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Reforming the State Secrets Privilege

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Reforming the State Secrets Privilege

Amanda Frost* and Justin Florence**

I. Introduction

Since September 11, 2001, President George W. Bush's Administration has repeatedly asserted the state secrets privilege as grounds for the dismissal of civil cases challenging the legality of its conduct in the war on terror. Specifically, the Administration has sought dismissal of all cases challenging two different government practices: (1) its use of "extraordinary rendition," under which the Executive removes suspected terrorists to foreign countries for interrogation; and (2) the National Security Agency's (NSA's) warrantless wiretapping of electronic communications. The government argues that the plaintiffs' claims in these cases can neither be proven nor defended against without disclosure of information that would jeopardize national security, and thus it seeks to have all cases related to these activities dismissed on the pleadings.¹

This issue brief provides a general overview of the state secrets privilege and then discusses the Bush Administration's recent assertion of the privilege in cases challenging extraordinary rendition and the NSA's warrantless wiretapping program. As will be explained, the Administration's blanket invocation of the privilege as grounds for immediate dismissal of these categories of cases is unprecedented, and threatens to eliminate the judiciary's role as a check on executive action. For that reason, courts should seek methods of protecting privileged material without dismissing litigation, as they have successfully done in the past, to ensure that legitimate challenges to these and other government actions get a fair hearing in court. In addition, the next presidential administration should revise its internal procedures and work with courts to limit the effect of the state secrets privilege so that it is used as originally intended, rather than as a de facto attempt to immunize executive action from judicial review. Finally, Congress should move quickly to pass pending legislation that would prevent indiscriminate use of the state secrets privilege.

II. The Origins of the State Secrets Privilege

The privilege was first explicitly recognized by the Supreme Court in its 1953 decision in *United States v. Reynolds*.² *Reynolds* involved a claim for damages against the federal

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¹ See, e.g., *Al-Haramain Islamic Found., Inc. v. Bush*, 507 F.3d 1190 (9th Cir. 2007); *ACLU v. NSA*, 493 F.3d 644 (6th Cir. 2007); *Hepting v. AT&T Corp.*, 439 F. Supp. 2d 974 (N.D. Cal. 2006), *remanded by* 539 F.3d 1157 (9th Cir. 2008); *Terkel v. AT&T Corp.*, 441 F. Supp. 2d 899 (N.D. Ill. 2006); *El-Masri v. United States*, 479 F.3d 296 (4th Cir. 2007), *cert. denied*, 128 S. Ct. 373 (2007).

² *United States v. Reynolds*, 345 U.S. 1, 6-7 (1953). Although this was the first case in which the Court explicitly recognized the privilege, the Court stated that the privilege was "well established," stretching back at least to the 1807 trial of Aaron Burr for treason. *Id.* at 9. For an in depth discussion of the *Reynolds* litigation, see LOUIS

government brought by the widows of three civilians killed in the crash of a B-29 aircraft. During discovery, plaintiffs sought production of the U.S. Air Force's official accident investigation reports and statements made by three surviving crew members. The United States objected, claiming that it had constitutional authority to refuse to disclose information related to national security.³ The Supreme Court rejected this "broad proposition[],"⁴ but explicitly noted for the first time the existence of a privilege to protect military and state secrets.

As described in *Reynolds*, the state secrets privilege is a common law evidentiary privilege that accords with the President's authority over national security.⁵ The privilege can be asserted only by the head of an executive branch agency with control over state secrets, and only after that person has filed an affidavit demonstrating that he or she has personally reviewed the information at issue and determined that it qualifies as state secrets.⁶ The court itself must ultimately decide whether the evidence is admissible.⁷ The *Reynolds* Court accepted the government's representations about the classified nature of the materials and refused to require their disclosure.⁸ The Court remanded the case so that litigation could proceed, declaring that "it should be possible for respondents to adduce essential facts as to causation without resort to material touching upon military secrets."⁹

Unfortunately, *Reynolds* left the contours of the privilege unclear. The Supreme Court did not describe the specific types of information that qualified for protection as a "state secret," or explain how courts should determine whether the privilege has been properly asserted. Unsurprisingly, lower courts have differed in their application of the privilege. Extrapolating from the brief description of the privilege in *Reynolds*, lower courts have concluded that it can affect litigation in a number of ways. First, it is clear from the result in *Reynolds* that the privilege can bar evidence from admission in litigation. The plaintiff's case will then go forward without the excluded evidence, and will be dismissed only if the plaintiff is unable to prove the prima facie elements of the claim without it. Second, lower courts have concluded that if the privilege deprives the defendant of information that would provide a valid defense, then the court may grant summary judgment for the defendant. And third, some courts have held that "if 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."¹⁰ However, as explained below, the Supreme Court has only taken such drastic action in the very narrow category of cases involving covert espionage agreements, and it is not clear that the Court ever intended the evidentiary privilege it recognized in *Reynolds* to serve as a jurisdictional bar.

FISHER, IN THE NAME OF NATIONAL SECURITY: UNCHECKED PRESIDENTIAL POWER AND THE *REYNOLDS* CASE 29-118 (2006).

³ Brief for the United States at *9-*10, *15-*16, *21-*22, *United States v. Reynolds*, 345 U.S. 1 (1953), 1952 WL 82378.

⁴ *Reynolds*, 345 U.S. at 6.

⁵ *Id.* at 6-12.

⁶ *Id.* at 7-8.

⁷ *Id.* at 8.

⁸ The accident report was eventually declassified and, according to Louis Fisher, "revealed . . . serious negligence by the government" but "contained nothing that could be called state secrets." Fisher, *supra* note 2, at xi.

⁹ *Reynolds*, 345 U.S. at 11.

¹⁰ *Kasza v. Browner*, 133 F.3d 1159, 1166 (9th Cir. 1998) (quoting *Reynolds*, 345 U.S. at 11 n.26).

Although *Reynolds* is the first explicit recognition of a state secrets privilege, it was not the first time the government claimed that litigation threatened national security. The 1875 decision in *Totten v. United States* is one of the Court's earliest cases addressing the issue, and is also one of only two cases in which the Court ordered that the case must be dismissed because its "very subject matter" concerned secret evidence.¹¹ *Totten* involved a contract dispute between a Union spy and President Abraham Lincoln. The contract, which the parties entered into in July 1861, provided that the spy was to travel behind rebel lines and transmit information about the Confederate Army in return for payment of \$200 per month. The spy performed the tasks agreed upon, but was reimbursed only for his expenses. The Supreme Court concluded that although President Lincoln had the authority to enter into the contract, no court could enforce it. The Court then stated: "[A]s a general principle . . . 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."¹² Accordingly, the Court dismissed the case.

Totten was recently reaffirmed by the Supreme Court in *Tenet v. Doe*, a case in which two former spies claimed that the government had reneged on its agreement to provide lifetime support for them in the United States in return for espionage services in their native country.¹³ Their complaint alleged that the government had violated their equal protection and due process rights by refusing to abide by the terms of their original agreement. The Supreme Court held that the so-called "*Totten* bar" precludes judicial review of any claim based on a covert agreement to engage in espionage for the United States.¹⁴ Aside from these two cases concerning the terms of covert espionage agreements, the Supreme Court has never required the dismissal of litigation on the ground that it concerns state secrets.

