THE POWER TO CONCEAL:
EXECUTIVE POWER AND THE STATE SECRETS PRIVILEGE

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THE POWER TO CONCEAL:
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ABSTRACT

Though conceived as a common law evidentiary privilege, for use within a trial, to protect discreet pieces of evidence in the public interest, the primary purpose of the state secrets privilege today is to conceal executive policy and activities. Following 9/11, the Bush administration began to utilize the state secrets privilege in a new way by demanding that cases, in which state secrets were allegedly involved, be dismissed before trials even began. President Obama has continued to expand the use of the privilege as broadly as his predecessor. My dissertation explores this dilemma of policy continuity. The resulting study is focused on the intersection of the institutional and personal presidency, and the embeddedness of secrecy within the executive branch. It finds that the institutional protections of the state secrets privilege far outweigh the personal preferences, ideology or scruples of whichever individual inhabits the Oval Office.
With immense gratitude to my parents, Janet and Howard Morgan; my sisters, Melanie and Tiffany Morgan; and my beloved, Jann Yogman. Your unending love and support made this project possible.

For my daughters, Bellamy and Esslyn.

Many Thanks,

**BRIANA ROSE MORGAN**
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Introduction: There’s No Such Thing as the State Secrets Privilege

In many ways, the very concept of a state secrets privilege is problematic in a free and open society. In a political system built on fear of tyranny and ambivalence toward executive action, a privilege used to prohibit public and political accountability strikes a dissonant chord. Although often referred to as “an ancient privilege with deep roots in Anglo-American law,”¹ the state secrets privilege was actually first recognized by United States law just over 60 years ago and has never been formalized through statute or legislation. Despite this, over the last half-century, the courts have allowed it to expand from a common law evidentiary privilege² to what is essentially blanket immunity for activities undertaken by the executive branch and those they employ, all in the name of national security.

Though conceived as an evidentiary privilege to be used only in the public interest, the primary purpose of the state secrets privilege today is to act as the ultimate legal shield to conceal executive policy and activities. According to the Congressional Research Service, the state secrets privilege is “a judicially created evidentiary privilege that allows the federal government to resist court-ordered disclosure of information during litigation if there is a reasonable danger that such disclosure would harm the national security of the United States.”³ Rejecting the judicial origins of the privilege, modern presidents have called it a constitutional privilege,⁴ although there is no mention of any presidential secrecy privilege in the U.S. Constitution or in any U.S. statute. The

² An evidentiary privilege is a rule of evidence that allows the holder to refuse to provide evidence, or bars evidence from being disclosed in a judicial proceeding.
absence of clear legal authority, coupled with an alarming trend of absolute judicial deference to claims of secrecy by the executive branch, demand inquiry into this most powerful state secrets privilege.

For most of American history, the state secrets privilege was a sleeping giant. It reared its head once every 50 years or so, generally in times of war, to impact a discreet group of cases before settling back into legal obscurity. But over the last two decades, dozens of controversial activities of the executive branch, including warrantless wiretapping, secret databases of digital information, extraordinary rendition, torture, unmanned drone assassinations and others have been concealed behind a shield of presidential secrecy. Any attempt by American citizens to challenge such programs through the courts has been preemptively dismissed through the use of the state secrets privilege. Throughout its history, the privilege has been considered a technical area of the law, obscure to even most attorneys. But the truth is that the state secrets privilege goes to the very heart of our constitutional government and unique American system of checks and balances,⁵ one that gives individuals an opportunity to challenge the legality and constitutionality of government action in court.

The story of the state secrets privilege begins as a divine right of kings and ends in obscured presidential action in matters as sensational as extraordinary rendition and drone assassinations, and as mundane as the employment practices at intelligence agencies. Along that chain is the earliest legal assertion of a secrecy privilege by King Charles I, its conspicuous absence from the U.S. Constitution, the first claim of executive privilege by Thomas Jefferson, a lawsuit from a Civil War spy and a Cold War spy plane that crashed due to negligent maintenance, which left three young, civilian mothers as

⁵ Statement of Louis Fisher before the Committee on the Judiciary, U.S. Senate, February 13, 2008 at p.160
widows. The modern history of the privilege sheds light on Richard Nixon’s notable failed attempts to conceal the infamous Watergate Tapes and the warrantless wiretapping of left-wing activists in the 1970s. The rise of the national security network appears in stark relief as the state secrets privilege begins to be asserted, not only in claims where the government is a party, but also in cases where private individuals sue government contractors.

Against the backdrop of the Cold War, the executive branch made a novel claim. It alone was the custodian of national security secrets, and the judicial branch could not review anything the executive branch decreed to be secret. The Supreme Court accepted the assertion and outlined basic regulations for future invocations of the state secrets privilege. Over the next 50 years, presidents slowly expanded the scope of the privilege, both in the number of invocations per administration and in the breadth of cases in which it was invoked, thus expanding a range of policies and activities beyond an increasingly opaque wall of secrecy.

The terrorist attacks of 9/11 presented the executive branch with another opportunity to expand the utility of the state secrets privilege. For most of its history, the state secrets privilege was used to withhold specific pieces of privileged information within a trial. The Bush administration began to utilize the privilege in a new way by demanding that cases, in which state secrets were allegedly (or even potentially) involved, be dismissed before trials even began. The state secrets privilege was no longer being used to protect individual national security documents within a normal process of trial discovery in a discreet category of cases, suddenly it became the first line of defense.
The dismissal of so many lawsuits, in which the government is charged with illegal and unconstitutional actions, has undermined our system of checks and balances.

Although the Supreme Court warned that a state secrets privilege could not “justify a broad doctrine of executive immunity from judicial oversight,” that is exactly what the modern state secrets privilege has become. Beginning with the seminal case back in 1953, the state secrets privilege has been used to conceal activities that range from embarrassing to criminal. This use of the privilege by the executive branch (and the failure of the courts to exercise independent review over such claims) has allowed serious, ongoing abuse of executive power to go unchecked and unconstrained.

At the beginning of 2009, observers predicted an end to the majority of the Bush Administration’s national security policies. Presidential candidate, Senator Barack Obama had been highly critical of the Bush Administration’s obsession with secrecy and was particularly disparaging of the way President Bush had used the state secrets privilege to force the dismissal of litigation and conceal national security programs. But power acquired by the presidency becomes embedded in the institution very quickly.

Even when the ideological and historical justifications for secrecy recede, it is almost impossible to reduce executive power. The personal inclinations of the President are often constrained by the institutional features of the executive branch. There is evidence, that will be explored further, that the national security network embedded within the executive branch constrains presidential preference in a number of important ways. In fact, President Obama made his first invocation of the state secrets privilege during his first hundred days when he demanded the dismissal of a case brought by a man who was kidnapped and tortured after being mistaken for a terrorist suspect. Since then,

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despite public statements in favor of constraining the state secrets privilege, “By holding ourselves to this higher standard, we're in some way sending a message to the courts. We're not following a ‘just trust us’ approach,” President Obama has continued to expand the use of the privilege as broadly as his predecessor.

Much of the previous literature in this field has focused on the ideological approach of the Bush Administration, which underscores many of the most notable cases. However, the national security activities of the Obama Administration suggest that the sharp increase in assertions of the state secrets privilege was not idiosyncratic to the Bush Administration. One president’s personal activities become another’s institutionalized power. President Obama now utilizes the state secrets privilege for political purposes that presidential candidate Obama found reprehensible. This project explores this dilemma of policy continuity. If Senator Obama objected so strenuously to President Bush’s use of the state secrets privilege, then why does President Obama employ it in exactly the same way? To answer this question, we must examine the intersection of the personal presidency and the institution and how that shapes the executive branch.

**The Executive Branch As An Institution**

In the 18th and 19th century, the executive branch was little more than the personal staff of the president, with the entire executive branch numbering less than 40 staff members as late as 1920. In the early 20th century the executive branch began a period of expansion and institutionalization. Institutionalization is the process by which an organization achieves stability and value, and resists or survives both internal and

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external change.\textsuperscript{9} Specifically, “it exhibits continuity and importance in spite of changes in individual or environmental exogenous constraints.”\textsuperscript{10} Beginning with the Budget and Accounting Act of 1921 (which created the modern federal budget), the executive branch began to shift from “a personal presidential staff to the rudiments of a presidential organization.”\textsuperscript{11} This process was expanded in 1939 by the founding of the Executive Office of the President (EOP) which included both the White House Office (WHO) and the Bureau of the Budget (now the Office of Management and Budget, OMB). Under President Truman, the institutional power base of the Executive Branch took another leap forward when Congress enacted the National Security Act of 1947. This law consolidated the military under the newly created Secretary of Defense and created the Joint Chiefs of Staff. It also established the Central Intelligence Agency (CIA), National Security Council (NSC) and the National Security Agency (NSA).\textsuperscript{12} It took another several decades before the fledgling organization fully emerged as an institution. Ragsdale and Theiss found that the executive branch achieved such institutionalization in the 1970’s, and since the post-Watergate housecleaning by Gerald Ford, presidents have been able to make very few significant changes to the executive branch.\textsuperscript{13}

As an organization becomes institutionalized it exhibits continuity despite changes in individual leadership.\textsuperscript{14} By its very nature, the stability of such executive branch institutionalization constrains various aspects of presidential behavior. As the institutional features of the presidency strengthen, the personal preferences of any

\textsuperscript{9} Id. p.1280
\textsuperscript{10} Id. p.1283
\textsuperscript{11} Id. p.1285
\textsuperscript{12} National Security Act of 1947, 50 U.S.C.A. §§ 3002-3, 321
\textsuperscript{14} Ragsdale and Theiss (1997) p.1283
individual president will be unable to overcome the need for organizational continuity.\textsuperscript{15} Therefore, certain effects “shape the environment for incoming presidents and circumscribe their choices once there.”\textsuperscript{16} In fact, scholars have found that the focus in presidency literature on the “idiosyncratic qualities of the president obscures the growing institutional continuity of the presidency across administrations.”\textsuperscript{17} The question then remains, how does the personal, transient presidency intersect with the institutional, stable presidency to sustain continuity or produce change?\textsuperscript{18} Given the stability of the institution over the last several decades, it appears as though when the president’s personal preferences collide with the institution imperative, it is the president, not the institution that will bend.\textsuperscript{19}

Within this relatively stable, institutionalized executive branch, there are many constraints preventing the president from achieving his policy agenda. Lowi describes two modes of presidential action under these circumstances. The first, he designates as the “slow-track.”\textsuperscript{20} This track is rooted in the Separation of Powers doctrine and defined by legislative action. This mode of action is normatively desirable, although not without its flaws. The very public and open nature of the slow-track means that it is only appropriate when “time permits.” The slow-track is “highly unpredictable, uncontrollable, public, full of leaky holes, and dominated not merely by the legislature

\textsuperscript{16} Jones, Charles O. “Knowing What We Want To Know About The Presidency.” \textit{Presidential Studies Quarterly} 32.4 (2002): 710-719, p.715
\textsuperscript{18} Jones (2002) p.711
\textsuperscript{19} Ragsdale and Theiss (1997) p.1315
but by a large and pluralistic process fueled by greed, otherwise called the pursuit of happiness.” Neustadt famously described this as the “power to persuade” and found that the president was most powerful when successful at such bargaining. But the slow-track has definite flaws in the real world of policy implementation. It is not exactly a model of efficiency, and certainly not the appropriate course of action under conditions of urgency, as in the case of emergency, war or national threat.

By contrast, the “fast-track is the track of secrecy, unilateral action, energy, commitment, decisiveness, where time is always of the essence.” For scholars and presidents alike the result is clear: “between accountability, political danger, and interference with policy desires on the one hand and total secrecy, efficiency, and virtually unimpeded policy action on the other it is not difficult” to choose the fast-track over the slow.

Particularly as the bureaucracy expanded, the incentives to utilize secrecy as a means of controlling information were great. Indeed, the ability to control massive amounts of information is part of what gave the institution such stability. Fast-tracking information through secrecy precludes the need to engage in public debate or justify controversial programs. Policies are much more efficiently implemented when they are not slowed by congressional or public inquiry.

For a time, presidential advisors and scholars alike lauded this sort of vigorous executive power. A new vein of political thought arose to support the idea of the...
permanent fast-track presidency. This neoconservative philosophy justified the shift to an “imperial presidency” by assuming a “condition of war – or constant threat of some sort to national security that makes aggrandizement of the presidency urgently necessary.”

Under those circumstances, the presidency can be as big as the war that calls upon his command… or certainly as big as he makes the threat appear.

