will lack a broad perspective seasoned by years of experience, and, as a result, judges will, through no fault of trying or effort or intelligence, simply not be competent, as Jackson wrote, to "review and perhaps nullify" a decision made by members of the executive branch.[326]

No one quarrels with the claim that the Constitution allocates to the Executive and Congress primary responsibility for the nation's security. But primary responsibility is not exclusive responsibility and the competency claim is so open-ended it could apply just as easily to other cases that the court has in fact decided that affect important, substantive aspects of American life—such as the economy,[327] health care,[328] and scientific study[329]—similarly obscuring them from judicial review. Moreover, the claim that competency—or, to be more precise, incompetency—should disable judges in national security cases is not descriptive of history.[330] Thus, in some landmark national security cases, federal judges have

---

leaks-reviewed-eric-posner ("Judges have pled time and again that they lack the training and knowledge to second-guess soldiers and spies.").

326. Chi. & S. Air Lines, Inc., 333 U.S. at 111; *see generally* Hamdi v. Rumsfeld, 542 U.S. 507, 582–84 (2004) (Thomas, J., dissenting) ("[T]he courts simply lack the relevant expertise to second-guess determinations made by the President based on information properly withheld."); N.Y. Times Co. v. United States, 403 U.S. 713, 757–58 (1971) (Harlan, J., dissenting) ("[T]he judiciary may not properly go beyond these two inquiries and redetermine for itself the probable impact of disclosure on the national security."); *Steel Seizure*, 343 U.S. 579, 708–10 (1952) (Vinson, C.J., dissenting) ("A sturdy judiciary should not be swayed by the unpleasantness or unpopularity of necessary executive action, but must independently determine for itself whether the President was acting, as required by the Constitution, to 'take Care that the Laws be faithfully executed.'").

327. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 36–38 (1937).

328. Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2579–80 (2012) (discussing the constitutionality of the Patient Protection and Affordable Care Act).

329. Ass'n for Molecular Pathology v. Myriad Genetics, Inc., 133 S. Ct. 2107, 2111 (2013) (discussing the validity of patents for isolated DNA sequences associated with predisposition to certain cancers and for diagnostic methods of identifying mutations in those DNA sequences).

330. *See* Boumediene v. Bush, 553 U.S. 723, 769 (2008) ("The Government presents no credible arguments that the military mission at Guantanamo would be compromised if habeas corpus courts had jurisdiction to hear the detainees' claims."); United States v. United States Dist. Court for the E. Dist. Of Mich., S. Div., 407 U.S. 297, 320 (1972) ("We cannot accept the Government's argument that internal security matters are too subtle and complex for judicial evaluation."). Even the Supreme Court's decision in *United States v. Reynolds* did not close the door on a federal judge reviewing classified and highly sensitive documents. 345 U.S. 1, 6–10 (1953).

exercised meaningful review, and by so doing have contributed to the prestige and legitimacy of the courts.[331]

Consider the *Steel Seizure Case*[332] of 1952. Faced with the possibility of a union strike that would shut the nation's steel mills, President Truman directed his Secretary of Commerce to take possession of and operate most of the mills on the basis that a strike would "jeopardize . . . national defense," in that steel was an indispensable component of "substantially all weapons and other war materials" required in the ongoing Korean War.[333] After the Supreme Court ruled that President Truman's seizure was unconstitutional, "a 53–day steel strike ensued . . . and no steel shortage occurred."[334] Though the legal issue presented did not require the Court to decide the direct question—namely, whether a strike would or would not result in a shortage of steel and have immediate consequences for the United States service units in Korea[335]—it seems naïve to imagine that the six members of the majority did not assess that factor as part of the process of deciding the case.