III. The State Secrets Privilege Since September 11, 2001

A. The Bush Administration's Unprecedented Assertion of the Privilege

Reynolds admonished that the state secrets privilege "is not to be lightly invoked,"¹⁵ and for over two decades following that decision the government rarely asserted the privilege. Starting in 1977, however, the privilege was raised with greater frequency by both Democratic and Republican administrations. The privilege was asserted two times between 1961 and 1970, 14 times between 1971 and 1980, 23 times between 1981 and 1990, 26 times between 1991 and 2000.¹⁶

From 2001 through 2006 both the number of invocations of the privilege and the occasions on which the Administration sought to dismiss a case in its entirety increased significantly. A recent article reviewed all the published cases in which the government has invoked the state secrets privilege since *Reynolds*. The author found that in its first six years, the

¹¹ See *Reynolds*, 345 U.S. at 7 n.11 (citing *Totten v. United States*, 92 U.S. 105, 107 (1875)).

¹² *Totten*, 92 U.S. at 107.

¹³ *Tenet v. Doe*, 544 U.S. 1 (2005).

¹⁴ See *id.* at 3.

¹⁵ *Reynolds*, 345 U.S. at 7.

¹⁶ See Robert M. Chesney, *State Secrets and the Limits of National Security Litigation*, 75 GEO. WASH. L. REV. 1249 (2007), app.

Bush Administration has raised the privilege 20 times, which amounts to 28% more cases per year than in the previous decade.¹⁷ The sample size is small, and it is hard to draw conclusions from published decisions alone.¹⁸ But to the degree that the published cases provide any insight into the policy of the Bush Administration, they are consistent with the conclusion that it has used the privilege with greater frequency than ever before.¹⁹

Furthermore, and of greater significance, the Bush Administration's recent assertion of the privilege differs from past practice in that it is seeking blanket dismissal of every case challenging the constitutionality of specific, ongoing government programs. The data show that the Bush Administration sought dismissal in 92% more cases per year than in the previous decade.²⁰ By comparison, the government responded to lawsuits brought in the 1970s and 1980s challenging its warrantless surveillance programs by seeking to limit discovery, and only rarely filed motions to dismiss the entire litigation.²¹ The current practice represents a marked change not only in the number of assertions of the privilege, but also in the degree to which it is aimed at restricting access to the courts.

The Bush Administration has asserted the privilege in every case challenging two controversial government practices: (1) the use of extraordinary rendition, under which the United States transfers foreigners suspected of having ties to terrorist organizations to foreign countries for interrogation; and (2) the NSA's warrantless wiretapping program, under which the NSA has eavesdropped on electronic communications without first obtaining a warrant. In these cases, the Executive has invoked the state secrets privilege, not just as grounds for excluding specific pieces of evidence, but as a basis for having all litigation challenging these two programs dismissed with prejudice prior to discovery. The government makes almost identical arguments regarding the need for dismissal in each of the extraordinary rendition and NSA warrantless wiretapping cases. Summarized below are two cases in each category to give the reader a sense of the underlying controversy, the position taken by the Bush Administration, and the courts' responses.

¹⁷ *Id.* The government has asserted the privilege even more frequently since 2006. In *Conner v. AT&T*, the government informed the court that it "intends to assert the military and state secrets privilege in all of the[] actions" pending against the telephone company that allegedly provided the United States access to telephone communications without a warrant, and would "seek their dismissal." No. CV F 06-0632, 2006 WL 1817094, at *2 (E.D. Cal. June 30, 2006).

¹⁸ As Professor Chesney is careful to note, using published decisions as the basis for determining the frequency of a particular administration's assertion of the privilege is problematic. Chesney, *supra* note 16, at 1301-02. The Executive's claims may often be decided in unpublished rulings that are not available for analysis. Furthermore, cases decided during one administration might have arisen out of an assertion of the privilege that originated in another administration. And in any event the frequency of the privilege's assertion might have more to do without the number of cases challenging executive branch activity than a particular administration's policy regarding use of the privilege. That said, Professor Chesney analyzed these cases because they provide the only data on the privilege, and because even with the aforementioned limitations they help to guide discussion of patterns in executive assertion of the privilege. *Id.* at 1302.

¹⁹ Professor Chesney did not think these numbers were significant, and in fact argued that they "do[] not support the conclusion that the Bush Administration employs the privilege with greater secrecy than prior administrations." *Id.* at 1301. We disagree with that conclusion.

²⁰ The Executive sought outright dismissal in five cases between 1971 and 1980, nine cases between 1981 and 1990, 13 cases between 1991 and 2000, and 15 cases between 2001 and 2006. *Id.* at app.

²¹ *Id.*

B. Challenges to Extraordinary Rendition

Secretary of State Condoleezza Rice has acknowledged that the “United States and other countries have used ‘renditions’ to transport terrorist suspects from the country where they were captured to their home country or to other countries where they can be questioned, held or brought to justice.”²² The United States denies, however, that the purpose of rendition is to send suspected terrorists to countries that engage in torture.²³ Two subjects of the extraordinary rendition program, Khaled El-Masri and Maher Arar, claim that the United States mistakenly identified them as suspected terrorists and sent them to countries where the U.S. government knew they would be tortured. Both filed lawsuits in federal court against the United States and the private contractors involved in the rendition. In both cases the United States filed motions to dismiss on the ground that the very subject matter of the cases involved state secrets.

1. *El-Masri v. Tenet*

Khaled El-Masri, a German citizen of Lebanese descent, filed a lawsuit against CIA officials and private contractors alleging that he was transported against his will to Afghanistan as part of the United States’ extraordinary rendition program, and that he was repeatedly interrogated, drugged, and tortured throughout his ordeal.²⁴ El-Masri claimed violations of his constitutional rights, as well as international legal norms prohibiting prolonged, arbitrary detention and cruel, inhumane, and degrading treatment.²⁵

The United States filed a motion to dismiss, claiming that maintenance of the suit would inevitably require disclosure of state secrets. The government asserted that “the plaintiff’s claim in this case plainly seeks to place at issue alleged clandestine foreign intelligence activity that may neither be confirmed nor denied in the broader national interest,” but could not give more details about the potential damage because “even stating precisely the harm that may result from further proceedings in this case is contrary to the national interest.”²⁶ El-Masri responded that the government’s practice of extraordinary rendition, as well as his rendition specifically, had been widely discussed in public. His counsel submitted evidence demonstrating that Secretary Rice, White House Press Secretary Scott McClellan, and CIA Directors George Tenet and Porter Goss had all publicly acknowledged that the United States conducts renditions, and that El-Masri’s rendition had been recounted in “numerous” media reports.²⁷ Thus, El-Masri argued that

²² Statement of Condoleezza Rice, Dec. 5, 2007, available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/12/05/AR2005120500462.html>. On September 6, 2006, President Bush publicly acknowledged a CIA program of detaining and interrogating suspected terrorists in foreign locations. See *El-Masri v. United States*, 479 F.3d 296, 302 (4th Cir. 2007).

²³ *El-Masri*, 479 F.3d at 302.

²⁴ *El-Masri v. Tenet*, 437 F. Supp. 2d 530 (E.D. Va. 2006)

²⁵ Specifically, El-Masri brought: (1) a *Bivens* claim against George Tenet, former Director of the CIA, and unknown CIA agents for violations of his Fifth Amendment right not to be deprived of his liberty without due process and not to be subject to treatment that “shocks the conscience”; (2) a claim pursuant to the Alien Tort Statute for violations of international legal norms prohibiting prolonged, arbitrary detention; and (3) a claim pursuant to the Alien Tort Statute for each defendant’s violation of international legal norms prohibiting cruel, inhuman, and degrading treatment.