Inhabitants of the Oval Office found these expanded powers seductive, and the benefits of secrecy obvious. But while the imperial presidency appealed to executive power enthusiasts in the hands of Roosevelt and Kennedy, it became overtly unattractive under the control Richard Nixon. The 1974 Watergate litigation forced the president for the first time to defend these vast claims of executive power in court. Here, the arguments justifying broad presidential secrecy fell short. The critical element of a national security threat was absent and without it the Supreme Court rejected the claim that the president had the power to withhold information from judicial oversight. The Nixon Court also made the legal distinction between an executive communications privilege and the state secrets privilege.

At first glance, *U.S v. Nixon* appeared to clarify that the president had no right to secrecy, at least over domestic security information. But at the same time, it left a wide range of “national security” information over which the president could claim such a privilege. That particular distinction was not lost on the executive branch. And as the presidency further institutionalized in the post-Watergate era, embedded within it was the

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*In the Name of National Security: Unchecked Presidential Power and the Reynolds Case.* (Lawrence: University of Kansas Press, 2006)


26 *Id.* p.231


very clear perception that national security could indeed be used to justify the expansion of secrecy within the executive branch.

The Nixon cautionary tale was instructive. While secrecy and the policy fast-track were tempting, like all magic, they came at a price. Presidents have personal and institutional incentives to maximize secrecy, but they must simultaneously minimize the risk of scandal and political retribution that disclosure would cause. Following the resignation of President Nixon, many of the tools of executive power and secrecy were constrained by legislation and public attention. A new mechanism was necessary for the president to maximize executive branch secrecy. At the heart of this presidential dilemma arose a supremely powerful state secrets privilege.29

Over the next twenty-five years, incrementally and always in the name of national security, “various types and segments of information become essentially withdrawn from public access”30 by the executive branch. Often, it was cloaked in the mundane yet ever-expanding use the classification system. In doing so a bureaucratic infrastructure developed to reinforce presidential control over national security information, and “maintain presidential prerogative against congressional inquiries and judicial orders.”31

The state secrets privilege furthered this end by providing the executive branch with a legal mechanism to make refusal the first response to judicial requests for information. When pressed by judges on the nature of the claimed state secrets, the president’s lawyers created a legal precedent whereby they asserted that the judiciary had

30 Pallitto & Weaver (2007) at Loc: 75
31 Id. at Loc: 46
a lack of expertise in national security matters. Judges were not competent to evaluate such information and must therefore rely upon the assurances of the executive branch.

A wall of institutionalized secrecy was established, behind which massive presidential power began to accrue with a built-in defense mechanism to deflect political accountability or judicial scrutiny. What for Nixon was considered an abuse of executive power was now being clothed in mundane institutional legitimacy, thus allowing “a wide range of questionable activity virtually without fear of congressional oversight and judicial interference.”  

The pervasiveness of secrecy in the 21\textsuperscript{st} century executive branch now “threatens to break the constitutional structures that have held the presidency in a dynamic, yet largely balanced, relationship with the other branches of American government.”

Skowroneck’s analysis of the institutional presidency shows that to a certain extent, each administration is defined by the decision of the president to continue or oppose the order that preceded him. Jones notes that while the president “operates within certain latitudes of freedom, [he is] more or less constrained by” institutional conditions. And Hult finds that continued institutionalization of the executive branch is “driven more by organizational dynamics and often inertial environmental expectations” rather than presidential preference. Over the final quarter of the twentieth century, a vast national security network, cloaked in secrecy, was embedded within the institution of

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32 Id. at Loc: 243
33 Id. at Loc: 280
34 Skowronek, Stephen. \textit{The Politics Presidents Make: Leadership from John Adams to Bill Clinton}. (Boston, MA: Harvard University Press, 1993.)
the executive branch. This tendency toward total secrecy is self-reinforcing, and unlikely to change regardless of the personal preferences of the occupant of the Oval Office.

The Impact of September 11th

Executive secrecy powers remained essentially an ad hoc collection of claimed privileges, executive policies and assumed powers that existed independently of one another. It would take the terrorist attacks of 9/11 to transform these disparate mechanisms into a functional infrastructure, dedicated to executive secrecy. The conjunction of the administration of George W. Bush, which was ideologically invested in expanding executive power, and the heightened national security threat level that existed in post-9/11 Washington, allowed this culture of secrecy to become embedded within the institution of the presidency. The use of the state secrets privilege placed that entire national security infrastructure beyond the reach of judicial review, congressional oversight and public accountability. In a shift that is likely permanent, secrecy has “fundamentally transformed the office of president and the powers of the executive branch in a manner that is inconsistent with constitutional provisions and the functioning of our democracy.”

For members of the Bush Administration, the terrorist attacks of 9/11 were the opportunity to put long-held theories of aggressive executive power finally into practice. Within days of the attack, lawyers for the administration began constructing legal arguments to justify their unprecedented expansion of executive power. This most visceral example of a national security threat presented the Bush administration with the

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37 Pallitto & Weaver (2007) at Loc: 130
sudden chance to transfer a huge array of policies and information onto Lowi’s fast track.\textsuperscript{39} And they did so with zeal, declaring that any attempt to constrain the president’s “constitutional authority to withhold information … which could impair foreign relations, the national security, the deliberative processes of the Executive, or the performance of the Executive’s constitutional duties”\textsuperscript{40} would be considered unconstitutional and disregarded.

Under other circumstances, these accelerated expansions of presidential power would have been retarded by congressional investigation, media inquiry, or judicial review. But the Bush administration created an impenetrable wall of secrecy by reimagining a novel use for the state secrets privilege. While previous presidents had attempted to uncouple the privilege from its roots as a mere common law evidentiary privilege, George W. Bush attempted (with apparent success) “to reformulate the privilege as a prerogative right of the presidency.”\textsuperscript{41}

The state secrets privilege was no longer being used to suppress specific pieces of national security information within a normal process of trial discovery in a discreet category of cases. Now, the president was using the state secrets privilege to completely quash litigation at the outset. Under President Bush, the number of claims, the kinds of cases in which claims were made, and the breadth of the claim of privilege all expanded exponentially. These claims deprived individuals of their constitutionally guaranteed access to the courts. They also created a shield of secrecy around the executive policies these cases represent that both the legislature and the courts have failed to penetrate.

\textsuperscript{39} Pallitto & Weaver (2007) at Loc: 645
\textsuperscript{40} Statement by the President on the signing of H.R. 2417 the “Intelligence Authorization Act for Fiscal Year 2004” December 13, 2003
\textsuperscript{41} Pallitto & Weaver (2007) at Loc: 1697
Inquiry into the legitimacy of such claims of executive power was treated as a direct threat to executive power and was therefore deflected by invoking the state secrets privilege. Routinely, this behavior became an insurmountable obstacle to litigation and essentially placed dozens of secret executive branch programs and hundreds of activities by members of the U.S. government (and the people they hire) outside the reach of judicial review. In the 13 years since 9/11, not a single case challenging these programs has even been heard on its merits. Judges complain that their hands are tied by the state secrets privilege, and even they cannot require the executive branch to release information to the court.

Each judicially accepted invocation of the privilege pushed the boundaries a little further, which allowed the Administration to use it much more freely. Instead of being confined to a discreet group of cases, suddenly the state secrets privilege was being used as the first line of defense against every inquiry into the executive branch. “For those of us defending the government from the range of legal assaults, openness is like AIDS… One brief exposure can lead to the collapse of the entire immune system… [But] we can always play the trump card – state secrets – and close down the game.”

The Bush administration’s experience with the state secrets privilege taught them two things very quickly. First, judicial acquiescence in the face of executive state secrets claims was almost complete, and the likelihood of being denied was practically nil. Second, in the years previous to 9/11, judges required the in camera (secret) inspection of documents over which the privilege was claimed only 33% of the time; following 9/11

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43 See author’s analysis of all state secrets cases in Chapter 3
that number dropped to less than 25%.\textsuperscript{44} Not only could the executive branch be fairly certain that their invocation would be upheld, the attorneys putting forward the claims did not have to be overly concerned that the “secrets” over which they were asserting the privilege would ever be examined by a judge. Even when judges did examine evidence, it was often redacted or non-classified versions of primary sources.\textsuperscript{45} It was legal strategy that accrued zero costs to employ.\textsuperscript{46}

As the War on Terror progressed, the scope of the state secrets privilege expanded to include everything from employment discrimination to torture. Even when atrocities committed in the name of national security were revealed publically and in the media, the state secrets privilege gave President Bush complete confidence that his techniques and methods were completely immune from judicial interference.\textsuperscript{47} In a very short time, the state secrets privilege became an institutionalized mechanism for presidents to avoid judicial review, congressional oversight and public accountability.

This trend has alarming implications. It should go without saying that the Constitution is the highest law of the United States. But, the Bush administration reimagined the state secrets privilege, not as a constitutional privilege (where its presence is demonstrably absent) but as a kind of super-constitutional privilege. “In virtually every case that pits the [state secrets] privilege against citizens’ constitutional claims, it is the privilege that wins the encounter.”\textsuperscript{48} While the impulse toward secrecy has always resonated with presidents, after 9/11 the reinvention of the state secrets privilege allowed

\textsuperscript{44} Pallitto & Weaver (2007) at Loc: 1516
\textsuperscript{46} Pallitto & Weaver (2007), Fisher (2006)
\textsuperscript{47} Statement by the President on the signing of H.R. 2417 the “Intelligence Authorization Act for Fiscal Year 2004” December 13, 2003
\textsuperscript{48} Pallitto & Weaver (2007) at Loc: 1238
the political and institutional incentives to finally converge and “create astoundingly
broad powers of secrecy in the presidency.” The national security network within the
executive branch was eager to embrace widespread secrecy that simultaneously
empowered and immunized them. And President Bush continued using the state secrets
privilege to expand the area behind its wall of secrecy until his final days in office.

The question then remained, what would be the long-term impact of such secrecy
powers on the presidency. Scholars predict that “even a president with a less pronounced
affinity for a secretive administration will confront structures that are, at the very least,
efficacious to the pursuit of political goals, and he or she will be strongly encouraged to
utilize them.”

A major critic of the use of the state secrets privilege was Senator Barak Obama.
His presidential campaign website denounced the Bush Administration’s use of the state
secrets privilege and proclaimed that “secrecy [would] not dominate government
action” in an Obama Administration. During his first year in office, Eric Holder,
Obama’s Attorney General released new official policies and procedures designed to
minimize the use of the privilege. In cases involving the state secrets privilege, the
Obama Administration would seek dismissal only to “protect against the risk of
significant harm to national security” and would never defend “an invocation of the
privilege in order to conceal violations of the law.” What they must have meant was

49 Id. at Loc: 859
50 Id. at Loc: 3103
51 “Barack Obama Presidential Campaign Website” http://l.barackobama.com/issues/ethics/
52 Policies and Procedures Governing Invocation of the State Secrets Privilege, Memo from Attorney
General Eric Holder for the Heads of Executive Departments and Agencies and the Heads of Department
secret-privileges.pdf
that the Obama Administration would never defend an invocation of the privilege in order to conceal violations of the law again.

Only two weeks into his term of office, President Obama faced this very challenge. The lawsuit originated when five plaintiffs sued the Bush administration. They claimed they were victims of mistaken identity, kidnapped through the illegal program known as extraordinary rendition, and tortured. The case extended beyond the Bush administration, and it would be up to the new Obama administration to maintain the invocation of the state secrets privilege and demand dismissal of the case. Although Senator Obama frequently condemned the legality of these specific programs, the Obama administration followed his predecessor’s lead and continued to conceal what many have called violations of both U.S. and International law. His Administration invoked the privilege and the case was ultimately dismissed. From that point on, Obama’s use of the state secrets privilege can only be distinguished from the George W. Bush by its expansion.

This dissertation examines how the state secrets privilege has made several controversial executive policies possible, including the current policies on domestic surveillance. This powerful tool has shut down judicial review of these policies, even when the courts rule that the president is acting unconstitutionally. The leaks by Edward Snowden in June 2013 forced President Obama to declassify many documents on this issue, but the White House continues to argue that its surveillance techniques are a state secret and cannot be challenged in court. Most notably in the warrantless wiretapping of Jewel (but also in several other cases in which documents in question were made public by Snowden), the very public nature of the leaks would seem to make fools of
government lawyers who insist that the front page of *The New York Times* is a secret of state. But they continue to do so at a staggering rate.53

Recently, President Obama successfully employed the state secrets privilege to deflect a challenge to the extrajudicial killings by unmanned drones that have become a primary tool of Obama’s national security policy. Although President Bush first developed the program, The New America Foundation’s study of the drone program showed that Obama authorized more attacks in his first 10 months as president than President Bush did in his final three years in office.54 In 2010, President Obama pressed the policy to its presumed limit by executing an American citizen, Anwar Al-Aulaqi and his teenage son, without charge or trial, through a drone attack in Yemen. Despite a judge who appeared disinclined to accept executive claims of secrecy, the case was dismissed in 2014.