Consider also the celebrated Pentagon Papers case in which the Nixon Administration claimed that the continued publication by the *New York Times* and the *Washington Post* of excerpts from a "Top Secret-Sensitive" Pentagon-sponsored history of the United States involvement in Vietnam from World War II to 1968 would seriously harm national security.[336] After reviewing the evidence, the Supreme Court concluded that the administration had not satisfied its "heavy" evidentiary burden and refused to grant a prior restraint.[337] Years later, Erwin Griswold, the Solicitor General who argued the government's appeal in the case, stated that the newspapers' publication of the Pentagon Papers excerpts caused no harm to the nation's security.[338]

---

331. See *supra*, text accompanying notes 245–248.

332. *Steel Seizure*, 343 U.S. 579 (1952).

333. *Id.* at 582–83, 590.

334. KATHLEEN M. SULLIVAN & NOAH FELDMAN, CONSTITUTIONAL LAW 306 (18th ed. 2013).

335. *See Steel Seizure*, 343 U.S. at 582–84.

336. *See* N.Y. Times Co. v. United States, 403 U.S. 713, 717–18 (1971).

337. *Id.*

338. See RUDENSTINE, *supra* note 293 for a thorough history of the Pentagon Papers case. For recent national security cases in which the Court asserted its independence and ruled against the Executive, see *Boumediene v. Bush*, 553 U.S. 723 (2008); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); and *Rasul v. Bush*, 542 U.S. 466 (2004). *See* David Rudenstine, *American Preeminence, Separation of Power and Human Rights: The Guantanamo Detainee Case, in*

Second, it is claimed that courts should defer in national security cases because the issues are of such importance that courts must stand aside and let the Executive and Legislative Branches, which are politically accountable, govern without judicial oversight.[339] Similar to the claim of competence, this claim is undermined by its sweeping character. Courts routinely decide many matters of high significance to the nation—such as same-sex marriage, abortion, affirmative action, the right to die, health care, voting rights and campaign financing;[340] it is hardly obvious that courts should be disabled by the political accountability argument only in national security matters. Moreover, because national security matters vary greatly in importance, it is unconvincing to claim that courts should defer to the Executive in all national security matters merely because they possibly should in rare cases.

Furthermore, the political unaccountability charge against courts is simplistic to a fault. Courts are hardly immune from political and popular influences.[341] Congress has substantial control over the jurisdiction of the courts,[342] the Executive influences the direction of the courts through the appointment of judges,[343] and there is substantial evidence indicating that over time public opinion has a shaping influence on judicial outcomes.[344] The implication that

---

GUANTANAMO BAY AND THE JUDICIAL-MORAL TREATMENT OF THE OTHER 15 (Clark Butler ed., 2007) (highlighting the break with the tradition of deference that the *Hamdi* and *Rasul* cases represented) [hereinafter *American Preeminence, Separation of Power and Human Rights*].

339. *See American Preeminence, Separation of Power and Human Rights*, *supra* note 338, at 23.

340. At least one jurist, however, advocates deference even in these cases. *See* David Rudenstine, *Self-Government and the Judicial Function*, 92 TEX. L. REV. 161, 161–62 (2013) (reviewing J. HARVIE WILKINSON III, COSMIC CONSTITUTIONAL THEORY: WHY AMERICANS ARE LOSING THEIR INALIENABLE RIGHT TO SELF-GOVERNMENT (Oxford University Press 2012)).

341. *Id.* at 195 & nn.290–91.

342. U.S. CONST. art. III, § 2, cl. 2; *Hamdan*, 548 U.S. at 573–75 (2006); *Ex Parte* McCardle, 74 U.S. 506, 512–14 (1868).

343. U.S. CONST. art. II, § 2, cl. 2. Charles M. Blow of the *New York Times* recently highlighted the composition of the United States Supreme Court by the political party of the President who nominated each member of the Court. Among his interesting findings, his statistics indicated that from 1976 to 2008 the Court membership consisted at any one time of no less than seven members appointed by a Republican president. In his column, Blow wrote that appointment of federal judges "is where a president can exert power long after he has officially faded from power." Charles M. Blow, *Court Fight*, N.Y. TIMES (Nov. 1, 2013), http://www.nytimes.com/2013/11/02/opinion/blow-court-fight.html.