²⁶ Motion to Dismiss at 11-12, *El-Masri v. Tenet*, 437 F. Supp. 2d 530 (E.D. Va. 2006).

²⁷ *El-Masri*, 479 F.3d at 301.

neither he nor the government needed to rely on privileged information to make their respective cases.

Judge T.S. Ellis granted the government's motion and dismissed the case. Judge Ellis observed that "courts must not blindly accept" the executive branch's assertion of the privilege, but then stated that "courts must also bear in mind the Executive Branch's preeminent authority over military and diplomatic matters and its greater expertise relative to the judicial branch in predicting the effect of a particular disclosure on national security."²⁸ Although the government had publicly acknowledged that it engaged in rendition of suspected terrorists, Judge Ellis concluded that this general information did not render the details of the program as it may have been applied to El-Masri less worthy of being kept classified. Judge Ellis then determined that the case must be dismissed because the United States could not mount a defense without the privileged information.²⁹ He rejected El-Masri's suggestion that the court establish protective procedures to allow the case to go forward, such as providing defense counsel with clearance to review classified documents. Such measures would be "plainly ineffective," Judge Ellis concluded, because the "entire aim of the suit is to prove the existence of state secrets."³⁰ Accordingly, "El-Masri's private interests must give way to the national interest in preserving state secrets."³¹

El-Masri appealed the dismissal to the Fourth Circuit, which affirmed the district court.³² Like Judge Ellis, the Fourth Circuit noted that the Bush Administration had publicly acknowledged the existence of the CIA's extraordinary rendition program generally, and that El-Masri's detention and rendition had been the subject of public investigation and discussion.³³ Nonetheless, the court held that El-Masri could not demonstrate that the defendants were involved in his detention and interrogation without relying on information constituting state secrets.³⁴ The Fourth Circuit also rejected El-Masri's suggestion that the privileged evidence be admitted under seal, to be reviewed only by the court and El-Masri's counsel, who would first obtain the requisite security clearance.³⁵ The court explained that it "need not dwell long" on this proposal, finding that such measures are "expressly foreclosed by *Reynolds*."³⁶

2. *Arar v. Ashcroft*

Maher Arar's claims parallel those raised by Khaled El-Masri.³⁷ Like El-Masri, Arar alleged that he was abducted, detained, and then sent to another country where he was tortured as part of the United States' practice of extraordinary rendition. Arar, a Syrian-born Canadian citizen, was employed as a software engineer in Massachusetts. In September 2002, he was

²⁸ *El-Masri*, 437 F. Supp. 2d at 536.

²⁹ *Id.* at 539.

³⁰ *Id.* at 540.

³¹ *Id.* The district court did not address the United States' alternative argument that the case was nonjusticiable pursuant to the "*Totten* bar." *Id.* at 540.

³² *El-Masri*, 479 F.3d 296.

³³ *Id.* at 302.

³⁴ *Id.* at 308-10.

³⁵ *Id.* at 311.

³⁶ *Id.* at 311.

³⁷ *Arar v. Ashcroft*, 414 F. Supp. 2d 250 (E.D.N.Y. 2006).

vacationing abroad and was detained by U.S. authorities at J.F.K. International Airport in New York City while making a flight connection on his way back to Canada. Federal officials took Arar into custody and held him for 13 days. He was then flown by private jet to Amman, Jordan, where he was delivered to Jordanian officials, who in turn brought him to Syria. In Syria, Arar was imprisoned for a year in a small jail cell where he was beaten and tortured by Syrian security forces. He claimed that his Syrian interrogators worked with U.S. officials, who provided information and questions and received reports from the Syrians about Arar's responses. Arar was released on October 5, 2003. No charges were ever filed against him.³⁸ On October 24, 2007, Secretary of State Condoleezza Rice admitted in a hearing before the House Foreign Affairs Committee that Arar's case was not "handled as it should have been."³⁹

Arar filed suit in the Eastern District of New York claiming that his removal from the United States violated his Fifth Amendment rights, as well as the Torture Victims Protection Act and applicable treaties. Prior to discovery, the government moved for dismissal or summary judgment on state secrets grounds.⁴⁰ The Administration's arguments were identical to those made in El-Masri's case: the very subject matter of the case concerned the details of a program that was secret, and needed to be kept that way to safeguard national security. The government's reasons for detaining Arar, concluding that he was a member of al Qaeda, and then sending him to Syria rather than to Canada cannot be disclosed, the government argued, without jeopardizing national security. Because information at the "core" of Arar's first three claims is a state secret, the government argued that these claims must be dismissed.

The district court dismissed all of Arar's claims, holding that Arar could not seek damages for violation of his constitutional rights "given the national security and foreign policy considerations at stake."⁴¹ Thus, although the court did not directly address the Executive's claim that the case should also be dismissed on state secrets grounds, the government's national security concerns were the basis for dismissal of some of his claims.⁴² A panel of the Second Circuit affirmed the dismissal, and the state secrets privilege again was a factor in its conclusion that Arar could not seek damages from federal officials for violations of his constitutional rights. The Second Circuit stated that assertion of the privilege serves as "a reminder of the undisputed fact that the claims under consideration involve significant national security decisions made in consultation with several foreign powers," and thus "constitutes a further special factor counseling us to hesitate before creating a new cause of action or recognizing one in a domain so clearly inhospitable to the fact-finding procedures and methods of adjudication deployed by the federal courts."⁴³

³⁸ In January 2007, a Canadian commission charged with investigating Canada's role in Arar's extradition concluded that Canadian intelligence officials had erroneously linked Arar to al Qaeda, and then provided that inaccurate information to their American counterparts. Canada issued an official apology to Arar and awarded him approximately \$10 million. See Scott Shane, *Justice Dept. Investigating Deportation to Syria*, N.Y. TIMES, June 6, 2008, at A6.

³⁹ *Rice Admits U.S. Erred in Deportation*, N.Y. TIMES, Oct. 25, 2007, at A10.

⁴⁰ The government did not seek dismissal of Arar's fourth claim on state secrets grounds. That claim concerned his alleged mistreatment while detained in the United States. The United States and the individual defendants sought to dismiss that claim on other grounds.

⁴¹ *Arar*, 414 F. Supp. 2d at 287.

⁴² *Id.*

⁴³ *Arar v. Ashcroft*, 532 F.3d 157, 183 (2d Cir. 2008).

In August 2008, the Second Circuit took the very unusual step of sua sponte granting rehearing en banc. Oral argument is scheduled for December 9, 2008.

C. Challenges to the NSA's Warrantless Wiretapping

President Bush publicly acknowledged the existence of the NSA's warrantless wiretapping program in December 2005 after an article describing the practice appeared in the *New York Times*. As the President explained at a press conference on December 19, 2005, he authorized the NSA to intercept communications for which there were "reasonable grounds to believe that (1) the communication originated or terminated outside the United States, and (2) a party to such communication is a member of al Qaeda, a member of a group affiliated with al Qaeda, or an agent of al Qaeda or its affiliates."⁴⁴ Shortly thereafter, a number of different individuals who believed they had been subjects of the warrantless wiretaps filed suit in federal court challenging the legality of this practice.