National security has been the rationalization for the massive expansion of domestic surveillance and the extrajudicial, targeted assassinations by unmanned drones. And the state secrets privilege has allowed this evolution of national security policy to occur behind an iron curtain of presidential secrecy. The level at which national security policy is implemented by private contractors has created many unintended consequences for the use of the state secrets privilege. Corporations are becoming more embedded within the national security infrastructure, and they are using the state secrets privilege to deflect their own legal responsibility in a range of matters, including cases where they are sued by U.S. soldiers over negligence. This deeply intertwined relationship between the

53 Jewel et al. v. NSA et al. (4:08-cv-4373-JSW), Gulet Mohamed v. Holder (1:11-cv-00050)
executive branch and private corporations actually serves to constrain the President’s options in many of these cases.

The trend of outsourcing national security and intelligence activities to private contractors has led to a steep rise in indirect claims of the state secrets privilege. This project looks at the unintended consequences of the privilege that stem from private corporations (being sued by private individuals) threatening to reveal national security information unless the government intervenes and asserts the state secrets privilege. This strategy for extorting the government into ending litigation is known as graymail and makes up a large number of recent state secrets privilege cases. Even more troubling is the readiness of private corporations to invoke the privilege directly, thus privatizing this very powerful privilege.

Themes and Overview

So, how did we get from a common law, evidentiary privilege to a supremely powerful extra-constitutional privilege that grants full legal immunity upon the entire executive branch and those they employ and shields national security policy from judicial review? On one hand, it is a complex story of the law, politics, power and institutions. On the other hand, it is a straightforward narrative of opportunism with presidents making ever-expansive assertions of secrecy. There is nothing in the law or Constitution to support such claims, rather “they are mainly self-serving statements reflecting presidents’ hopes of what they wished the law to be.”\textsuperscript{55} As these assertions continued to go unchecked, legal theories developed in support of these claims that cloaked this vast expanse of presidential secrecy in legitimacy. But wishful thinking is no substitute for a foundation in positive, public law.

\textsuperscript{55} Pallitto & Weaver (2007) at Loc: 1375
This was a very specific historical conjuncture where the institutional conditions (the slow but steady progression toward secrecy) and the personal preferences (an ideology of unilateral executive power based in large part on secrecy) simultaneously embodied in the presidency interacted with the historical conditions of 9/11 to significantly change the executive branch. The re-interpretation of the state secrets privilege then gave the executive branch the mechanism to “reinforce themselves against political accountability and legal scrutiny.”

In this dissertation, I examine these dynamics through three frames. Building on the work of Pallitto and Weaver (2007) I attempt to advance two normative claims. The theoretical formulation of the state secrets privilege as an absolute executive secrecy privilege inherently threatens democracy. The second claim is rooted in constitutional law, and finds no support for an absolute secrecy privilege authorized by Article II of the Constitution. I explore a third, institutional claim. Writing at the end of the Bush administration, Pallitto and Weaver wondered what the institutional impact of the post-9/11 secrecy practices would be on the executive branch. If the next occupant of the Oval Office were less inclined toward secrecy and the national security threat receded, would the president be able to diminish the level of secrecy? Or would the institutionally embedded dynamic constrain the president? Six years in to the Obama Administration, despite policy and public rhetoric to the contrary, President Obama’s use of the state secrets privilege has only increased over his predecessor. This dilemma of policy continuity is explored by investigating the institutional factors that may have constrained

56 Id. at Loc: 46
57 Pallitto & Weaver (2007) at Loc: 3082
58 Id. at Loc: 3085
59 See author’s analysis of all state secrets cases in Chapter 3 and 4
President Obama’s preferences in his use of the privilege, and what that can tell us about the future.

Within the literature of political science there is little sustained analysis of presidential secrecy, and almost none regarding the development of secrecy powers within the institutionalized presidency.60 Previous research on government secrecy was often event driven and focused on instances glaring abuse, such as President Nixon and Watergate. Even most of the literature from the past decade focused on the particular ideology and activities of the Bush Administration, rather than the impact of institutionalized secrecy. Noting this, Fisher has urged political scientists to focus not just on the how or why of presidential behavior, but also the sources and limits of presidential power in constitutional and public law.61 With this in mind, I have anchored this narrative in the legal history of the state secrets privilege.

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60 Pallitto & Weaver (2007) at Loc: 87
Chapter 2: Murky Origins of the State Secrets Privilege

It has been called “the most powerful secrecy privilege available to the president and executive branch of the federal government.”\(^{62}\) Although often referred to with the deference due “an ancient privilege with deep roots in Anglo-American law,”\(^{63}\) in fact, the state secret privilege was first recognized by United States’ law just over sixty years ago in the landmark case of *United States v. Reynolds* (1953). The privilege itself has never been formalized through statute or legislation, and rather than providing a clear articulation of the privilege and guidelines for how it should be implemented, the precedent set by *Reynolds* is vague and somewhat suspect. Indeed, the entire historic record of the state secrets privilege is riddled with vague legal jargon, dire warnings of executive overreach, and extreme judicial wariness. But “the mode of origin is instructive,”\(^{64}\) and provides important insight into the nature and development of the state secrets privilege.

The purpose of this chapter is to investigate the development of the state secrets privilege in the United States leading up to the landmark *Reynolds* decision. By delving into the enigmatic origin of this executive privilege I hope to illuminate many of the flaws inherent in *Reynolds* and its subsequent interpretations. In recent decades, the privilege has been both more frequently invoked and expanded in scope beyond what many believe an open democracy should bear.\(^{65}\) The absence of clear legal authority


\(^{63}\) Id. p. 4

\(^{64}\) Id. p.13

coupled with the alarming trend of absolute judicial deference to executive branch claims of secrecy demand further investigation into this “most powerful” state secrets privilege.

The progenitor of the American state secret privilege is the crown privilege of Great Britain. William Blackstone defined such a royal prerogative as “those powers which the crown enjoys alone, not to those which it enjoys in common with any of its subjects.”66 Although the assumption was that the crown would always act in the public interest, 67 in reality there was no distinction between the withholding of information for national security or for political advantage.68 Despite its presumed critical role in the protection of national security, recognition of the prerogative of crown privilege is conspicuously absent from early works and compilations in British law.69

One hundred and fifty years before the American Revolution, Charles I of England claimed, “kings are not bound to give an account of their actions, but to God alone.” Current interpretations of the state secrets privilege seem to exclude the Almighty as well. When Charles I initially asserted this crown privilege, it was an attempt to circumvent habeas corpus. The crown held that if they did not disclose the cause of the detention, the courts had no jurisdiction to act in the matter.70 Therefore, the nobles could not challenge their detention and torture after refusing to fund the King’s unpopular wars.

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66 Weaver and Escontrias (2008) p.14
67 Weaver and Escontrias report that a 17th century standard text on law noted that “it hath been established as a rule, that all prerogatives must be for the advantages and good of the people, otherwise they ought not be allowed by the law” (Id. p.14).
68 Pallitto and Weaver (2007)
69 Weaver and Escontrias (2008) p.14
70 Id.
However, by 1627 the nobles united in an attempt to constrain the power of the king through the Petition of Rights, which established the right of *habeas corpus*. Once the royal prerogative to withhold information was separated from *habeas corpus* the legal controversy faded. Over time, the English courts developed a deferential stance toward the crown privilege, assuming a standard that precluded discovery if the disclosure of the requested documents would have a negative impact on the “public interest.”

However, even in this the record is not quite as straightforward U.S. presidents might want us to believe. In some cases, there is a clear prescription against the release of information. “You cannot read the minutes taken against the king, because these matters are not ripe yet, nor to be discovered to the world.” Yet in other cases, the production of documents of a secret nature (including statements made in the King’s Privy Council) was ordered. In *The Trial of Maha Raja Nundocomar* (1775) the English court’s request for documents from the East India Company was refused asserting that they contained “secrets of the utmost importance to the interest, and even to the safety of the state.” The court rejected this assertion, noting that “[h]umanity requires [evidence in the hands of the state] should be produced… where justice shall require copies of the records and proceedings from the highest court of judicature, down to the court of Pie-Powder magistrates have the power to compel disclosure.”

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72 Weaver and Escontrias (2008)
73 see, for example *Layer’s Case* 16 How. St. Tr. 94, 223-224 (1722)
74 Weaver and Escontrias (2008)
75 32 How. St. Tr. 1, 389 (1817).
76 See, for example For example, in *The Earl of Strafford’s Trial* in the House of Lords, accounts of statements Strafford made in Privy Council were allowed into evidence. (3 How. St. Tr. 1351, 1442-43 (1640).
77 20 How. St. Tr. 923, 1057 (1775).
78 Id.
The overwhelming standard that developed was the vague assessment of whether or not the disclosure of the requested documents would damage the “public interest.” 79 But this left the state as the final arbiter of what was in the “public interest.” Not all judges found this standard to be appropriate for the British judiciary. In a Canadian case, Judge Mondelet directly objected to such an approach, “A doctrine which reduces the judge on the Bench to an automaton, who, like the statue of Don Juan, will bend at the bidding of any reckless politician, whatever shade of politics or party spirit, it may be his misfortune to be tainted with, or of any unprincipled member of society . . . who is desirous of, or has interest in being screened, or of screening others, from the responsibility his misdeeds have subjected them to. If that doctrine be law, or rather, were law, it would be appalling. It would be such that no one would feel himself secure cannot, I must not assent to it. It is not law. It is unconstitutional. It is tyrannical. It is monstrous.” 80

It was not until 1860 that the British court made a definitive statement regarding the crucial question of who should determine exactly what is and is not in the public interest. 81 Scholars trace the classic phrasing of this concept to the case of Beatson v. Skene (1860). In it the Law Lords wrote, “We are of the opinion that, if the production of a state paper would be injurious to the public service, the general public interest must be considered paramount to the individual interest of a suitor in a court of justice … It appears to us that the question, whether the production of the documents would be

79 Weaver and Escontrias (2008) p. 27
81 Id.
injurious to the public service, must be determined not by the judge but by the head of the department having the custody of the paper.”

This articulation of the state secrets privilege is a clear product of the political system within which it was constructed - one without the checks and balances mandated by the American Constitution - and gave all deference to the Crown, regardless of the necessity of the plaintiff. Further, it suggests that the judicial inspection would be tantamount to public disclosure. This rationale would have long-reaching implications for the ultimate American absorption of the state secrets privilege. The assumption that judicial analysis “cannot take place in private” was a reflection of the British trial system where in camera, ex parte review was not available. The same is not true in the American trial system, although one might not know it from the way modern U. S courts treat the state secrets privilege. Weaver and Escontrias found that “in approximately only twenty percent of state secrets cases over the last two decades have courts required in camera production of any of the underlying classified material requested by litigants.”

Beatson remained the controlling case on the crown privilege for eighty years, until the Scottish case, Duncan v. Cammell in 1941, that involved circumstances similar to those in Reynolds, surrounding a fatal accident aboard a submarine and a plaintiff’s demand for “secret” papers. The Duncan holding essentially transported the English conception of the privilege into Scottish law, and conferred upon the executive absolute authority to withhold documents from disclosure in judicial proceedings.

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82 Beatson v. Skene 5H, & N.838 (1860) at 3
83 Id.
84 Chesney (2007) p.1280
85 Weaver and Escontrias (2008) note 78 p.30
86 Id.
87 Duncan v. Cammell (1941) 1 KB, 640
88 Pallitto & Weaver (2007) p.102
despite the fact that Scottish rule had always maintained that the final arbiters of claims of crown privilege are judges: “the Court has, no doubt the right to order the Lord Advocate or anyone else, to produce documents.”\textsuperscript{89} Although the English law indeed developed to show almost total deference to executive claims of secrecy in the vaguely defined “public interest,” Scottish law rejected such an approach, instead adopting “a balancing approach to determine whether or not to uphold the assertion of crown privilege.”\textsuperscript{90} Further, “Scottish courts have shown little patience for attempts to shield the government from embarrassment, liability, or investigation.”\textsuperscript{91} Thus, a misappropriation of English law by a Scottish court became the direct progenitor of the American state secrets privilege.