344. *See generally* BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION

courts are politically insulated suggests that the Executive and the administrative agencies and departments that comprise the national security state are at the opposite end of the accountability spectrum and are highly politically accountable. But that is surely not so. A second-term president holds office on the legitimacy of the past presidential election but is no longer politically accountable.[345] More strikingly, the numerous departments and agencies directly responsible for national security function mainly in secret.[346] Thus, the National Security Council, CIA, National Security Agency, and intelligence agencies within the Pentagon function in secret[347] and have only limited accountability to Congress—and then, only to a few members on select committees—and almost no accountability to the public.[348] Once the political accountability claim is placed in this

(2009) (chronicling the history of the link between public opinion and judicial review).

345. U.S. CONST. amend. XXII.

346. *See, e.g.*, United States v. Richardson, 418 U.S. 166 (1974) (ruling that an individual who sought disclosure of the CIA budget under the "Statement and Account" Clause of the Constitution was not entitled to information that precisely detailed CIA expenditures).

347. Although the Constitution states that, "a regular statement and account of the receipts and expenditures of all public money shall be published from time to time," U.S. CONST. art. 1, § 9, cl. 7, the CIA's budget is secret. *See Richardson*, 418 U.S. at 168–69, 175. Thus, the voting public learns about CIA expenditures only when the Executive makes such expenditures public or when a government official makes an unauthorized disclosure, as was very recently done regarding the "bags" of cash the CIA leaves in the office of Afghan President Hamid Karzai. *See* Matthew Rosenberg, *With Bags of Cash, C.I.A. Seeks Influence in Afghanistan*, N.Y. TIMES (Apr. 29, 2013), http://www.nytimes.com/2013/04/29/world/asia/cia-delivers-cash-to-afghan-leaders-office.html; *see also* Chesney, *supra* note 22, at 1430–31 (referencing the undemocratic nature of the "the decisionmaking role of the Administrative Review Board (ARB) mechanism for Guántanamo detainees . . . . [T]he nature of the ARB's composition . . . and the non-transparent nature of its work . . . call into question whether there is a meaningful nexus between ARB decisions and democratic accountability.").

348. Unauthorized disclosures by government employees—so-called "leaks"—are a staple of national security reporting. Indeed, some even maintain that because of the enormous net cast by the United States classification system there would be no meaningful national security reporting absent unauthorized disclosures. Max Frankel, *Where Did Our 'Inalienable Rights' Go?*, N.Y. TIMES (June 22, 2013), http://www.nytimes.com/2013/06/23/opinion/sunday/where-did-our-inalienable-rights-go.html; Andrew Beaujon, *Jill Abramson: Leak Prosecutions Threaten to 'Rob the Public of Vital Information,'* POYNTER (June 18, 2012, 8:57 AM), http://www.poynter.org/latest-news/mediawire/177554/jill-abramson-leak-prosecutions-threaten-to-rob-the-public-of-vital-information/; Arthur S. Brisbane, *National Secrets and National Security*, N.Y. TIMES (June 16, 2012),

light, the merits of the claim can be turned on their head for it is highly plausible that the public nature of judicial proceedings would make national security policies and operations *more* transparent.

The third cluster of considerations asserted in support of judicial deference revolves around the idea that the protection of national security trumps all other interests.[349] Underlying this perspective is a conception of national security that emphasizes current, narrowly construed security interests over a broader conception of security with long-term implications.

Several considerations undermine this perspective. First, there is simply no evidence that an alteration of the deferential judicial stance in cases implicating national security will increase the risk of national danger. Indeed, as noted, in cases in which federal judges have exercised meaningful judicial review, they have impressively acquitted themselves.[350] Second, there is reason to believe that curbing judicial deference may enhance the nation's security because the expectation of more meaningful judicial oversight might cause the Executive to proceed with deliberateness, which may result in

---

http://www.nytimes.com/2012/06/17/opinion/sunday/national-secrets-and-national-security.html. For an historic statement of the importance of unauthorized disclosures in informing the American public about national security matters, see the affidavit of Max Frankel, dated June 17, 1971, filed in the Pentagon Papers case, in which he stated:

> Without the use of "secrets" that I shall attempt to explain in this affidavit, there could be no adequate diplomatic, military and political reporting of the kind our people take for granted, either abroad or in Washington and there could be no mature system of communication between the Government and the people.