1. *Hepting v. AT&T Corporation*

In *Hepting v. AT&T Corporation*,⁴⁵ filed in the Northern District of California, plaintiffs alleged that AT&T collaborated with the NSA to eavesdrop on the communications of millions of Americans. The complaint asserted that AT&T, acting as an agent of the U.S. government, violated the First and Fourth Amendment rights of U.S. citizens, as well as the Foreign Intelligence Surveillance Act (FISA) and various other state and federal laws. Plaintiffs sought damages, restitution, disgorgement, and injunctive and declaratory relief on behalf of the class.⁴⁶ The United States sought to intervene and moved for dismissal or summary judgment on the basis of the state secrets privilege, for three reasons: first, because the "very subject matter of [the action]" concerns privileged information; second, because the plaintiffs could not make their prima facie case without the privileged information; and third, because the absence of the privileged information would deprive AT&T of a defense.⁴⁷ In addition, because the case concerned a covert agreement between AT&T and the government, the United States contended that it qualified for dismissal under *Totten v. United States*.

Judge Vaughn Walker denied the government's motion, explaining that there was a great deal of publicly available information about the NSA terrorist surveillance program that cut against application of the "*Totten* bar."⁴⁸ Turning to the state secrets privilege, the court noted as a threshold matter that "no case dismissed because its 'very subject matter' was a state secret involved ongoing, widespread violations of individual constitutional rights," as were alleged here, but instead most cases concerned "classified details about either a highly technical invention or a covert espionage relationship."⁴⁹ In addition, the court stated that the "very subject matter of this action is hardly a secret" because "public disclosures by the government and AT&T indicate that AT&T is assisting the government to implement some kind of

⁴⁴ Press Release, Press Conference of the President (Dec. 19, 2005), available at <http://www.whitehouse.gov/news/releases/2005/12/20051219-2.html>.

⁴⁵ *Hepting v. AT&T Corp.*, 439 F. Supp. 2d 974 (N.D. Cal. 2006).

⁴⁶ *Id.* at 979.

⁴⁷ *Id.* at 979, 985.

⁴⁸ *Id.* at 993.

⁴⁹ *Id.*

surveillance program.”⁵⁰ Finally, Judge Walker concluded that it was “premature” to decide whether the case should be dismissed on the ground that plaintiffs could not make out a prima facie case or AT&T could not assert a valid defense.⁵¹ Instead, he decided to let discovery proceed and then assess whether any information withheld pursuant to the state secrets privilege would require the suit’s dismissal. In conclusion, Judge Walker commented that he viewed the state secrets privilege as limited, at least in part, by the role of the judiciary in the constitutional structure:

[I]t is important to note that even the state secrets privilege has its limits. While the court recognizes and respects the executive’s constitutional duty to protect the nation from threats, the court also takes seriously its constitutional duty to adjudicate the disputes that come before it. . . . To defer to a blanket assertion of secrecy here would be to abdicate that duty. . . .⁵²

The decision was appealed to the Ninth Circuit. On August 21, 2008, a panel of the Ninth Circuit remanded the case to the district court “in light of the FISA Amendments Act of 2008.”⁵³

2. *ACLU v. NSA*

ACLU v. NSA was filed by a group of journalists, academics, attorneys, and nonprofit organizations.⁵⁴ The plaintiffs regularly communicate with individuals from the Middle East whom the government might suspect of being affiliated with al Qaeda, and thus they claimed a “well-founded belief” that their telephone calls and internet communications have been intercepted under the NSA’s warrantless wiretapping program. They contended that even the possibility that the government is eavesdropping on their calls has a chilling effect on their communications and thus disrupts their ability to talk to clients, sources, witnesses, and generally engage in advocacy and scholarship.⁵⁵ Plaintiffs brought suit in federal court in the Eastern District of Michigan challenging the surveillance program as a violation of the separation of powers doctrine, their First and Fourth Amendment rights, FISA, and other federal laws. They sought declaratory and injunctive relief that would prevent the NSA from eavesdropping on domestic communication without a warrant.

The United States filed a motion to dismiss very similar to that in *Hepting*. The Executive conceded that the “issues before the Court” regarding the constitutionality of the NSA’s surveillance program “are obviously significant and of considerable public interest.”⁵⁶

⁵⁰ *Id.* at 994.

⁵¹ *Id.*

⁵² *Id.* at 995 (internal citations omitted).

⁵³ *Hepting v. AT&T Corp.*, 539 F.3d 1157 (9th Cir. 2008).

⁵⁴ *ACLU v. NSA*, 438 F. Supp. 2d 754 (E.D. Mich. 2006).

⁵⁵ Complaint at 2, *ACLU v. NSA*, 438 F. Supp. 2d 754 (E.D. Mich. 2006).

⁵⁶ Memorandum of Points and Authorities in Support of the United States’ Assertion of the Military and State Secrets Privilege; Defendants’ Motion to Dismiss or, in the Alternative, for Summary Judgment; and Defendants’ Motion to Stay Consideration of Plaintiffs’ Motion for Summary Judgment at 1, *ACLU v. NSA*, 438 F. Supp. 2d 754 (E.D. Mich. 2006).

But it contended that these questions cannot be explored in litigation because disclosure of the “intelligence activities, information, sources, and methods” relevant to the litigation would jeopardize national security.⁵⁷ Without this evidence, the Executive claimed that plaintiffs could neither establish standing to sue nor prove the merits of their claims. Furthermore, the Executive argued that the “very subject matter” of the lawsuit is a state secret, and thus asserted that the litigation must be dismissed, or alternatively the court should grant defendants’ motion for summary judgment.⁵⁸

The plaintiffs responded that the Executive’s public statements acknowledging the existence of the NSA’s surveillance program were sufficient to determine their standing and the lawfulness of the program. The government, however, strongly disagreed: “[T]o decide this case on the scant record offered by Plaintiffs, and to consider the extraordinary measure of enjoining the intelligence tools authorized by the President to detect a foreign terrorist threat on that record, would be profoundly inappropriate.”⁵⁹ The government argued that the President’s exercise of his “core Article II and statutory powers to protect the Nation from attack” cannot be resolved on the basis of the public record alone.⁶⁰

On August 17, 2006, Judge Anna Diggs Taylor rejected the government’s claim that the case should be dismissed on state secrets grounds, and found the NSA’s warrantless wiretapping program to be unconstitutional.⁶¹ The government’s attempt to have the case dismissed prior to discovery suggested to Judge Taylor that the government was arguing that the case was not justiciable under the *Totten* doctrine. Judge Taylor concluded, however, that the *Totten* bar was not applicable because the case did not concern an “espionage relationship between the Plaintiff and the Government,” as had been the case in *Totten* and in the most recent application of that doctrine in *Tenet v. Doe*.⁶² Following the lead of Judge Walker, Judge Taylor reviewed the aspects of NSA’s warrantless wiretapping program that had been publicly admitted by the Administration, and the defense of that program that the Administration had articulated thus far. She concluded that plaintiffs’ challenge to the program could be resolved based on the Executive’s on-the-record statements, and that neither the plaintiffs nor the government needed to discuss the allegedly privileged details of the program to pursue the litigation.⁶³ For those reasons, Judge Taylor denied the government’s motion to dismiss or for summary judgment, and went on to address the merits of the constitutional and statutory challenges to the NSA warrantless wiretapping program.