Such an incorrect assertion of legal precedent was possible because of some unique features that are woven into the history of the state secrets privilege. The first is that even though Scottish law had rejected the English method of total deference, it had done little to articulate any constraints on public interest secrecy or prescriptions for judges to directly investigate such claims. “The meanings of these phrases were never examined, and judges proceeded on a case-by-case basis in determining the deference to give to assertions of crown privilege.”\textsuperscript{92} This ad hoc approach would be replicated in the American system. It is also possible that the increase in deference to the crown privilege was a by-product of the era, as \textit{Duncan} was decided at the height of World War II. A second feature apparent throughout state secrets jurisprudence is the external influence of a time of war (in the traditional sense, such as World War II) or exogenous threat (such as

\textsuperscript{89} \textit{Dowgray v. Gilmour} 14 S.L.T. 906, 909 (1907)
\textsuperscript{90} Weaver and Escontrias (2008) p.37
\textsuperscript{91} \textit{Id.} p.34
\textsuperscript{92} \textit{Id.} p.38
the Cold War and the War on Terror.) The impact of these conditions would be widely felt in the American understanding of the privilege, as the U.S. Supreme Court turned almost exclusively to the decision in *Duncan* when confronting the challenges presented by *Reynolds* a few years later.

It is important to note that although the *Duncan* rule had such a major impact on the United States, the rule did not stand the test of time in Great Britain. In 1968, the court overruled *Duncan* in *Conway v. Rimmer*, finding that “by a misapprehension in Duncan’s case the protection in Crown privilege cases … was held to be absolute.”

Following *Rimmer*, all the courts of the British Commonwealth, as well as those of Canada, Ireland, Australia, and Israel have thusly altered their concept of crown privilege. The current British incarnation of this truly ancient privilege is known as “public interest immunity,” and it maintains that the final arbiters of such claims are judges.

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93 *Conway v. Rimmer* (1968) AC 910 1 All ER 874, [1968] 2 WLR 998, (101 LQR 200) at 27
94 Canada Evidence Act, R.S.C., ch. C-5, ß 37 (1985). “If the court having jurisdiction to hear the application concludes that the disclosure of the information to which the objection was made under subsection (1) would encroach upon a specified public interest, but that the public interest in disclosure outweighs in importance the specified public interest, the court may, by order, after considering both the public interest in disclosure and the form of and conditions to disclosure that are most likely to limit any encroachment upon the specified public interest resulting from disclosure, authorize the disclosure, subject to any conditions that the court considers appropriate, of all of the information, a part or summary of the information, or a written admission of facts relating to the information.
95 *Murphy v. Lord Mayor of Dublin*, [1972] I.R. 215 (Ir.) at 1. “the Minister had no absolute right to withhold the production of the report but that it was the function of the court to decide whether the document should be made available to the parties to the litigation, and for that purpose the Court had jurisdiction to require the production of the document for inspection by the Court.”
96 *Alister & Ors v The Queen* [1983–84] 154 CLR 404 (at 431) “There is a public interest in certain official information remaining secret; but there is also public interest in the proper administration of criminal justice.”
Constitutional Origins of the State Secrets Privilege

The Constitutional claim for the state secret privilege, supported unanimously by presidents and their administrations, draws its authority from an inference of the President’s Article II powers in foreign affairs and as Commander in Chief. Chesney notes that this view would elevate the privilege to near sacred status and would therefore preclude oversight by either Congress or the judiciary.⁹⁹ In fact, the Constitution is conspicuously silent on the subject of executive secrecy. Scholars have argued that the Framers intentionally decided against granting an executive privilege in Article II.¹⁰⁰ They point to Article I, Section 5(3) of the Constitution which, when referring to the Congress, states that “Each House shall keep a Journal of its proceedings, and from time to time, publish the same excepting such parts as may in their judgment require secrecy.”¹⁰¹ It is difficult to believe that the framers intended for the executive branch to have an unmentioned secrecy privilege when such a privilege is explicitly granted to the legislature in the preceding section. However, the executive branch circumvents this particular omission by claiming that the privilege is so integral to the role of the executive that it performs a Constitutional function.

In United States v. Nixon, the Court suggested that a state secrets privilege “is fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution,”¹⁰² and further noted that it was the custom of the courts to extend great deference to the executive in fulfilling Article II responsibilities.¹⁰³ In the

¹⁰⁰ Rozell (2002)
¹⁰¹ Constitution of the United States of America
¹⁰³ Id. note 17
more recent *El-Masri* case, the U.S. Court of Appeals for the Fourth Circuit further expanded this interpretation by maintaining that “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.”\(^{104}\) This elevation from common law principle to evidentiary procedure to inferred Constitutional power often appears to be driven by presidential slight-of-hand rather than sound legal reasoning.

This argument was recently proffered by the Obama administration in an amicus brief filed in the case of *Mohawk Industries, Inc. v. Carpenter*.\(^{105}\) At issue before the Supreme Court was a question regarding a party’s ability to immediately appeal an order to disclose materials ostensibly covered by attorney-client privilege. The Government’s brief added an additional comment claiming that some privileges, including “the state secrets privilege, whose origins extend to early Anglo-American law”\(^ {106}\) rise to a level of Constitutional significance. They further claim that the “state secrets privilege does not turn on the merits of the action in which they arise, but rather on the nature of the Constitutional prerogatives of the Executive Branch.”\(^ {107}\) Oddly reminiscent of the royal prerogative, this claim of “Constitutional prerogative” does not actually refer to any citation in the Constitution, statute or case law. It is an unsubstantiated interpretation of the scope of executive power by the president of the United States.

The judiciary, the branch charged by the Constitution with interpreting such things, has yet to challenge this executive assertion. However, the Court does not

\(^{104}\) *El-Masri v. Tenet* 479 F.3d 296, 303 (4th Cir. 2007) at 8.

\(^{105}\) *Mohawk Industries, Inc. v. Carpenter* No. 08-676 (2009) Brief for the United States As Amicus Curiae Supporting Respondent

\(^{106}\) *Id.* at 29

\(^{107}\) *Id.* at 30
explicitly endorse it either. Telman finds that the Constitutional authority for the privilege is weak and that “the stronger view seems to be that the origin of the Privilege lies in the common law but that the common law rules have been developed to protect some essential constitutional core.”

The fact that the state secret privilege was not recognized, either through statute or case law until Reynolds in 1953, begs skepticism of the core of this constitutional claim. In fact, the legal history of the privilege in the United States reveals that at best, these cases had constitutional overtones. The Reynolds Court itself essentially bypassed the constitutional question and dealt only with the issue of discovery. The Court has since refused to directly address the constitutional nature of the privilege, and has instead has referred to this vague foundation in the separation of powers and legal custom. In response to the Obama claim in Mohawk Industries, the Court simply stated that, “we express no view on that issue.”

Whether it is a royal or constitutional prerogative, the implication is clear. The executive branch believes it possesses a form of executive immunity, the ability to act with impunity and the privilege to withhold any information that might be used to hold it accountable, all in the name of national security. The actual legal history of the state secrets privilege in the United States is much more circumspect. A defining characteristic is its near absence from the record.

The Road to Executive Immunity

Legal scholarship and court documents alike point to two major cases in the history of the state secret privilege in the United States. However, upon closer

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109 Mohawk Industries, Inc. v. Carpenter No. 08-676 (2009) at 15
examination, neither the trial for treason of Aaron Burr in 1807, nor the Civil War spy case of Totten in 1875, deal directly with the issue of the state secrets privilege. Chesney alone introduces the infamous Marbury v. Madison (1803)\textsuperscript{110} as the earliest whisper of a secrecy privilege in the United States. Although the case centered on larger separation of powers issues, it did address “a basic question of evidentiary procedure involving the judiciary and the executive.”\textsuperscript{111} In this case, the court decided the documents in question were not confidential in nature, but went on to note in dicta that the executive officer might not have been “obliged” to disclose information “communicated to him in confidence.”\textsuperscript{112} This sort of language would become a hallmark of state secrets jurisprudence, leaving more questions than answers in terms of the nature and scope of an executive secrecy privilege. “Did the Court mean to suggest that confidential communications to executive branch officials are privileged and hence both inadmissible and beyond the scope of discovery?”\textsuperscript{113} It is not clear. Four years later, Justice Marshall did little to clarify his intent when he noted in Burr that on the issue of the power of the executive to withhold state secrets, “it need only be said that the question does not occur at this time.”\textsuperscript{114}

In 1807, former Vice President Aaron Burr made history (not for dealing Alexander Hamilton a fatal wound in their famous duel) when he became the first American citizen on trial for treason against the newly established United States. Here, Burr attempted to subpoena a letter by General James Wilkinson to President Thomas Jefferson. Jefferson objected that the letter contained “matter which ought not be

\textsuperscript{110} Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803)  
\textsuperscript{111} Chesney (2007) p.1271  
\textsuperscript{112} Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803)  
\textsuperscript{113} Chesney (2007) p.1272  
\textsuperscript{114} United States v. Burr, 25 F. Cas. 30, 32 C.C.D. Va. (1807) at 8
Chief Justice John Marshall responded by articulating the balancing test still at issue today. Sitting as judge on the circuit court, he held that “the defendant's need for the evidence and the government's need for secrecy must be weighed against each other, and that a defendant's need would not always be overridden by the government's privilege.” He ordered production of the letters and President Jefferson complied with portions deleted.

Contrary to the behavior of British jurists of the time, the American court did not extend the concept of the royal prerogative by showing complete deference to the executive. The judiciary fulfilled its obligation to adjudicate the case fully, and the executive was able to retain privilege over those matters he felt would directly “endanger the public safety.” The court did not take the claim of privilege at face value, nor did the president demand that the entire matter be dismissed. The court was clear on the distinction between public disclosure and judicial inquiry and noted that they would not “make confidential matters public” and “there was no assertion that the confidential material would not be made available to the court.” Balancing of the rights of individuals with the needs of the government is arguably the central tenet of the American legal system.

This first expression of an executive secrecy privilege is notable for several reasons. First, there was no assertion that secrecy from the court was a necessary, constitutional function of the executive branch (perhaps the fact that the Framers were

115 Id. at 8
116 Perkins (2007) p.3
117 United States v. Burr at 8; Chesney (2007) p. 1273 notes that “the record of the trial remains significant for Marshall’s introduction of the notion that risk to public safety might impact the discoverability of information held by the government.
118 Weaver and Escontrias (2008) p.48
still available to directly comment on their intent gave the executive branch less latitude in assuming powers). Second, the court intentionally avoided creating the precedent of an executive secrecy privilege in American case law, stating simply that, in the matter of the power of the executive to withhold state secrets, “it need only be said that the question does not occur at this time.” *Burr* is not referenced in any opinion on the privilege until the Reynolds case over a hundred years later.119

So how did we get from a rational balancing of interests to executive immunity? The chain has fewer links than one might imagine. It was another 70 years before the executive branch made another assertion of a secrecy privilege, and that case did little to clarify the issue.

Following the Civil War, the family of William Lloyd, a man hired by President Lincoln to spy behind Confederate lines, brought a lawsuit against the government in *Totten v. United States* (1875). Lloyd’s estate claimed that he was owed compensation dating to a secret espionage contract from the war. Once again, the Totten Court did not directly address the constitutional authority of an executive secrecy privilege,120 nor is there any legal citation to *Burr*. Instead, the decision focused on the nature of contracts.

The court found that a secret contract with the government for secret spy services is essentially intended to remain secret and cannot be the basis of a civil suit that would reveal the very secrets intended to be, secret. “It may be stated as a general principle, 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... Much

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119 *Id.*
120 Palitto and Weaver (2007)
greater reason exists for the application of the principle to cases of contract for secret services with the government, as the existence of a contract of that kind is itself a fact not to be disclosed."\textsuperscript{121}

This statement has lately been often used to define the scope of the state secret privilege as anything the executive regards as confidential, yet that interpretation has no foundation in law. The court articulated a very specific assumption that, when people enter into contracts for secret spy services with the government, they are willing parties entering into privileged relationships. They clarified this statement by likening it to the confidentiality presumed in a doctor/patient or spousal privileged relationship.\textsuperscript{122} Based on these very specific circumstances, the court dismissed Totten. Later courts would ignore these defined parameters and inadvertently establish a legal precedent precluding judicial review of cases involving a “secret espionage relationship with the Government.”