Affidavit of Max Frankel at ¶ 4, United States v. N.Y. Times, 328 F. Supp. 324 (S.D.N.Y. 1971) (No. 71 Civ. 2662), 1971 WL 224067. In that regard, the Obama Administration has initiated "an aggressive focus on leaks and leakers that has led to more than twice as many prosecutions as there were in all previous administrations combined." Sharon LaFraniere, *Math Behind Leak Crackdown: 153 Cases, 4 Years, 0 Indictments*, N.Y. TIMES (July 20, 2013), http://www.nytimes.com/2013/07/21/us/politics/math-behind-leak-crackdown-153-cases-4-years-0-indictments.html.

349. *See, e.g.*, Marcus Eyth, *The CIA and Covert Operations: To Disclose or Not to Disclose—That is the Question*, 17 BYU J. PUB. L. 45, 71 (2002). Chief Justice Rehnquist raised this consideration in *Tenet v. Doe*:

> The state secrets privilege and the more frequent use of *in camera* judicial proceedings simply cannot provide the absolute protection we found necessary in enunciating the *Totten* rule. The possibility that a suit may proceed and an espionage relationship may be revealed, if the state secrets privilege is found not to apply, is unacceptable.

544 U.S. 1, 11 (2005).

350. *See supra* notes 15, 325–38 and accompanying text.

wiser decisions in the long term.[351] Third, the Executive demand for judicial deference rests in part on the assumption that security depends solely on the military front lines— front lines that are defined by elusive non-state actors.[352] This outlook overlooks the importance of what is often termed "soft-power," which emphasizes factors that greatly contribute to America's standing in the world, such as the freedom of American private and public institutions, the scope of individual liberties, and the rule of law.[353]

CONCLUSION

In retrospect, the Executive's claims for an expansive construction of the state secrets privilege may be dispiriting, but it is not surprising. Indeed, given the constitutional structure of the national government and what might be thought of as the constitutional invitation for the three branches to compete for authority and power, it should be expected that the President, who is Commander-in-Chief and dominates in national security matters, will continually assert authority and press the other two co-equal branches to cede to its requests and demands for more and more unilateral authority.

At the same time, it is disappointing that the Supreme Court has failed to wend its way through the thicket so as to simultaneously respect Executive and Congressional responsibilities to protect the national security, and to not surrender so completely its own independence and its responsibility to provide a meaningful check on Executive power. But that is what the Supreme Court has done. For decades, it has endorsed a robust and sweeping state secrets privilege and even recently—without one member of the Court breaking ranks and criticizing the Court's disposition—reaffirmed its long-standing refusal to reconsider the scope of the privilege.[354]

The fact that the high court's attitude toward the privilege seems so impenetrable to change, especially given that the privilege is so

351. *See* SHANE, *supra* note 15.

352. *See Steel Seizure*, 343 U.S. 579, 583 (1952).

353. *See generally* JOSEPH S. NYE, JR., SOFT POWER: THE MEANS TO SUCCESS IN WORLD POLITICS 6 (2004). President Barack Obama recently acknowledged this basic political tenet in a speech at the National Defense University: "So America is at a crossroads. We must define the nature and scope of this struggle, or else it will define us. We have to be mindful of James Madison's warning that 'No nation could preserve its freedom in the midst of continual warfare.'" President Barack Obama, *Remarks by the President at the National Defense University*, WHITEHOUSE.GOV (May 23, 2013), http://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university.

354. *See* Gen. Dynamics Corp. v. United States, 131 S. Ct. 1900, 1906–07 (2011).

convincingly criticized, is best understood as a manifestation of the Age of Deference.[355] For decades, the Supreme Court has adopted a hands-off attitude toward the Executive in national security cases,[356] and while there are notable exceptions to this pattern, those exceptions remain just that—exceptions.[357] The general rule is one of deference, and while the past suggests that now and then a majority of justices will break ranks with tradition, all signals indicate that no one currently on the Court will challenge the general rule of deference in the near future. As a result, there is little reason to expect that the Court will any time soon revise the privilege, and moreover, even if the Court did revise the privilege, absent a substantial shift in the Court's deferential disposition, the balloon effect created by the cluster of doctrines that comprise the Age of Deference would sharply minimize the importance of the restructuring.