The Executive filed an appeal in the Sixth Circuit, which reversed the district court and concluded the plaintiffs lacked standing to litigate their claims. The Sixth Circuit agreed with the lower court that because the government had acknowledged engaging in warrantless wiretapping, the case could not be dismissed on the ground that the subject matter of the lawsuit was a state secret.⁶⁴ But the Sixth Circuit concluded that the state secrets privilege applied to bar

⁵⁷ *Id.* at 4.

⁵⁸ *Id.* at 5.

⁵⁹ *Id.* at 3.

⁶⁰ *Id.*

⁶¹ *ACLU*, 438 F. Supp. 2d 754.

⁶² *Id.* at 763.

⁶³ *Id.* at 765-66.

⁶⁴ *ACLU*, 493 F.3d at 650 n.2.

disclosure of documents that could have established standing. Without such records, the plaintiffs could not demonstrate that their own communications had been intercepted by the NSA.⁶⁵

D. Conclusion

The state secrets privilege has strayed far from the narrow evidentiary privilege described in *Reynolds*, and is now being asserted as a basis for dismissal of entire categories of litigation challenging government programs. *Reynolds* admonished that the privilege is “not to be lightly invoked,” and yet it is now cited regularly by the government in numerous cases. As one commentator put it, the state secrets privilege has been “transform[ed] from a narrow evidentiary privilege into something that looks like a doctrine of broad government immunity.”⁶⁶

IV. The State Secrets Privilege and the Courts

The cases described above demonstrate that many judges readily defer to executive claims of privilege. Judges explain that they are ill-equipped to determine whether the information sought in discovery would undermine relations with foreign governments, put informants at risk, or alert terrorists to government surveillance. Judges repeatedly assert that they must defer to the executive because they lack the ability to make independent judgments about the executive’s claimed need for the privilege, and frankly concede that they are reluctant second-guess the executive’s assertions that disclosure will put the nation at risk.

But the executive is also not a good judge of the need for the privilege. When high-ranking government officials are sued for violating the law, they have an obvious self-interest in avoiding scrutiny of their actions and the liability that might follow. Although there have been many legitimate assertions of the privilege, the executive has also been known to overuse the privilege to avoid the embarrassment, cost, and hassle of litigation. Indeed, *Reynolds* itself is claimed to have been just such a case. Although the United States had asserted that the accident investigation report sought in that case contained state secrets, when the report was eventually declassified many years later, a leading expert on the case observed that the report “revealed . . . serious negligence by the government” but “nothing that could be called state secrets.”⁶⁷ Judges cannot simply accept sweeping executive claims of privilege, because to do so would be to allow the executive to serve as judge and jury in its own case.

As James Madison explained, the federal courts play an essential role in checking the power of the executive, thereby preventing the “tyranny” that results from the “accumulation of all powers legislative, executive and judiciary in the same hands.”⁶⁸ Indeed, the Framers of the Constitution provided federal judges with life tenure and salary protections in part to ensure that courts can block legislative and executive branch overreaching without fear of retribution. When courts dismiss cases challenging the legality of executive conduct, they have abdicated this vital role in the tripartite system of government.

⁶⁵ *Id.* at 653.

⁶⁶ Henry Lanman, *Secret Guarding*, SLATE, May 22, 2006, available at <http://www.slate.com/id/2142155>.

⁶⁷ See Fisher, *supra* note 2, at xi.

⁶⁸ THE FEDERALIST No. 47, at 324 (James Madison) (J. Cooke ed., 1961).

Of particular importance is the federal judicial role in safeguarding individual constitutional rights against executive abuse of power – issues directly implicated by challenges to extraordinary rendition and warrantless wiretapping. The Supreme Court has repeatedly asserted its power to review constitutional claims, despite executive and legislative attempts to strip courts of jurisdiction, observing that “serious constitutional questions [] would arise” if a plaintiff were denied “any judicial forum for a colorable constitutional claim.”⁶⁹ In the leading case on this question, *Webster v. Doe*, the government made many of the same arguments against judicial review that it raises in cases challenging extraordinary rendition and warrantless wiretapping. In *Webster*, a former CIA employee challenged his termination on the ground that it violated his constitutional rights to equal protection and due process. The government responded that no court could review the decision to terminate Webster, arguing that “judicial review even of constitutional claims will entail extensive ‘rummaging around’ in the Agency’s affairs to the detriment of national security.”⁷⁰ The Court rejected this argument, concluding that the need for a judicial forum in which to litigate constitutional claims was too weighty an interest to preclude litigation entirely, and explained that the district court could control discovery so as to “balance [the employee’s] need for access to proof . . . against the extraordinary needs of the CIA for confidentiality and the protection of its methods, sources, and mission.”⁷¹ The recent decisions denying plaintiffs a forum in which to litigate their claims challenging the constitutionality of extraordinary rendition and warrantless wiretapping are incompatible with this long tradition of judicial protection of individual rights.

Plaintiffs challenging warrantless wiretapping claim that the practice exceeds statutory as well as constitutional limits, and thus these cases should be even harder for courts to dismiss without review. Congress enacted FISA precisely to limit executive power to monitor the communications of those within the United States.⁷² When courts dismiss claims that FISA has been violated, they undermine Congress’s authority as well as their own, rendering laws like FISA a nullity. The Supreme Court has repeatedly rejected the executive’s attempt to assume the unilateral power to decide for itself what the law requires. As the Court explained in *Hamdi v. Rumsfeld*, “it would turn our system of checks and balances on its head to suggest that a citizen could not make his way to court with a challenge to the factual basis for his detention by his government, simply because the Executive opposes making available such a challenge.”⁷³ Likewise, the executive cannot be allowed to ignore the limitations imposed by federal law and then seek to avoid judicial review entirely on the ground that the case concerns a “state secret.”

Although the federal courts may not have the expertise to determine in every case which information constitutes a state secret, they are well-equipped to apply safeguards and protective procedures that would allow litigation to proceed without jeopardizing national security. Indeed, courts have done so on a regular basis for decades. Long before the Bush Administration took office, courts responded to the Executive’s claimed need for secrecy in challenges to the CIA’s employment practices, in Freedom of Information Act (FOIA) cases, and in countless criminal

⁶⁹ *Webster v. Doe*, 486 U.S. 592, 603 (1988) (citing *Bowen v. Michigan Acad. of Family Physicians*, 476 U.S. 667, 681 n.12 (1986)).

⁷⁰ *Id.* at 604 (citing Tr. of Oral Arg. 8-13).

⁷¹ *Id.* at 604.

⁷² Americo R. Cinquegrana, *The Walls (and Wires) Have Ears: The Background and First Ten Years of the Foreign Intelligence Surveillance Act of 1978*, 137 U. PA. L. REV. 793, 806-08 (1989).