Even among modern scholars there is disagreement over the nature and scope of the executive secrecy at issue in Totten. Fisher, for instance, finds that Totten is “far afield” from any conception of a state secrets privilege. The Court addressed the confidentiality inherent in specific forms of communications, and whether the contract itself was enforceable in court.\textsuperscript{123} In fact, there were no state secrets at issue in the case. The New York Times discussed the facts of the case in contemporary coverage,\textsuperscript{124} and the issues of secret documents or testimony were neither argued nor briefed.\textsuperscript{125} Even the secrecy of the subject matter – a “secret espionage relationship with the Government”\textsuperscript{126}

\begin{flushright}
\textsuperscript{121} Totten v. United States at 3
\textsuperscript{122} Id. at 12
\textsuperscript{123} Fisher (2006) p.222
\textsuperscript{124} New York Times, Notes from the Capital, March 16, 1876
\textsuperscript{125} Weaver and Escontrias (2008) p.53
\end{flushright}
– is debatable as there were no laws prohibiting the disclosure of spying activities. Indeed
it was one of the more popular forms of literary memoir in the post-Civil War period.\textsuperscript{127}

Weaver and Escontrias find that a reading of \textit{Totten} “yields the idea that suits for
breach of payment for espionage services are a discrete category of unenforceable
contracts.”\textsuperscript{128} There were no constitutional or separation of powers issues raised. At best
it can be said that security “played a critical yet outspoken role” in the Totten case.\textsuperscript{129} In
stating that “as a general principle, 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,”\textsuperscript{130} Chesney suggests the adoption of a British principle
“recognizing a public-policy justification for precluding public disclosure of information
on security-related grounds.” However, he then draws the tenuous conclusion that
\textit{Totten} established the absolute nature of the state secrets privilege in at least some
contexts, taking the concept to its logical extreme: as the facts and details of an espionage
relationship cannot be disclosed, there would be no point in proceeding with litigation
that would require precisely that."\textsuperscript{131}

Is it possible that the Totten Court (like the constitutional framers before them)
meant to create an unspoken but general privilege for the executive to withhold
information or documents, rather than the narrow rule preventing the litigation of a
specific type of contract? Weaver and Escontrias think that given the lack any such

\textsuperscript{127} Weaver and Escontrias (2008) p.54 See, for example T. Conrad, \textit{A Confederate Spy: A Story of the Civil
War} (1892); S. Edmonds, \textit{Memoirs of a Soldier, Nurse, and Spy: A Woman’s Adventures in the Union Army}
(1865)
\textsuperscript{128} Id. at p.52
\textsuperscript{129} Chesney (2007) p.1278
\textsuperscript{130} \textit{Totten v. United States} at 3
\textsuperscript{131} Chesney (2007) p.1278
evidence in the legal record, that conclusion is “unlikely.”\textsuperscript{132} However, over time that became the position of the government lawyers.\textsuperscript{133} Another three-quarters of a century would pass before the Supreme Court was compelled to deliver a straightforward decision on the existence of the state secrets privilege. During that time, \textit{Totten} was invoked only six times.\textsuperscript{134}

Chesney finds it less problematic that there is a near-total “absence of on-point case law” in United States history of the state secrets privilege.\textsuperscript{135} He points to early American treatises on evidence law as another example of a public policy exemption to discovery. “There are some instances where the law excludes particular evidence, not because in its own nature it is suspicious or doubtful, but on grounds of public policy, and because greater mischief and inconvenience would result from the reception than from the exclusion of such evidence.”\textsuperscript{136} But, as with so much else in this legal narrative, this analysis is not the result of development in American legal thought on the issue of executive secrecy. Rather, it was the American reliance on (and often direct adoption of) English evidence treatises, which when possible were sometimes republished with annotations to American authorities.\textsuperscript{137}

Between \textit{Totten} and \textit{Reynolds} there are only a handful of cases that touch more directly upon the issue of executive secrecy and control of information, although though they do little to clarify the controversies. In 1877, the Great Railroad Strike in

\textsuperscript{132} Weaver and Escontrias (2008) p.55
\textsuperscript{133} See Memorandum of the United States in Support of the Military and State Secrets Privilege; Motion to Dismiss, \textit{Hepting v. AT&T}, C-06-0672-VRW, No. 124-1; \textit{Tenet v. Doe}, 544 U.S. 1, 8–11 (2005).
\textsuperscript{134} Fisher (2006) p.223
\textsuperscript{135} Chesney (2007) p.1273
\textsuperscript{136} Starkie, Thomas. “A Practical Treatises on the Law of Evidence and Digest of Proofs in Civil and Criminal Proceedings (Boston, Wells & Lilly, 1826)
\textsuperscript{137} Chesney (2007) p.1273
Pennsylvania led to decision known as the Appeal of Hartranft. The question before the Supreme Court of Pennsylvania was whether the court could compel the testimony of a state executive official, an act that implied some element of judicial control over the executive branch. Such a proposition, Chesney notes, is “fraught with separation of powers concerns” and the court held that only the executive department had “power to judge . . . what of its own doings and communications should or should not be kept secret.” In *Firth v. Bethlehem Steel* (1912), the government successfully asserted the idea of a “military privilege” as a means of intervening in a private suit to have testimony stricken from the record. However, in 1901, the Court of Appeals of the District of Columbia rejected the government’s attempt to withhold municipal maintenance records in *District of Columbia v. Bakersmith*. Likewise, in *King v. United States* (1902), the Fifth Circuit rejected a claim to “state secrets” and compelled the testimony of a witness concerning a plea agreement with the government. And in 1948, the Second Circuit pointedly noted that “right cannot be done if the government is allowed to suppress the facts in its possession.”

In a criminal case from 1944, *United States v. Haugen*, the district court introduced the idea that executive control of information is stronger in times of war, finding that “the determination of what steps are necessary in time of war for the

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138 Appeal of Hartranft, 85 Pa. 433 (1877)
139 Chesney (2007) p.1279
140 Appeal of Hartranft, 85 Pa. 433 (1877) at 444-45
141 *Firth v. Bethlehem Steel*, 199 F. 353 (E.D. Penn. 1912)
143 *King v. United States*, 112 F. 988, 996 (5th Cir. 1902)
144 At this point in time “state secrets” and “public interest” were being used interchangeably as an umbrella concept including a deliberative process privilege and government communications privilege. A distinctive “state secrets privilege” focused on national security began to develop in the early 20th century. (Chesney (2007) p.1281)
protection of national security lies exclusively with the military and is not subject to court
review.” However, because this was a criminal case, the judge would not allow the
government to prosecute on the basis of a privileged document. In this case, exercising a
secrecy privilege was not costless. The government could withhold the document, but it
would lose the case.

Finally, in a case that holds eerie similarities to the Reynolds case, a civilian
brought a suit against the government following an Air Force plane crash. In *Evans v.
United States* (1950) the court found that “It is not the exclusive right of any agency of
the Government to decide for itself the privileged nature of any such documents, but the
Court is the one to judge of this when contention is made. This can be done by presenting
whatever is claimed to have that status to the Judge, without disclosure to the other side.
The Court then decides whether it is privileged or not. This would seem to be the
inevitable consequence of the Government submitting itself either as plaintiff or
defendant to litigation with private persons.” This was the direct intent of Congress in
enacting the Federal Tort Claims Act in 1946 in which the United States waived
sovereign immunity stating that the government “shall be liable…in the same manner and
to the same extent as a private individual under like circumstances,” and the Federal
Rules of Civil Procedure which includes provisions for discovery of documents in the
sole possession of the government. This holding would appear to be straightforward,
but it would ultimately be turned on its head in the case that finally established a state
secrets privilege in the United States in 1953.

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146 *United States v. Haugen*, 58 F. Supp. 438 9E.D. Wash. 1944
147 Fisher (2006) p. 38
149 28 U.S.C. § 2680
150 Title V: Disclosures and Discovery, Federal Rules of Civil Procedure (1938)
United States v. Reynolds (1953)

On October 6, 1948, a U.S. Air Force B-29 exploded over Waycross, Georgia. The details of the accident were widely reported in local newspapers throughout the state and the country, and residents of Waycross would say 50 years later that it was the “biggest thing that ever happened here.”151 Louis Fisher weaves together the original news coverage into a comprehensive account of the events.152 And Barry Siegel takes a more journalistic approach to the individuals involved.153 The basic facts of the case are as follows. Around 2pm, a fire broke out in the four-engine plane. At 2:07 the plane exploded with the cacophony of a bomb.154 The co-pilot, who survived the crash, told the Atlanta Journal that a fire had begun in the first engine, the second engine failed and then the plane went into a spin.155 Four men managed to parachute to safety. Nine were killed, as the plane broke apart and crashed onto the Zachry family farm.156 According to the Waycross newspaper the sight of such destruction had “not been beheld in many years.”157

In the early years of the Cold War, the government was actively developing secret communication technology to spy on the Soviets. Of the five men killed in the B-29 crash, four were a group of civilian engineers under contract to the U.S. Air Force working on such a project at a base in Georgia. The flight was intended to be a test of their surveillance device, but the fire broke out aboard the plane before the equipment

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152 Fisher (2006)
153 Siegel (2008)
154 Id. at p.44 and p.57
155 “Survivors Describe Plane Wreck Over Waycross Costing 9 Lives” Atlanta Journal, October 7, 1948 p.4
156 Siegel (2008)
157 Id. at p.47
could be used.\footnote{158} At the time, newspapers explicitly reported on the secret equipment and even speculated upon the specific nature of the surveillance,\footnote{159} and the Air Force confirmed that the B-29 was “engaged in electronic research on different types of radar.”\footnote{160} In the wrongful death suit brought by the civilian widows that followed, these publically available details would ultimately be called a “military secret” with “national security implications.” The case itself would become the landmark ruling on the state secrets privilege in the United States and the first step in the executive branch’s 50-year march toward total immunity.

The litigation turned on the Air Force accident report, which was sought in discovery by the families of the victims. On the grounds that disclosure would harm national security, the Air Force refused to turn over the document, even when the court ordered their delivery for \textit{in camera} review. In support of its motion, the government did not directly claim an executive state secret privilege.\footnote{161} Rather, they cited an internal Air Force regulation prohibiting dissemination of official reports “to persons outside the authorized chain of command without the specific approval of the Secretary of the Air Force.”\footnote{162} The only other legal authority claimed by the government was the Housekeeping Statute of the U.S. Code which, at the time of \textit{Reynolds} stated, “The Head of an Executive Department or military department may prescribe regulations for the government of his department the conduct of its employees, and the distribution and

\footnotesize{\begin{itemize}
\item \footnote{158} Siegel (2008) p. 38-39
\item \footnote{159} Fisher (2006) p.2
\item \footnote{160} “B-29 Testing Electronic Device Explodes in Midair, Killing Nine,” \textit{The Washington Post}, October 7, 1948
\item \footnote{161} Perkins (2007)
\item \footnote{162} \textit{U.S. v. Reynolds}, 345 U.S. 1, 7 1953 at 6
\end{itemize}}
performance of its business, and the custody, use and preservation of its records, papers
and property.”163

Judge Kirkpatrick of the district court found these arguments unpersuasive. In
other cases the Housekeeping Statute had previously been rejected as justification for
withholding information in litigation,164 and Kirkpatrick did the same. In response to such
executive abuse the Housekeeping Statue, an additional sentence was added in 1958
clarifying that “This section does not authorize withholding information from the public
or limiting the availability of records to the public.”165

Kirkpatrick pointed out that in this case the government “does not here contend
that this is a case involving the well-recognized common-law privilege protecting state
secrets or facts which might seriously harm the Government in its diplomatic relations,
military operations or measures for national security.”166 Instead, he accused the
government of claiming “a new kind of privilege.”167 The government refused to turn
over the Accident Report, insisting that their investigation “should be privileged in order
to allow the free and unhampered self-criticism within the service necessary to obtain
maximum efficiency, fix responsibility and maintain proper discipline.”168 Kirkland
found that the existence of such a broad, self-serving privilege had “no recognition in the
law.”169 Thusly, he denied the government’s motion and ordered that the documents be
produced.

163 5 U.S.C § 22
164 see Wunderly v. United States, 8 F.R.D. (1948) and O’Niell v. United States, 79 F.Supp (1948)
166 Brauner v. United States, 10 F.R.D. (D.Pa 1950) at 468 (later known as Reynolds v. United States)
167 Id. at 472
168 Id.
169 Id.
The government again refused to turn over the Accident Report, this time claiming that “executive files and investigative reports are confidential and privileged and that their disclosure would not be in the public interest.”\(^{170}\) This was the first hint that the government would begin shifting their arguments in order to justify a broad privilege to withhold documents. Kirkpatrick decided to push back on such a claim and ordered that the Accident Report be produced for \textit{in camera} review “so that this court may determine whether or not all or any parts of such documents contain matters of a confidential nature, discovery of which would violate the Government’s privilege against disclosure of matters involving the national or public interest.”\(^{171}\) Had the government been able to prove that the documents legitimately included the secrets implied by the Air Force, Kirkpatrick seemed inclined to accept the claim of privilege. Instead the government withheld the documents even from \textit{in camera} review. In light of this, the court entered a verdict on behalf of the families, granting a total of $225,000 in damages. The decision was appealed by the government to the Third Circuit.\(^{172}\)

In 1949 a Justice Department attorney named Herman Wolkinson wrote a three-part article describing the executive branch’s version of the history of executive privilege in the United States.\(^{173}\) He wrote that federal courts “have uniformly held that the President and the heads of departments have uncontrolled discretion to withhold the information and papers in the public interest, and they will not interfere with the exercise.