This is a deeply regrettable state of affairs. And although no one claims that the expanded privilege will "plunge us straightway," as Justice Jackson wrote in another context, "into dictatorship . . . it is at least a step in that wrong direction."[358] And because, as Jackson also wrote, "men have discovered no technique for long preserving free government except that the Executive be under the law," although it may well be that free government "may be destined to pass away . . . it is the duty of the Court to be last, not first, to give [it] up."[359]

Perhaps in time individual justices on the Supreme Court will reconsider the Court's deferential disposition in national security cases, and write opinions that chart a new course—a course in which the Court functions as a third co-equal and independent branch of government that provides meaningful judicial review of Executive policies and conduct, even in cases implicating national security.

355. *See* Rudenstine, *supra* note 3, at 1287.

356. *See supra* notes 6 & 13.

357. *See supra* note 15.

358. *Steel Seizure*, 343 U.S. 579, 653 (1952) (Jackson, J., concurring).

359. *Id.* at 655.

APPENDICES

Methodology

The three appendices illustrate the rate at which citations to *United States v. Reynolds*, 345 U.S. 1 (1953) have appeared in federal court decisions and law review articles over time (the "intensity" of citations to *Reynolds*). A decision or article is only counted once, regardless of how many times it mentions *Reynolds*; no distinction is made between decisions and articles that merely mention *Reynolds*, and those that explore it in great detail. Data for the graphs was collected using the KeyCite function on WestlawNext, an "up-to-the-minute citation service" which enables users to retrieve citing references and is available via a toolbar above every document accessed on WestlawNext, including *Reynolds*.[360] More specifically, the KeyCite feature for "Viewing Citing References for a Case" (called "Citing References" on the KeyCite toolbar) was used to generate lists of decisions and articles. Each list was then exported to Microsoft Excel, sorted by date of decision/publication, and tallied to provide the data for the tables in the appendices.

The lists that provided the data for Appendices 1 and 3 were generated by narrowing the Citing References to display only court decisions (called "Cases" in the section of the sidebar labeled "View"). The Citing References were narrowed further to display only decisions from federal District Courts (Table 1, Appendix 1), Courts of Appeal[361] (Table 2, Appendix 1), and the Supreme Court (Table 1, Appendix 3). This further narrowing was accomplished by selecting the appropriate checkbox in the sidebar labeled "Jurisdiction."

The list that provided the data for Appendix 2 was generated by narrowing the Citing References to display only "Secondary Sources" (in the section of the sidebar labeled "View"), which were then narrowed further to display only "Law Reviews" (also in the "View" section).

Court decisions and law review articles that were decided/published after 2013, are not reflected in the appendices.

---

360. *KeyCite on Westlaw Next*, THOMPSON REUTERS (2012), https://info.legalsolutions.thomsonreuters.com/pdf/wln2/L-356347.pdf.