⁷³ *Hamdi v. Rumsfeld*, 542 U.S. 507, 536-37 (2004).

cases. Such cases were not dismissed on the pleadings. Rather, courts applied longstanding litigation tools designed to allow litigation to proceed while at the same time safeguarding national security. For example, courts can require the executive to submit allegedly classified documents in camera, so that only the court can review them to determine whether the documents can be withheld from the opposing party. So too, courts can allow attorneys who hold appropriate security clearances to review classified materials on behalf of their clients. In FOIA cases, the government has long been required to generate an index describing each document withheld and explaining the basis for the executive's claim that its disclosure would harm national security.⁷⁴ This procedure allows both the court and the opposing party to determine which documents are truly relevant and to challenge the basis for the executive's claim that the documents must remain secret. Finally, courts regularly mandate that the United States segregate any non-classified material from classified documents to provide the opposing party with as much information as possible.⁷⁵

Significantly, courts and Congress have successfully worked together in the past to manage classified evidence in criminal prosecutions. In 1980, Congress enacted the Classified Information Procedures Act (CIPA) to balance the government's interest in protecting such information from disclosure against criminal defendants' need to obtain all information relevant to their defense. Under CIPA, the court responds to a defense request for classified documents by first determining whether the evidence sought is relevant and material. If so, the burden shifts to the government to show that the information contains sensitive information about national security that cannot be publicly disclosed.⁷⁶ Even if the government satisfies its burden, the information is not completely withheld from the defendant. Rather, the court decides whether a modification or substitute for the evidence is possible. CIPA requires the government to produce redacted versions of documents, submit a summary of the information in the classified documents, or substitute a statement admitting relevant facts that the classified documents would prove.⁷⁷ If the government fails to provide a sufficient substitute for the requested documents, the court may dismiss specified counts or even the entire prosecution.⁷⁸ Similar procedures should be followed in the context of civil cases, as is proposed in pending legislation that is described in more detail below.

In sum, there are many steps short of outright dismissal that judges can take to protect state secrets from public disclosure. At the very least, judges should allow discovery to proceed in some fashion before deciding whether the "very subject matter" of the case requires its dismissal. What courts should not do is find that executive claims of privilege are grounds for immediate dismissal of entire categories of cases challenging the legality of executive conduct. The dismissals are particularly egregious considering that the Bush Administration has expressly conceded the existence of both the NSA's warrantless wiretapping and the practice of extraordinary rendition, albeit only after journalists uncovered the practices and pressed the Administration to justify them. These activities are public, not secret, and determining their legality is important not just to those harmed by them, but to all who might be in the future. It is

⁷⁴ See *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973).

⁷⁵ See, e.g., *Schiller v. NLRB*, 964 F.2d 1205, 1209 (D.C. Cir. 1992).

⁷⁶ See *United States v. Yunis*, 867 F.2d 617, 622 (D.C. Cir. 1989).

⁷⁷ 18 U.S.C. App. § 4.

⁷⁸ 18 U.S.C. App. § 6.

time the courts determined the legality of executive conduct rather than ducking these questions at the executive's behest.

V. The State Secrets Privilege and the New Administration

A. The Need for the Executive Branch to Reform the Privilege

The next presidential administration should reform the use of the state secrets privilege. By adopting some or all of the steps proposed below, the new administration can ensure that the coordinate branches of government are able to fulfill their constitutional roles. These measures will reduce inter-branch friction, restore Congress's and the courts' trust in the executive branch, and ensure that Americans are not denied justice by their own government.

As scholars, lawyers, and policymakers have recognized, the executive branch can place its programs on firmer ground, and better protect both the nation's security and liberty, through working with and not against the coordinate branches of government. Jack Goldsmith, a former senior official in the Bush Pentagon and Justice Department, testified before the Senate Judiciary Committee last year that "[t]he administration's failure to engage Congress deprived the country of national debates about the nature of the threat and its proper response that would have served an educative and legitimating function regardless of what emerged from the process."⁷⁹ As Professor Goldsmith explained, "[w]hen the Executive branch forces Congress to deliberate, argue, and take a stand, it spreads accountability and minimizes the recriminations and other bad effects of the risk taking that the President's job demands."⁸⁰ Just as an extreme unilateralist approach with respect to Congress ultimately undermines authority and support for administration programs, so too will an administration's efforts to limit the role of the courts through excessive use of the state secrets privilege eventually backfire.

When the executive branch deprives courts of the ability to perform their constitutional job of interpreting the law and administering justice, it calls into question the legal basis for its programs, and cause judges and the public at large to question whether the executive branch is operating in good faith. This may, over time, lead to a "boy who cried wolf" scenario where the executive cannot rely on the privilege in a situation in which it is truly necessary. Indeed, Maher Arar's case illustrates the growing skepticism regarding the Bush Administration's assertion of the privilege. Even as the government was claiming that Arar's case could not proceed because it might damage U.S. relations with Canada, the Canadian government was holding public hearings on the matter, and ultimately issued an apology to Arar and awarded him approximately \$10 million.⁸¹ Distrust of the Administration's claimed need for secrecy may have been the basis for the Second Circuit's highly unusual decision to sua sponte grant rehearing en banc of an appellate panel's dismissal of Arar's case. If the new administration wishes to avoid judicial and legislative second-guessing of its claims of privilege, it should better police its assertions of the privilege.

⁷⁹ Testimony of Jack Goldsmith on "Preserving the Rule of Law in the Fight Against Terrorism" Before the S. Comm. on the Judiciary (Oct. 2, 2007) (hereinafter Goldsmith Testimony), *available at* http://judiciary.senate.gov/testimony.cfm?id=2958&wit_id=6693.

⁸⁰ *Id.*

⁸¹ *See* Shane, *supra* note 38.

B. Specific Measures the New Administration Should Adopt

The next administration should consider implementing the following measures upon taking office. These proposals could be adopted individually, or grouped together as a comprehensive package. The list below is not intended to be exhaustive, but rather to suggest useful avenues for the new administration to pursue.

First, the new administration should conduct an across-the-board review of all pending litigation in which the government – either as a party or an intervenor – has invoked the state secrets privilege. Just because the Bush Administration invoked the privilege in a particular case does not mean the new administration should consider itself bound by its predecessor’s litigation approach. This across-the-board review should be carried out by a joint group of career employees and political appointees of the new administration, and should include officials from both the Justice Department and the intelligence and national security communities. It should cover not only cases that are pending in district courts, but also those in which the state secrets privilege is at issue on appeal.

Second, the next president should issue an executive order, binding on all federal agencies, that sets out substantive legal standards regarding use of the privilege. This order might include a new definition of what constitutes a state secret and what evidence the government believes is appropriately subject to the privilege, based either on the current classification system,⁸² or the definitions of “state secrets” in proposed legislation that is currently pending before Congress. An important element of an executive order on the privilege would be creating a standard for when the government may seek outright dismissal of a case, at the pleadings stage, on the basis of the privilege. For example, an effective order could emphasize that this approach is supported by precedent only in cases involving secret espionage agreements, such as those at issue in *Totten v. United States* and *Tenet v. Doe*, and may not be appropriate in cases relating to other subjects. The executive order should take into account the harm to litigants and the public of invoking the privilege either to prevent introduction of evidence or seek dismissal of the case. The president’s constitutional responsibilities include not only protecting the nation’s security, but also taking care that the laws are properly enforced.⁸³ If important evidence is kept out of court, or entire cases are dismissed on the pleadings, the law cannot be optimally followed and enforced. Accordingly, the executive branch should adopt a substantive standard that requires it to evaluate the harm that will result when invoking the state secrets privilege.

Third, either as part of an executive order or through a formal memorandum issued by the new attorney general, the administration should create a durable and extensive review process within the executive branch for deciding when to assert the privilege in future cases. Internal procedural requirements within the bureaucracy can create a strong layer of checks and balances, taking advantage of the benefits of multiple viewpoints and the experience and judgment of career civil servants.⁸⁴ When just a few executive branch officials make decisions without

⁸² See Exec. Order No. 13292, 68 Fed. Reg. 15,315 (Mar. 25, 2003) (specifying classification guidelines).