\(^{170}\) Claim of Privilege by the Secretary of the Air Force, \textit{Reynolds v. United States}, Civil Action, No. 10142 (E.D.Pa 1950), presented on August 9, filed on October 10, 1950.
\(^{171}\) Amended Order, September 21, 1950 \textit{Reynolds v. United States}, Civil Action, No. 10142 (E.D.Pa 1950) at 2
\(^{172}\) Sur Pleadings and Proof, \textit{Reynolds v. United States}, Civil Action, No. 10142 (E.D.Pa February 20, 1951)
of that discretion.”\textsuperscript{174} As Fisher notes, this claim was “false when it was written and grows more false with time.”\textsuperscript{175} The claim did serve a purpose. It is not an uncommon legal strategy for government attorneys to publish on a topic in order to provide a legal authority to cite in a later case. Through the Wolkinson articles, the Justice Department created a narrative of extremely broad executive privilege and this became the primary authority on which the government relied in their \textit{Reynolds} appeal.\textsuperscript{176}

On appeal, the government raised constitutional and statutory questions regarding executive control of documents, but did not specifically invoke a state secrets privilege. The government’s primary argument was that “the Constitutional doctrine of separation of powers creates in the head of an executive department a discretion, to be exercised by him, to determine whether the public interest permits disclosure of official records.”\textsuperscript{177} But this would appear to claim that “access to evidence in a trial would be decided not by the judiciary, but by one of the parties to the case: the executive branch.”\textsuperscript{178} Such a concession of judicial authority would violate the very checks and balances the doctrine of separation of powers is designed to protect.

Although the trial court had rejected the Housekeeping Statute as justification for withholding documents from a federal court, the government again pressed the statutory argument. But the claim never quite bridged the gap between the concept of a statutory grant of power to executive department heads and the power of a constitutional privilege against federal court orders. Besides relying upon the Wolkinson for legal authority, the government’s brief had precious little on-point case law upon which to refer. Instead,

\textsuperscript{174} Id. p. 103
\textsuperscript{175} Fisher (2006) p.69
\textsuperscript{176} Id. p.70
\textsuperscript{177} Brief of the United States, \textit{Reynolds v. United States}, No. 10,483 (3d Cir. 1951) p.1
\textsuperscript{178} Fisher (2006) p.61
they turned explicitly to the British model, a choice that would enhance rather than minimize the problematic nature of the state secrets privilege in the United States. “We believe that all controlling governmental and judicial material, here and in England, clearly supports the view that, in this type of case at least, disclosure by the head of an executive department cannot be coerced.” The embrace of the British precedent was misguided because, as noted above, the American constitution “recognizes values and principles that broke with British history and practice, including an independent judiciary capable of deciding against the executive branch, even in cases of national security.”

When framing the constitution, the founding fathers had considered an executive branch more analogous to the British sovereign (one “which placed all of external affairs, foreign policy and the war power in the executive”) and rejected it.

Despite the vast differences between the American and British system, it was the problematic Scottish case, *Duncan v. Cammell*, upon which the government relied. But even in this case, the government conveniently omitted a particularly relevant passage which states “Although an objection validly taken to production, on grounds that this would be injurious to the public interest, is conclusive, it is important to remember that the decision ruling out such documents is the decision of the judge.”

On December 11, 1951, the Third Circuit upheld the trial court’s decision that the documents were not privileged. Writing for the court, Judge Maris concurred with Kirkpatrick’s assessment that the statutory power of the Housekeeping Statute did not trump that of a federal judge. He found the government’s argument that the Statute

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179 Brief of the United States, *Reynolds v. United States*, No. 10,483 (3d Cir. 1951) p.6
181 *Id.*
183 *Reynolds v. United States*, 192 F.2d 987 (3d Cir. 1951)
granted the Secretary of the Air Force “full discretionary power in the public interest to refuse to produce any such records for examination and use in a judicial proceeding and that such records thereby become ‘privileged.’”\textsuperscript{184} Rather, Maris found this interpretation to illegally place their discretion “wholly beyond judicial review.”\textsuperscript{185} He concluded that under the Federal Tort Claims Act and the Federal Rules of Civil Procedure, “Congress has withdrawn the right of the executive departments of the Government in tort claims cases, even if under other circumstances such right exists, to determine without judicial review the extent of the privilege against disclosure of the Government documents sought to be produced for use in litigation.”\textsuperscript{186} Judge Maris noted that to abdicate to such a concept of a “sweeping privilege” would be not only “contrary to sound public policy,”\textsuperscript{187} but allowing an agency head to “conclusively determine the Government’s claim of privilege is to abdicate the judicial function and permit the executive branch of the Government to infringe on the independent province of the judiciary as laid down by the Constitution.”\textsuperscript{188}

Maris also rejected the government’s reliance on \textit{Duncan} as a legal authority, noting “whatever may be true in Great Britain the Government of the United States is one of checks and balances” and neither Congress nor the executive branch “may constitutionally encroach upon the field which the Constitution has reserved for the judiciary by transferring to itself the power to decide justiciable questions which arise in cases or controversies submitted to the judicial branch for decisions.”\textsuperscript{189} Judge Maris

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\textsuperscript{184} \textit{Reynolds v. United States}, 192 F.2d 987 (3d Cir. 1951) at 992
\textsuperscript{185} \textit{Id.}
\textsuperscript{186} \textit{Id.} at 993
\textsuperscript{187} \textit{Id.} at 995
\textsuperscript{188} \textit{Id.} at 997
\textsuperscript{189} \textit{Id.}
\end{flushleft}
found the notion that federal judges in the United States could not be trusted to review sensitive information in camera to be particularly offensive: “The judges of the United States are public officials whose responsibility under the Constitution is just as great as that of the heads of the executive departments.” If “a knowledge of background facts is necessary to enable one properly to pass on the claim of privilege those facts also may be presented to the judge in camera.” Ultimately, the government completely “failed to convince the lower courts that the executive branch had exclusive control over the release of agency documents.”

The Reynolds opinion of the Third Circuit was noted by several contemporary law reviews. The Harvard Law Review noted that to concur with the government’s assessment of executive privilege in this and many cases, the result would be that “the Government’s consent to suit would be to no avail if its executives had the uncontrolled power to withhold information in their sole possession.” And the University of Pennsylvania Law Review advised that “national security has become a pervasive concept susceptible to abuse in its name, and to allow the assertion of military secrecy to serve as

190 Id. at 997
191 Id. at 998
a complete defense to a bona fide claim against the government would place many
injured persons at an unfair disadvantage.”\textsuperscript{195}

Indeed, this warning was prescient. The Cold War brought an increase in national
defense and an expansion in the powers claimed by the executive branch under these
circumstances. Such views of the executive branch were on display in another
contemporary case, \textit{Youngstown Co. v. Sawyer}.\textsuperscript{196} In this famous case in 1952, President
Truman used an executive order to seize control of steel mills on the verge of a strike. He
justified this aggressive use of presidential power through the national emergency of the
Korean War. In the arguments before the District Court, the Assistant Attorney General
argued that there were only two ways to limit such presidential power: “One is the ballot
box and the other is impeachment.”\textsuperscript{197} The government believed that “when a sovereign
people granted power to the federal government, it limited Congress and the judiciary but
not the executive.\textsuperscript{198} Further, they pressed that if the President determined that an
emergency existed “the Courts cannot even review whether it is an emergency.”\textsuperscript{199} The
court firmly rejected this conception of “unlimited and unrestrained Executive power.”\textsuperscript{200}
Thus, the executive branch would have to turn to other, less overt ways of expanding
presidential power.

At this point, the Reynolds case was no longer about a $225,000 judgment
awarded to the widows.\textsuperscript{201} The nascent national security network had arrived, and it was
being built on the control of information. The government’s assertion that they alone

\begin{itemize}
  \item \textsuperscript{195} Note, “Procedure – Discovery Against the Government – Privilege for State Secrets,” 100 U. Pa. L. Rev. 917 (1952) p. 921
  \item \textsuperscript{196} \textit{Youngstown Co. v. Sawyer}, 103 F.Supp., 569 (D.D.C. 1952)
  \item \textsuperscript{197} H. Doc. No. 534 (Part I), 82d Cong., 2d Sess. 371-72 (1952)
  \item \textsuperscript{198} Fisher (2006) p. 93
  \item \textsuperscript{199} H. Doc. No. 534 (Part I), 82d Cong., 2d Sess. 371-72 (1952)
  \item \textsuperscript{200} \textit{Youngstown Co. v. Sawyer}, 103 F.Supp., 569 (D.D.C. 1952) at 577
  \item \textsuperscript{201} Indeed, this was only $55,000 more than the government would end up settling the case for.
\end{itemize}
were the legitimate stewards of state secrets came at a time when Americans were being charged and convicted of leaking secret information to the Soviet Union. This political environment encouraged the government to appeal the Reynolds decision all the way to the Supreme Court. The executive branch sought a legal determination that would “permanently establish an exclusive presidential power” to control secret information, and would be final and conclusive on the legislative and judicial branches, and Reynolds became that vehicle. Fisher observes that whatever the government’s hopes for Reynolds, the executive branch has “never possessed an unreviewable power to withhold documents either before Reynolds or after it.”

The Third Circuit had thrown the executive branch a bone of sorts. Despite rejecting the government’s claim of privilege, Maris added the caveat that “state secrets of a diplomatic or military nature have always been privileged from disclosure in any proceeding.” In this way, the court distinguished between a “state secrets” privilege that refers to military information and a more general “public interest” privilege that might apply to other government information and communications. The government took the hint, and reformulated their refusal to produce the requested documents as an official invocation the suggested state secrets privilege.

Throughout the government’s brief they intentionally misled the court as to the secret contents of the accident report, without actually declaring such. “To the extent that the report reveals military secrets concerning the structure or performance of the

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202 Fisher (2006) p. 95
203 Id. p. 98
204 Id.
205 Reynolds v. United States, 192 F.2d 987 (3d Cir. 1951) at 996
206 Chesney (2007) p.1284
plane that crashed or deals with these factors in relation to projected or suggested secret improvements it falls within the judicially recognized ‘state secrets’ privilege.”

A privilege, the government claimed, that was the executive branch’s exclusive right to determine. “It is within the sole province of the Secretary of the Air Force to determine whether any privileged material is contained in the documents and that his determination of this question must be accepted by the district court without any independent consideration of the matter by it.”

The government further argued that the constitutional role of the court to balance the interests of opposing parties was already being filled by the executive branch. “In the absence of compelling evidence to the contrary, it can be presumed that the Secretary has given full consideration to the problems involved in civil litigation, has weighed the possible hardships to plaintiffs, and has made a responsible decision in the light of adverse effects of non-disclosure… the Secretary has great interest in assuring litigants full information.” Fisher finds this assertion to be “pretentious, risible and preposterous” to say nothing of its dubious legal foundation.

Besides the brief of the government and the plaintiff’s reply, there is very little information available on the record of the Supreme Court appeal in United States v. Reynolds. There is no record of the oral arguments and very little in the personal papers of the justices who decided the case. However, in Fisher’s exhaustive study of the Reynolds case, he did uncover a few morsels of background information that are worth noting. On April 7, 1952 the Court voted to grant certiorari with five votes, only four of

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208 “Brief for the United States,” United States v. Reynolds, No.21, October Term, 1952 at 45
209 Reynolds v. United States, 192 F.2d 987 (3d Cir. 1951) at 996
210 “Brief for the United States,” United States v. Reynolds, No.21, October Term, 1952 at 51
211 Id. at 65
which represented substantive questions regarding the decision of the Third Circuit.\textsuperscript{213} The four votes to deny cert, plus the final vote to grant cert that seemed to support the Third Circuit, would appear to predict a 5 to 4 opinion upholding Maris’ decision. Ultimately the Court split 6 to 3 to overturn the Third Circuit.\textsuperscript{214} There is very little detail regarding the thought process of the Justices who decided what would become a landmark decision of the 20\textsuperscript{th} century. What information is available illustrates a Court that was hesitant to engage in the constitutional issues raised by the case.