361. In addition to the Circuit Courts, this includes one decision by the Temporary Emergency Court of Appeals.

Appendix 1

Table 1

Intensity of District Court Citations to Reynolds from 1953 to 2013

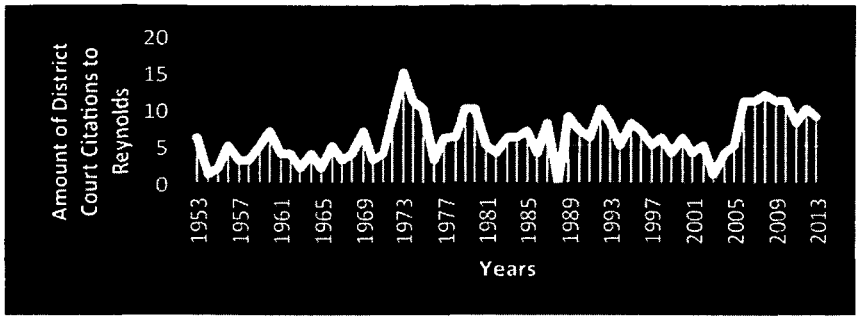
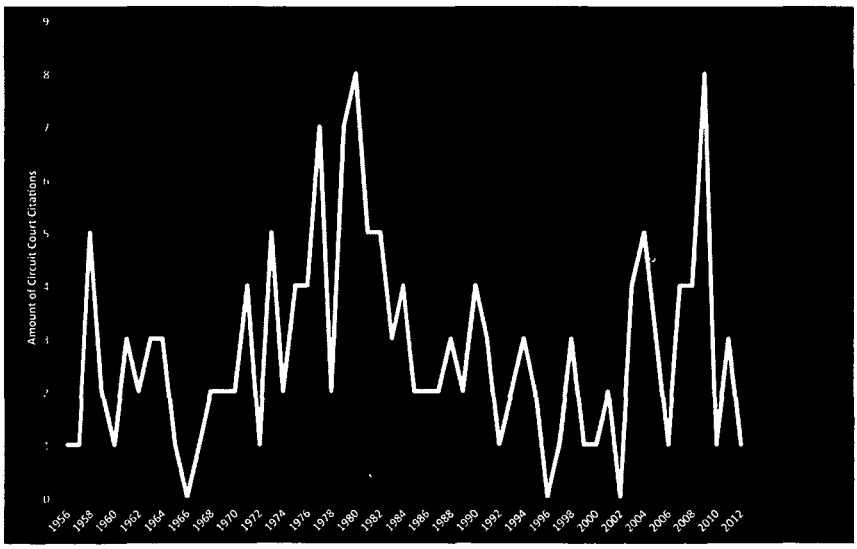


Table 2

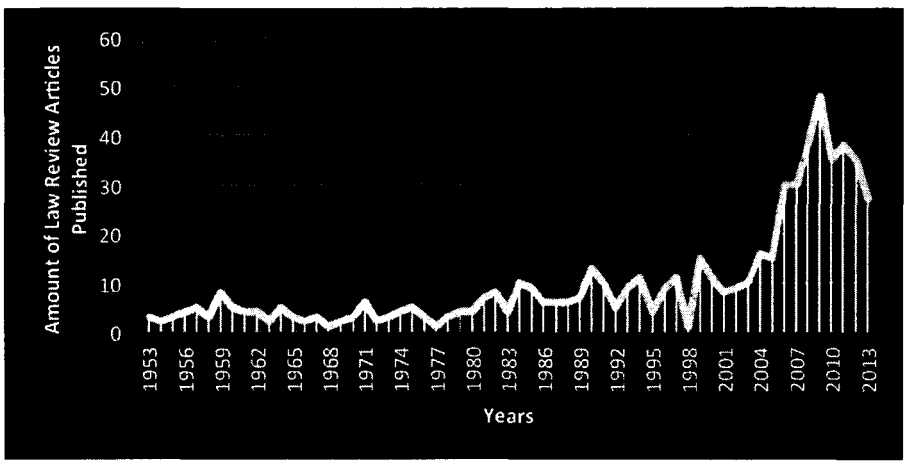
Intensity of Circuit Court Citations to *Reynolds* from 1953 to 2013



Appendix 2

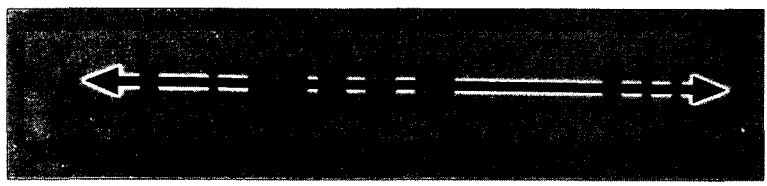
Table 3

Intensity of Law Review Citations to *Reynolds* from 1953 to 2013



Appendix 3

Table 4



Legend

2010–present
Gen. Dynamics Corp. v. United States, 131 S. Ct. 1900 (2011).