⁸³ See U.S. CONST., Art. II, § 3 (the President “shall take Care that the Laws be faithfully executed”).

⁸⁴ See Neal Kumar Katyal, *Internal Separation of Powers: Checking Today’s Most Dangerous Branch from Within*, 115 YALE L.J. 2314, 2317 (2006) (arguing that the bureaucracy can serve as a “critical mechanism to promote

broader consultation and input, the results can be severely flawed. This is especially the case with complex legal analysis, as demonstrated by the failures resulting from the Bush Administration's refusal to seek input from different officials within the administration.⁸⁵ As Professor Goldsmith testified before the Senate Judiciary Committee, “[c]lose-looped decision-making by like-minded lawyers resulted in legal and political errors that would be very costly to the administration down the road. Many of these errors were unnecessary and would have been avoided with wider deliberation and consultation.”⁸⁶

Judicial doctrine provides that the state secrets privilege may only be “lodged by the head of the department which has control over the matter” – not a low-level official.⁸⁷ That official must give “actual personal consideration” to the issue, and attest to this in a formal declaration.⁸⁸ Recent practice suggests, however, that these doctrinal procedural requirements are insufficient in light of the significant impact of invocation of the privilege. And although officials from the Bush Justice Department have asserted that attorneys from the Department, in addition to counsel from the relevant agency, are involved in determining when to invoke the privilege, they have not indicated the existence of any formal review process within the Justice Department.⁸⁹

The new administration or Justice Department should institute a formal process for invoking the privilege, by setting out a list of offices or officials who must sign off on the decision. To begin, a senior official within the Department, perhaps the deputy attorney general, should be required to personally approve all invocations of the privilege. This will provide accountability for secrecy at the highest levels of the administration. Moreover, a new review process might include a referral to the Department's Professional Responsibility Advisory Office (PRAO) to ensure that the privilege is not being invoked out of a conflict of interest.⁹⁰ Further, the Justice Department should consider establishing a litigant's ombudsman who could serve as an advocate for the members of the public who would be harmed by invocation of the

internal separation of powers” in part because it “contains agencies with differing missions and objectives that intentionally overlap to create friction.”).

⁸⁵ See Goldsmith Testimony, *supra* note 79 (“For example, the controversial interrogation opinion of August 1, 2002, was not circulated for comments to the State Department, which had expertise on the meaning of torture and the consequences of adopting particular interpretations of torture. Another example is the Terrorist Surveillance Program (TSP). Before I arrived at OLC, the NSA General Counsel did not have access to OLC's legal analysis related to the TSP.”).

⁸⁶ *Id.*

⁸⁷ See *United States v. Reynolds*, 345 U.S. 1, 7-8 (1953).

⁸⁸ *Id.*

⁸⁹ See Letter from Michael Mukasey, U.S. Att'y Gen., to Sen. Patrick Leahy (Mar. 31, 2008) (hereinafter Mukasey Letter) (asserting that “[s]everal procedural and substantive requirements preclude the state secrets privilege from being lightly invoked or accepted” but not delineating any within the Justice Department); Statement of Carl J. Nichols, Dep. Ass't Att'y Gen., Before the S. Comm. on the Judiciary (Feb. 13, 2008), *available at* <http://www.fas.org/sgp/congress/2008/021308nichols.html> (“In practice, satisfying these requirements typically involves many layers of substantive review and protection. The agency with control over the information at issue reviews the information internally to determine if a privilege assertion is necessary and appropriate. That process typically involves considerable review by agency counsel and officials. Once that review is completed, the agency head – such as the Director of National Intelligence or the Attorney General – must personally satisfy himself or herself that the privilege should be asserted.”).

⁹⁰ See Professional Responsibility Advisory Office Website, *available at* <http://www.usdoj.gov/prao/mission.htm> (stating that the mission of PRAO includes providing “definitive advice to government attorneys and the leadership at the Department on issues relating to professional responsibility”).

privilege.⁹¹ By requiring that these offices approve the government's exercise of the privilege, the new administration would bring more viewpoints into its deliberations and reduce the likelihood of error or unnecessary harm to the interests of justice.

Fourth, the administration should institute a system to automatically refer evidence that it asserts is privileged to an Office of the Inspector General (OIG). Even if the privilege is invoked appropriately and narrowly by the administration, and subjected to careful review by the courts, the state secrets privilege will prevent the introduction of some important evidence in court. This is the very purpose of the privilege, and it may sometimes be necessary to prevent the disclosure of secret information that would harm the nation's security – even when that evidence demonstrates illegal activity. Because even proper use of the privilege can disrupt the usual system of checks and balances and limit oversight of the executive branch, it is important that an independent body within the executive branch review the evidence and take action to prevent or ameliorate violations of the law that cannot be disclosed in court. By mandating referral of assertedly privileged evidence to an OIG, the new administration can ensure that any evidence of abuse or wrongdoing – even if properly covered by the privilege – will be addressed and corrected. The Justice Department's OIG has demonstrated extraordinary integrity and independence in recent years, and thus would be the appropriate office to conduct the review. However, if the administration believes it appropriate, the privileged evidence could be referred to the relevant department or agency OIG, for example that within the Department of Defense or the CIA. The OIG could then serve as a partial substitute for the courts by investigating and providing accountability for any wrongdoing revealed by the privileged evidence.

Finally, the new administration should encourage the next Congress to enact the State Secrets Protection Act, discussed below, or similar legislation. Rather than work with Congress to craft state secrets legislation, the Bush Administration has attempted to undermine the proposed legislation by making specious attacks on its constitutionality and vowing to veto any bill passed by Congress.⁹² The new administration should work with members of the House and Senate Judiciary Committees to pass and sign into law the State Secrets Protection Act. At a minimum, it should cooperate with the Judiciary Committees to modify these bills to address its concerns. The next section discusses the legislation and its benefits in more detail.

Adopting these measures would enable the new administration to restore a proper balance between the branches of government, fulfill its constitutional responsibilities to enforce the rule of law, and protect both national security and the interests of justice.

VI. The State Secrets Privilege and Congress

Congress also has the power to shape the judicial response to the state secrets privilege, and a bipartisan group of legislators has recently introduced legislation seeking to do so. In January 2008, Senators Edward Kennedy, Patrick Leahy, and Arlen Specter introduced the State Secrets Protection Act,⁹³ which is a bill to regulate the use of the state secrets privilege. The Act

⁹¹ A model for this would be the Justice Department's Office of the Victims' Rights Ombudsman. *See* <http://www.usdoj.gov/usao/eousa/vr/index.html> (describing that office's mission and operations).

⁹² *See* Mukasey Letter, *supra* note 89.

⁹³ The State Secrets Protection Act of 2008, S. 2533, 110th Cong.

was voted out of the Senate Judiciary Committee, but did not reach the floor. The House of Representatives also introduced a Bill to reform the use of the state secrets privilege, which was recently approved by the House Judiciary Subcommittee on the Constitution, Civil Rights, and Civil Liberties.⁹⁴ Although these bills likely will not be enacted into law by this Congress, we hope similar legislation will be revived by a future Congress to provide much-needed guidance to courts struggling to resolve blanket assertions of privilege.