Notes from the Justices’ conference on October 25, 1952 reveal that Chief Justice Vinson saw no role for the judiciary in the review of executive claims of state secrets. Indeed, he had “no confidence that district judges could read sensitive documents in their chambers without sharing them with private counsel.”\textsuperscript{215} Justice Black concurred that the executive branch did have the right to withhold documents from litigation, but in agreement with both Kirkpatrick and Maris, believed the government must pay a price to exercise such a privilege. In other words, refusal to produce documents would result in losing the case and paying damages. Black dissented from the decision.\textsuperscript{216}

Justice Reed believed that the government “can protect itself against disclosure of secret intelligence,” and voted to reverse the Third Circuit.\textsuperscript{217} Justice Frankfurter was concerned that no settled “body of law” existed on the nature of sovereign secrecy or its limitations and voted to affirm. Justice Douglas initially indicated in his notes that he

\textsuperscript{213} See Fisher (2006) p. 105 Harold Burton indicated he believed the decision was correct “right below” when he voted for cert. Papers of Harold H. Burton, Library of Congress, Container 222, Folder No. 10, \textit{(United States v. Reynolds, No. 21)}

\textsuperscript{214} \textit{Reynolds v. United States}, 192 F.2d 987, March 9, 1953

\textsuperscript{215} Fisher (2006) p. 106


\textsuperscript{217} \textit{Id.}
would also vote to affirm the Third Circuit, but apparently changed his mind, writing on the proof of the Chief Justice’s decision that “I voted the other way but will go along. It’s a nice opinion.” Justice Jackson supported the Third’s Circuit demand for in camera inspection of the accident report and voted to “affirm but not touch privilege.” Justice Burton voted with the majority stating his belief that the Tort Claims Act did not waive executive privilege in litigation, but noted that he believed that Congress had the authority to limit executive secrecy.

Although Justice Clark was advised by his law clerk that “in this situation the conflicting interests of the parties – the government and private litigants – are best accommodated by the procedure adopted by the DC here, i.e. a submission of the documents to the judge for his examination in camera and a ruling by him as to whether the national interest precludes disclosure,” the advice was disregarded and he voted to reverse. Ultimately a majority of six Justices signed the opinion of Chief Justice Vinson that ruled in favor of the government’s claim of privilege, reversed the Third Circuit, and sent the case back to the district court “for proceedings consistent with the views expressed in this opinion.” Only three judges made up the dissent, which was

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222 See Fisher (2006) p. 109 Papers of Tom C. Clark, Tarlton Law Library, University of Texas at Austin, Box No. B149 Folder No.3
223 345 U.S. at 10
brevity itself. It reads in its entirety Mr. Justice Black, Frankfurter, and Jackson “dissent, substantially for the reasons set forth in the opinion of Judge Maris below.”

Although it became a landmark decision, and the bedrock of modern state secret law, the Vinson opinion is explicit in its evasion of constitutional doctrine in favor of pragmatic evidentiary procedure, stating, there are “constitutional overtones which we find it unnecessary to pass upon, there being a narrower ground for decision.” This distinction, which should have limited the subsequent power of the privilege, was ultimately lost in a series of whiplash inducing judicial prescriptions in the decision. Foremost among them, the curious statement, “While claim of executive power to suppress documents is based more immediately upon [statute], the roots go much deeper. [Statutory privilege] is only a legislative recognition of an inherent executive power which is protected in the constitutional system of separation of power.”

As previously explored, the Reynolds Court had neither statutory guidelines nor good judicial precedent on which to rely in deciding the case. Vinson’s opinion was demonstrably influenced by the Cold War anxiety that gripped the entire federal government at the time, noting, “We cannot escape judicial notice that this is a time of vigorous preparation for national defense.” Although both the district court and Third Circuit had adamantly rejected it, the Supreme Court followed the advice of the government’s brief that, “Great weight should also be given to the decision in Duncan v. Cammel… in which the House of Lords reached the result urged by the Government

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224 *U.S. v. Reynolds*, 345 U.S. 1, 1953 at 12
225 *Id.* at 6
226 Weaver and Escontrias (2008) p. 60
227 *U.S. v. Reynolds*, 345 U.S. 1, 1953 at 9
228 Weaver and Escontrias (2008) p. 61
229 *U.S. v. Reynolds*, 345 U.S. 1, 1953 at 10
here.”\textsuperscript{230} The Court decided \textit{Reynolds} by establishing requirements taken almost verbatim from the \textit{Duncan} case, decided in Scotland the decade before.\textsuperscript{231}

The Reynolds Court held that 1) the state secret privilege “belongs to the Government and must be properly asserted by it” – notably, not the executive branch or president; 2) it should not be “lightly invoked;” 3) The claim must be formally made by the head of a department after “actual personal consideration;” and 4) the judge must determine if the claim is appropriate “yet do so without forcing disclosure of the very thing the privilege is designed to protect.”\textsuperscript{232} It is this final point from which so much judicial ambivalence arises. On one hand, it declares, “judicial control over the evidence in a case cannot be abdicated to the caprice of executive officers,”\textsuperscript{233} on the other hand, it qualifies itself with a procedure that does precisely that. “We will not go so far as to say that the court may automatically require a complete disclosure to the judge before the claim of privilege will be accepted in any case…. the judge 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.”\textsuperscript{234} It is unclear what level of judicial control the Court was suggesting could be maintained without \textit{in camera} inquiry. In practice, it has reduced the role of federal judges to a subordinate status to executive branch officers, making them unable to fulfill their constitutional role as neutral arbiter of disputes.\textsuperscript{235}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{230} Brief of the United States, \textit{United States v. Reynolds} (1953), at 38
\item \textsuperscript{231} Pallitto and Weaver (2007); Weaver and Escontrias (2008); Fisher (2006)
\item \textsuperscript{232} \textit{U.S. v. Reynolds}, 345 U.S. 1, 1953 at 8
\item \textsuperscript{233} \textit{Id.} at 10
\item \textsuperscript{234} \textit{Id.}
\item \textsuperscript{235} Fisher (2006) p. 118
\end{itemize}
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Notably, the Court did not dismiss *Reynolds*. The Court held that the privilege prevented the discovery of the document, but remanded the case to the trial court to continue without the privileged report. Thus, at least in legal principle "*Reynolds* conforms to a normative framework that allows for private and public rights to be adjudicated in the courts and creates a balanced approach to adjudicating these rights in light of countervailing government interests."236 This legal reasoning is both sound and straightforward and emphasizes the sense of equal standing before the law, so crucial to the American legal system.

Vinson went on to create a balancing test based upon the strength of the plaintiff’s showing of necessity that “will determine how far the court should probe in satisfying itself that the occasion for invoking the privilege is appropriate."237 The Court referred repeatedly to judicial experience, and the responsibilities of judges in the process of discovery.238 For non-disclosure by the government to be appropriate, the judge must be convinced from all other evidence and circumstances “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.”239 But, Vinson’s warnings against interference in such matters makes it unclear how courts should make such a determination, without examining all the evidence and circumstances in person.

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237 *U.S. v. Reynolds*, 345 U.S. 1, 7 1953 at 10
238 Weaver and Escontrias (2008) p.61
239 *U.S. v. Reynolds*, 345 U.S. 1, 7 1953 at 9
Vinson went on to further undermine his own “sound formula of compromise” through a now frequently cited footnote to *Totten*. In the footnote, the Court embraced the holding in *Totten “where the very subject matter of the action was a matter of state secret’ the action must be dismissed on the pleadings.”* This in itself seems to broaden the scope of *Totten* from the narrow secret spy contract to anything the government determines to be “secret.” In a decision such as *Reynolds*, where the Court created a balancing test, it misapplied *Totten*, a case in which there can be no balance because the privilege is absolute.

The Court did attempt to find a middle ground between the plaintiffs’ need for disclosure and the necessity of protecting state secrets. However, in attempting to balance the competing interests, the Court failed to reconcile these objectives into sufficiently clear guidelines for lower courts that are faced with an assertion of privilege by the executive branch. Such problems implementing the *Reynolds* doctrine would become apparent in subsequent cases dealing with the state secrets privilege. The government relied heavily on the specter of crown privilege and hoped for a judicial decision with the finality of the English power for ministers to withhold documents, and while they did not achieve it directly, in pragmatic terms, they did.

It appears that the first court to bungle the interpretation of *Reynolds* was the *Reynolds* Court itself. Although admonished by the Supreme Court not to abdicate

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240 “Where there is a strong showing of necessity, the claim of privilege should not be lightly accepted, but even the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that military secrets are at stake.” (See *Totten v. United States*, 92 U.S. 105 (1875), where the very subject matter of the action, a contract to perform espionage, was a matter of state secret. The action was dismissed on the pleadings without ever reaching the question of evidence, since it was so obvious that the action should never prevail over the privilege.)” Id. at 10

241 Telman (2007) p.3


243 Weaver and Escontrias (2008) p.63
judicial control of the evidence, once remanded to the district court, for some reason Judge Kirkpatrick did not demand to review the Air Force report in camera in order to make a determination of the state secret privilege. By taking the claim of privilege at face value, the lower court explicitly undermined the actual precedent of Reynolds and its balancing test. In the face of this final refusal to produce the accident report, the lawyer for the families recommended that they settle the case with the government, which they did for $170,000. The case was dismissed on June 22, 1953.

Contemporary coverage of the Supreme Court decision in Reynolds was brief and unfavorable, by both the news media and law reviews. The New York Times wrote a short piece entitled “High Court Denies Rights of Judges to Arms Secrets” which correctly chided the judiciary for abdicating its power while incorrectly implying that military secrets were involved in the Reynolds case, misinformation that would be reprinted in various other venues. The New York University Law Review also derided Vinson for relinquishing its constitutional power, “the Court by this decision has, in practical effect, relinquished to an executive officer discretion to determine whether Government documents shall be produced in court,” noting that “there is no reason why the judge cannot examine the documents ex parte.” A Vanderbilt Law Review article pointed out that a judicial investigation into claims of privilege was “not attempting to impinge on the executive function, since the only question is the admissibility of evidence, a question purely judicial in nature,” and further that “it is usually unquestioned

244 Fisher (2006) p. 120
that at a trial the judge determines whether a privilege exists.”\textsuperscript{247} The article went on to suggest that the Court showed “too little faith in the ability and loyalty of judges” by “accepting as final a determination by an administration official.”\textsuperscript{248} The epilogue to the Reynolds case illustrates how such critiques, particularly those that warned that such a decision meant that “no judicial safeguards existed to limit or prevent abuse,” were prophetic.\textsuperscript{249}

In 1996, the infamous accident report was declassified by the Air Force as a matter of course. Patricia Herring, the daughter of one of the engineers killed in the crash, found the report on the Internet in 2000. There was no “secret military information” in the report. The report notes that the B-29 took off on October 6, 1948 “on a research and development mission completing an electronics project.”\textsuperscript{250} something that was reported throughout the national news media at the time. Instead, it revealed that the crash was caused by “the failure to comply with ‘Technical Order 177… which resulted in a very serious fire hazard prevailing in all engines.”\textsuperscript{251} Further, “the passengers and crew including the civilian passengers were not briefed prior to takeoff on emergency procedures in accordance with Air Force regulations.”\textsuperscript{252} The report concluded that the “aircraft is not considered to have been safe for flight because of non compliance.”\textsuperscript{253} The entire case was a blatant cover-up of criminal negligence on behalf of the Air Force.

\textsuperscript{247} Asbill, Mac and Willis B. Snell, “Scope of Discovery Against the Unites States,” 7 Vand.L. Rev, 582 (1954) p. 595, 593
\textsuperscript{248} Id. at 600, 602
\textsuperscript{249} Fisher (2006) p. 122
\textsuperscript{250} Petition for Writ of Certiorari Reynolds (Herring) v. United States December 21, 2005 Appendix – Accident Report at 14a
\textsuperscript{251} Id. at 65a
\textsuperscript{252} Id. at 19a
\textsuperscript{253} Id. at 22a
In 2003, Patricia Herring and the remaining heirs took their case back to the Supreme Court, requesting a Writ of Error *Coram Nobis*, and asked it to correct its error from 50 years earlier. They told the Court that, despite the government’s claims to the contrary, the now declassified report “includes nothing approaching a ‘military secret.’ Indeed, they are no more than accounts of a flight that, due to the Air Force’s negligence went tragically awry… In telling the Court otherwise, the Air Force lied.” Rather than inspecting the accident report and discovering the lies, the Supreme Court then relied upon that falsehood in deciding the case. Thus depriving “the widows of their judgment” and creating a landmark decision based on fraud. The petition urged the Court to correct this fraud and “to put things right.” The plaintiffs went further and noted that while the government “practiced fraud in three courts, it succeeded only here [at the Supreme Court]. Only the Supreme Court can correct its error and undo what it has done.”