2000–2009
Boumediene v. Bush, 553 U.S. 723, 128 S. Ct. 2229 (2008).
Tenet v. Doe, 544 U.S. 1 (2005).
Cheney v. U.S. Dist. Court for D.C., 542 U.S. 367 (2004).

1990–2000
no cases

1980–1989
United States v. Zolin, 491 U.S. 554 (1989).
Webster v. Doe, 486 U.S. 592 (1988).
U.S. Dep't of Justice v. Julian, 486 U.S. 1 (1988).
Dep't of Navy v. Egan, 484 U.S. 518 (1988).
United States v. Valenzuela-Bernal, 458 U.S. 858 (1982).
Nixon v. Fitzgerald, 457 U.S. 731 (1982).
Weinberger v. Catholic Action of Haw./Peace Educ. Project, 454 U.S. 139 (1981).

1970–1979
Herbert v. Lando, 441 U.S. 153 (1979).
Nixon v. Adm'r of Gen. Servs., 433 U.S. 425 (1977).
Kerr v. U.S. Dist. Court for N. Dist. of Cal., 426 U.S. 394 (1976).
United States v. Nixon, 418 U.S. 683 (1974).
Envtl. Prot. Agency v. Mink, 410 U.S. 73 (1973).
Branzburg v. Hayes, 408 U.S. 665 (1972).
Gravel v. United States, 408 U.S. 606 (1972).
Gelbard v. United States, 408 U.S. 41 (1972).
N.Y. Times Co. v. United States, 403 U.S. 713 (1971).

1960–1969
Alderman v. United States, 394 U.S. 165 (1969).

1950–1959
Greene v. McElroy, 360 U.S. 474 (1959).
Jencks v. United States, 353 U.S. 657 (1957).

Notes to Appendix 3

The Court has only considered the state secrets privilege and *Reynolds* on rare occasions. In these instances, the Court has never explicitly expanded *Reynolds* beyond its original scope. While the Court does apply *Reynolds* to new circumstances, the pure holding of the case does not seem to be disturbed. *General Dynamics Corp. v. United States*, 131 S. Ct. 1900 (2011), is the only case in which the Court seems to be mildly cautioning courts on the use of the privilege, declaring that the "privilege 'is not to be lightly invoked,'" and that "[c]ourts should be even more hesitant to declare a Government contract unenforceable because of state secrets. It is the option of last resort, available in a very narrow set of circumstances." *Id.* at 1910 (citation omitted). In *General Dynamics*, Justice Scalia held that when the state secrets privilege is invoked to dismiss a government contractor's prima facie valid "superior knowledge" affirmative defense to the government's allegations of contractual breach, the proper remedy is to leave the parties where they were on the day that they filed suit. *Id.* at 1902. Justice Scalia noted that the proper state secrets jurisprudence does not arise from *Reynolds* but from *Totten v. United States*, 92 U.S. 105 (1875) and *Tenet v. Doe*, 544 U.S. 1 (2005). *Id.* at 1906. This is because *Reynolds* deals with "a Government privilege against court-ordered disclosure of state and military secrets," while *Totten* and *Tenet* deal with "alleged contracts to spy." *Id.* at 1905–06.

In *United States v. Nixon*, 418 U.S. 683, 715 (1974), the Court briefly but meaningfully discussed the states secrets privilege holding that it was "in the public interest to afford Presidential confidentiality the greatest protection consistent with the fair administration of justice." Further, in regard to Presidential privilege, in *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425 (1977), Justice Brennan discusses presidential privilege and

confidentiality for a former president. Relying on *Reynolds*, the Court contended that, "only an incumbent President can assert the privilege of the Presidency." *Id.* at 448. The privilege belongs to the Government and must be asserted by it, it can neither be claimed nor waived by a private party. *Id.* A former president is less in need of the privilege than an incumbent, and also there are "obvious political checks against an incumbent's abuse of the privilege." *Id.*

Even when a case meaningfully discussed *Reynolds*, state secrets was not always the topic *per se*. For instance, in *Kerr v. U.S. Dist. Court for N. Dist. of Cal.*, 426 U.S. 394 (1976), Justice Marshall was primarily concerned with whether documents from a prison could be disclosed when prisoners filed a class action against the California Department of Correction. The Court affirmed the Court of Appeals decision, which discussed *Reynolds* and proposed that "in camera review is a highly appropriate and useful means of dealing with claims of governmental privilege." *Id.* at 406.