A. Overview of the State Secrets Protection Act

This section will briefly describe the Senate version of the State Secrets Protection Act, S. 2533, which is quite similar to the bill pending in the House. The Act states that a court shall not dismiss a case on state secrets grounds prior to holding a hearing on the matter. As is already the case, the Act requires that the government provide an affidavit, signed by the head of the executive branch agency responsible for the information, explaining the factual basis for the claim of privilege. In addition, the government must make all the evidence it claims is subject to the privilege available for review by the judge, together with an index explaining the basis for withholding each item of evidence. For each item the government asserts is privileged, the court must determine whether the claim is valid, and whether it is possible to segregate and disclose non-privileged evidence.

If the court agrees with the government that material evidence is privileged, the Act provides that it should then attempt to craft a non-privileged substitute that will allow the case to go forward. This portion of the Act is modeled after CIPA, described in more detail above, which has proven effective in governing the use of classified evidence in criminal cases. For example, the court might order the government to provide a summary of the privileged information, or a statement admitting relevant facts established by the privileged information. If the government refuses to comply with such an instruction, the court must resolve the disputed question of fact or law to which the evidence relates in favor of the plaintiff. If, however, the court concludes that material evidence is privileged and a substitute is not possible, it may dismiss the claim if it concludes that, in the absence of evidence, the defendant would be unable to pursue a valid defense to the claim.

If attorneys for the nongovernmental parties obtain security clearance, the Act states that they may review the affidavits and motions, and participate in the hearings. The court also has the authority to appoint a guardian ad litem with the necessary clearance to represent a party at a hearing on the privilege, and to stay proceedings while an attorney applies for such a security clearance. Finally, the Act provides that the attorney general report to Congress any assertion of the state secrets privilege so that Congress can monitor its use.

B. The Constitutionality of the State Secrets Protection Act

Some have argued that the state secrets privilege is rooted in the executive's constitutional role as commander-in-chief, and thus contend that this legislation might impermissibly encroach on executive authority.⁹⁵ The Supreme Court has never held that the

⁹⁴ The State Secrets Protection Act of 2008, H.R. 6507, 110th Cong.

⁹⁵ See Mukasey Letter, *supra* note 89.

privilege is constitutionally required, however, or that it is within the exclusive control of the executive branch. In *Reynolds*, the United States argued that it had “inherent” power to withhold information that it claimed contained claimed secrets, but the Court expressly eschewed reliance on this “broad proposition[.]”⁹⁶ The Court made clear that the judiciary should not blindly accept the executive’s assertions of the privilege, but rather declared that the “court itself must determine whether the circumstances are appropriate for the claim of privilege.”⁹⁷ In short, administration of the privilege has always been shared by the executive and judicial branches, and the Constitution certainly does not bar Congress from playing an active role as well.

Moreover, the legislative, executive, and judicial branches have a long tradition of working together to provide access to information for litigants without jeopardizing national security. For example, FOIA provides that the government may withhold from public disclosure information that has been classified under Executive Order, but gives the courts the authority to decide de novo whether the classification is reasonable.⁹⁸ FOIA requires that administrative agencies segregate all non-classified material from classified documents, and assigns courts the task of ensuring that agencies have disclosed all “reasonably segregable” portions of classified records.⁹⁹ Likewise, CIPA demonstrates that it is possible to enact legislation that protects sensitive information without sacrificing either national security or the role of the courts in upholding the law. The State Secrets Protection Act is a useful addition to this existing body of legislation, the constitutionality of which is well-established.

C. Merits of the State Secrets Protection Act

The pending legislation would accomplish a number of important objectives. First, by setting out parameters for use of the privilege, the Act would ensure that most cases challenging the legality of government conduct will proceed despite the presence of privileged information, and will do so without jeopardizing national security. Using CIPA as its model, the Act would provide judges with several different options as to how to proceed when the executive raises a claim that relevant evidence contains state secrets. These guidelines would assist the courts and litigants as they seek to find a means to litigate cases that involve evidence relating to national security, rather than leaving them to flounder under the ad hoc procedures and varying standards employed by the courts today.

Second, the Act would ensure that sensitive national security information will not be publicly disclosed. The Act provides the same security safeguards that have proven effective in CIPA cases, and prevents privileged evidence from ever being produced. At the same time, the Act attempts to ameliorate the impact this might have on innocent litigants as much as is possible.

Third, the Act would require the attorney general to report within 30 days to the House and Senate Intelligence and Judiciary Committees each instance in which the United States

⁹⁶ *Reynolds*, 345 U.S. at 6 n.9.

⁹⁷ *Id.* at 8.

⁹⁸ 5 U.S.C. § 552(b)(1).

⁹⁹ 5 U.S.C. § 552(b). *See also* *Ctr. for Int’l Env’tl. Law v. Office of the Trade Representative*, 505 F. Supp.2d 150, 158 (D.D.C. 2007) (stating that even when documents are classified, and thus exempt under FOIA, the government must disclose all reasonably segregable non-classified information within those documents).

claims the privilege. In the unusual circumstance that a case must be dismissed due to the sensitive nature of evidence vital to a valid defense, Congress would be alerted to the problem and would be able to engage in the executive oversight that is no longer possible in court.

Finally, the Act would reestablish Congress's role in regulating the cases that come before federal courts and the evidence that can be heard in such cases. Under Article I, Section 8, and Article III, Section 2, of the U.S. Constitution, Congress has broad authority both to grant federal courts jurisdiction over cases challenging executive conduct and to establish rules regarding the evidence that may be presented in such litigation. Indeed, Congress has always taken an active role in providing for rules regarding the admission of evidence in federal court, as illustrated by FOIA, CIPA, and the Federal Rules of Evidence. Furthermore, Congress is ideally situated to craft procedures to protect national security information without sacrificing litigants' rights to hold the executive accountable for violations of federal law. The State Secrets Protection Act provides a systematic approach that takes into account both the security of the country and the interests of litigants, and would provide essential guidance to courts struggling with this issue.

VII. Conclusion

The Bush Administration's assertions of the state secrets privilege as grounds for immediate dismissal of challenges to the government's use of extraordinary rendition and warrantless wiretapping are unprecedented. Although the Administration has acknowledged both programs exist, and even revealed details of how they operate, it nonetheless claims that the very subject matter of the litigation is too sensitive to undergo judicial review. In short, the privilege is no longer being used to exclude documents from litigation, as in *Reynolds*, but rather now is asserted as a bar to any judicial review of executive conduct in these areas. The transformation of the privilege into a claim of immunity is not supported by Supreme Court jurisprudence and is incompatible with the judicial role in overseeing the executive branch.

Fortunately, there is no need to choose between full disclosure of state secrets on the one hand or immediate dismissal of all pending litigation challenging these programs on the other. A middle ground exists that can accommodate both interests. Courts can respond to assertions of the privilege by structuring discovery so as to balance the need for secrecy against the rights of litigants. Judges have long crafted special procedures to protect privileged material, such as by requiring redactions, summaries, indexes, and other modifications to discovery requests, and these same techniques should be employed in cases in which the government raises the state secrets privilege. The executive branch can take steps internally to clarify the appropriate standards for assertion of the privilege and increase the participation of all relevant parties in making the decision to invoke the privilege. Finally, Congress can pass legislation such as the State Secrets Protection Act to protect both the interests of litigants and secret national security information.