The Court in *United States v. Zolin*, 491 U.S. 554 (1989), in an opinion by Justice Blackmun, also relied on *Reynolds* for its elucidation of *in camera* review. Quoting *Reynolds*, Blackmun recognized that "'examination of the evidence, even by the judge alone, in chambers' might in some cases 'jeopardize the security which the privilege is meant to protect.'" *Id.* at 570 (citation omitted). The *Zolin* Court agreed with the assertion in *Reynolds* that "some compromise" between too much judicial inquiry and a complete abandonment of judicial control "must be reached." *Id.* at 571. The Court then attempted to fashion a standard for when *in camera* review would be appropriate, and relied on *Caldwell v. Dist. Court*, 644 P.2d 26, 33 (Colo. 1982) for its result.

In *Tenet v. Doe*, 544 U.S. 1 (2005), the Court primarily grapples with the *Totten* rule, but points out that *Reynolds* "cannot plausibly be read to have replaced the categorical *Totten* bar with the balancing of the state secrets evidentiary privilege in the distinct class of cases that depend upon clandestine spy relationships." *Id.* at 9–10.

Most of the court cases that cite to *Reyonds* are brief and perfunctory. In some of the cases, there is only one citation to *Reynolds* and no expansive discussion on the case. *See* Cheney v. U.S. Dist. Court for D.C., 542 U.S. 367, 389 (2004); Webster v. Doe, 486 U.S. 592, 604 (1988); U.S. Dep't of Justice v. Julian, 486 U.S. 1, 13 (1988). In *Weinberger v. Catholic Action of Hawaii/Peace Education Project*, 454 U.S. 139, 147 (1981), the Court claims to be "confront[ing] a similar situation" to *Reynolds*, however, it only cites to *Reynolds* once. In *Environmental Protection Agency v. Mink*, 410 U.S. 73 (1973), the Court only weakly relies on *Reynolds* and proposes that:

> in the absence of a claim that disclosure would jeopardize state secrets, memoranda consisting only of compiled factual material or purely factual material contained in deliberative memoranda and

> severable from its context would generally be available for discovery by private parties in litigation with the Government.

Id. at 87–88 (footnote omitted) (citation omitted).

In one instance, *Reynolds* is included within a string of citations. *See* Dep't of Navy v. Egan, 484 U.S. 518, 527 (1988). In two instances, *Reynolds* is cited to as a "cf." or "compare to" citation. *See* Boumediene v. Bush, 553 U.S. 723, 796 (2008); N.Y. Times Co. v. United States, 403 U.S. 713, 757 (1971). Other times, *Reynolds* is only mentioned in a footnote. *See* Nixon v. Fitzgerald, 457 U.S. 731, 753 n.35 (1982); Gelbard v. United States, 408 U.S. 41, 44 n.3 (1972); Branzburg v. Hayes, 408 U.S. 665, 738 n.25 (1972); Gravel v. United States, 408 U.S. 606, 645 n.11 (1972). The Court has also cited to *Reynolds* in dicta. *See* Alderman v. United States, 394 U.S. 165, 199 (1969) (Harlan, J., concurring in part and dissenting in part) (stating he would "go even further" than the Court in *Reynolds* and "lay upon trial judges the affirmative duty of assuring themselves that the national security interests claimed to justify an in camera proceeding are real and not merely colorable"). In a defamation case, *Herbert v. Lando*, 441 U.S. 153, 196 (1979), the Court cites to *Reynolds*, stating that a "general statement of need will not prevail over a concrete demonstration of the necessity for executive secrecy."