On June 23, 2003, the Supreme Court denied their request without comment. The families did not give up the fight and filed another suit in October 2003, charging that the original case had represented a fraud upon the court. The government responded with a motion to dismiss the case in January 2004. The government’s brief opened with the reminder of the case’s landmark status, where the Supreme Court recognized “for the first time in its modern jurisprudence the state secrets privilege – the government’s privilege against disclosures of information that could be harmful to national security.” But even this basic description is wildly more broad than the privilege described in the *Reynolds* decision. The fact that there were no military secrets in the accident report was irrelevant.

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254 Petition for Writ of Certiorari *Reynolds (Herring) v. United States* December 21, 2005 at i
255 *Id.* at 1
256 *Id.* at 20
the government contended, because “plaintiffs lack the informed expertise of Executive Branch officials who are responsible for determining what information should or should not be withheld in the interests of national security.”258 They further argued that plaintiffs couldn’t anticipate “how seemingly trivial information contained in these documents may have provided valuable intelligence to the nation’s enemies – all the more so considering that the events in question took place over 50 years ago.”259 The government had better hope that the Soviets didn’t read The New York Times.

The plaintiff’s reply was pointed. The Air Force had clearly been guilty of negligence in the cause of death of the original plaintiffs. In order to prevent that information from being disclosed the government crafted an elaborate series of falsehoods and implicit lies implying the existence of military secrets.260 This was no accident, but were submitted to the Court “with a view toward fabricating a ‘test case’ for a favorable judicial ruling on claims of an executive or [eventually] ‘state secrets’ – a case built on the fraudulent premise that the documents in question contained ‘secret’ military or national security information.”261 “Thus, a ‘fraud on the court’ is a fraud designed not simply to cheat an opposing litigant, but to ‘corrupt the judicial process’ or ‘subvert the integrity of the court,’ ” all of which occurred in the Reynolds case.262

In September 2004, the district court ruled on the case. The opinion reflects the true legacy of Reynolds – 50 years of practically unquestioned deference to the executive branch. It also echoes the extreme view embraced by the Bush Administration and its

258 Id. at 2
259 Id.
261 Plaintiffs’ Memorandum in Opposition to Defendant’s Motion to Dismiss, Herring v. United States, Civil Action No. 03-5500 (LDD) (E.D.Pa. 2004) at 12
262 Id. at 14
lawyers that even unclassified information might be pieced together to create classified information and should be withheld. In finding against the families, the court wrote that the case “does not suggest that the Air Force intended to deliberately misrepresent the truth or commit a fraud on the court.” 263 The memo relied on the assumption that “fifty years ago the government had a more accurate understanding ‘on the prospect of danger to [national security] from the disclosure of secret or sensitive information’ than the lay persons could appreciate or than hindsight now allows.” 264 They ignored the fact that the case was never about the analysis of lay people, but the right of judges to investigate executive claims of secrecy. To conflate the two is to presume that judicial review is “tantamount to making the report public.” 265 The court also accepted the legal theory (known as Mosaic Theory) that even material devoid of actual military secrets could be withheld from discovery “because ‘each individual piece of intelligence information, like a piece of a jigsaw puzzle, may aid in piecing together bits of information even when the individual piece is not of obvious importance itself.’” 266

The families again appealed to the Third Circuit, who heard oral arguments in July 2005. A three-judge panel (which included soon-to-be Supreme Court Justice Samuel Alito) decided in favor of the government on September 22, 2005. 267 Writing for the court, Judge Ruggero J. Aldisert focused on the burden of proving a fraud upon the court, “the presumption against the reopening of a case that has gone through the appellate process all the way to the Supreme Court and reached final judgment must not

264 Id. at 8
267 *Herring v. United States*, 424 F.3d 384, 386 (3d Cir. 2005)
be just a high hurdle to climb, but a steep cliff-face to scale.”268 Accepting the government’s argument that judges lacked the expertise to evaluate national security information, the court refused to engage in hindsight “because of the near impossibility of determining with any level of certainty what seemingly insignificant pieces of information would have been of keen interest to a Soviet spy 50 years ago.”269 In December 2005, the plaintiffs again filed for cert with the Supreme Court. On May 1, 2006 the Court (with its newest member, Justice Alito, recused) again refused to hear the case.

The landmark case on the state secrets privilege, the case upon which all other such claims stand, is a fraud. In 1953, the Reynolds Court was persuaded by the argument that, in order to keep America safe from enemies, the executive branch must be able to withhold information from the courts. Despite being confronted with the direct evidence of deception, the post-9/11 Court found the argument equally persuasive. Fifty years of heightened national security had done its job. Even when faced with the reality of executive abuse of the state secrets privilege – in the very case that created the privilege – the courts deferred to the executive branch. In doing so, it effectually endorsed what had become the mantra of the Bush White House: national security is the exclusive domain of the executive branch and cannot be questioned under any circumstances.

**Implementing Reynolds: Legacy of Dismissal**

For the remainder of the 20th century, the impact of the state secrets privilege as articulated in the Reynolds decision could be observed in a discrete but growing category of cases, as the executive branch gradually expanded their definition of a state secret. The

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268 *Id.* at 386
269 *Id.* at 391
Supreme Court’s decision in *Reynolds* made the explicit point that “courts need not be so deferential to the privilege and should thoroughly inquire into its assertion before accepting it.”

Further, the court demonstrated (and later reiterated in *Tenet*) that an invocation of the state secret privilege need not lead to a dismissal of the case before a full hearing of the facts. And yet, much of the legacy surrounding *Reynolds* has been that of complete dismissal. On occasion, the court has demanded *in camera* review of evidence and then dismissed the case on the basis of a properly invoked state secret privilege. But even in those cases, the courts have tended to expand the level of deference shown to the executive rather than constrain it. This has allowed the government to use the privilege as a tool to effectively dismiss complaints in their entirety and ultimately eliminate the possibility of judicial review.

As noted earlier, the rationale for early dismissal often comes from the footnote reference to *Totten*. The language describing the “very subject matter” of the case as a state secret has permitted the executive branch to expand this to include cases “involving” or “thematically about” matters that may (or may not) be state secrets. The executive branch has successfully exploited this caveat in *Reynolds* to maintain “blanket assertions of the privilege over every document, person, and shred of information regarding a case,” arguing, “every bit of information in a complaint is classified such that none of it can be presented in court.” Following 9/11, the Bush administration went even further, and made what is known as the Mosaic Theory, their primary argument for the withholding of information. The theory states “privileges against disclosure will be

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270 *U.S. v. Reynolds*, 345 U.S. 1, 7 (1953)
271 *Id.*
272 Yamaoka (2007)
upheld against requests for even unclassified information, if that information may be assembled into a classified ‘mosaic’ of national security activity."\(^{274}\)

Mosaic Theory was not original to the Bush administration, and was first articulated by the Supreme Court in 1978 who suggested, “It requires little reflection to understand that the business of foreign intelligence gathering in this age of computer technology is more akin to the construction of a mosaic than it is to the management of a cloak and dagger affair. Thousands 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.”\(^{275}\)

Even on the face of it, this argument appears to require several enormous leaps of logic. Weaver observed that after a career in military intelligence, it was his firm belief that “innocuous looking material is usually just that and provides no aid to our enemies and that the impulse is to classify everything merely to be on the safe side.”\(^{276}\) This justification ultimately permits the executive branch the power to control information that could not otherwise be legally classified under statute or executive order, thus placing enormous categories of information and executive action out of reach of judicial review or public accountability.\(^{277}\)

Two Vietnam-era wiretapping cases birthed this theory, and highlight the courts’ uncertainty regarding the level of deference to be shown to an executive claim of the state secrets privilege. The *Halkin* (*Halkin I*\(^{278}\) and *II*\(^{279}\)) and *Ellsberg*\(^{280}\) cases revealed that

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274 Palitto and Weaver (2007)
275 *Halkin v. Helms*, 598 F.2d 1 (D.C. Cir. 1978) at 8
276 Weaver and Escontrias (2008) p.76
278 *Halkin v. Helms*, 598 F.2d 1 (D.C. Cir. 1978)
279 *Halkin v. Helms*, 690 F.2d 997 (D.C. Cir. 1982)
government had “practically unlimited ability to wiretap” U.S. citizens. In a rare case of legislative initiative, the U.S. Senate investigated executive branch surveillance practices through the U.S Senate Church Committee. This report, ultimately led to the passage of the Foreign Intelligence Surveillance Act (FISA). The Ellsberg decision did reinforce the Court’s admonishment to review government claims of secrecy, but was ultimately undermined by a precedent set in the Halkin cases. Halkin I involved a suit and an appeal (Halkin II), of the dismissal based on the state secrets privilege. Writing in Halkin II, the Court outlined a new boundary for the state secrets privilege that seems to render the Reynolds balancing test obsolete. “Secrets of state ... are absolutely privileged from disclosure in the courts... Once the court is satisfied that the information poses a reasonable danger to secrets of state, even the most compelling necessity cannot overcome the claim of privilege.”

This statement illustrates the dangers of conflating the Reynolds and Totten doctrines. A literal reading of Halkin II would seem to preclude any area of government that the executive branch deems to be a “secret of state.” As noted previously, this interpretation would elevate an evidentiary common law to a legal standing that would supercede the necessity of even grievance of Constitutional proportions.

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280 Ellsberg v. Mitchell, 709 F.2d 51 (D.C. Cir. 1983)
282 Convened in 1975, in the wake of Watergate, this committee was the precursor to the U.S. Senate Select Committee on Intelligence. The fourteen reports produced by the committee between 1975-76, represented the most extensive review of intelligence activities. In Johnson (2004).
284 Zeigler (2008) p.9
285 Halkin v. Helms, 690 F.2d 997 (D.C. Cir. 1982) at 13
Perkins writes that *Halkin II* essentially endows the government with the ability to eliminate any case against it. By simply invoking the state secrets privilege, the plaintiff is denied the very evidence necessary to make a *prima facie* case. Then the government moves to dismiss because the plaintiff lacks the evidence necessary to make a *prima facie* case. Thus, the government can avoid judicial review of potential constitutional violations by “unreviewable, vague and cursory assertion by the executive that disclosure might implicate national security.”

**Privilege Limited and Denied**

In general, the court’s inquiry into a claim of state secrets privilege is by far the exception, rather than the rule. Although the definitive number is somewhat indeterminable, most scholars agree that the courts have only denied the executive’s use of the privilege four or five times. One notable limitation of the privilege came out of Watergate. In *United States v. Nixon*, the Supreme Court laid out the clearest limits on claims of privilege to date. The Court ruled that the state secrets privilege only applies to cases of national defense and cannot be invoked to cover criminal behavior. They refused to accept the argument that the privilege could be used to “justify a broad doctrine of executive immunity from judicial oversight.”

However, the Supreme Court did not stop there. Rather, by suggesting that the state secrets privilege “concerns areas of Art. II duties [in which] the courts have traditionally shown the utmost deference to Presidential responsibilities,” they

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286 Perkins (2007)  
287 Id. p.8  
288 Pallitto & Weaver (2007); Lyons (2007); Zeigler (2008)  
289 Pallitto & Weaver (2007); Lyons (2007); Zeigler (2008)  
291 Id. n152
perpetuated the presidentially-created myth concerning the constitutional nature of the privilege. The Court went even further by stating that “the privilege is fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution.” But the precise origin of such a privilege, unmentioned in Article II, is not explained, although it is bizarrely given a constitutional justification. “Nowhere in the Constitution, as we have noted earlier, is there any explicit reference to a privilege of confidentiality, yet to the extent this interest relates to the effective discharge of a President's powers, it is constitutionally based.”

The Court did recognize that the executive branch had an interest in maximizing the power of the privileges it claimed and that it was the responsibility of the judiciary to limit such behavior. The decision cited Powell v. McCormack as a reminder that our democracy often “requires that federal courts on occasion interpret the Constitution in a manner at variance with the construction given the document by another branch,” and Baker v. Carr, that “deciding 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 in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution.” But after carving out this area of judicial rights and responsibilities, the Court then undermined their own prerogative by making it clear that had the circumstances been slightly different, the outcome of the case would have changed. First

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294 Telman (2007) p.5
296 Id. at 710, quoting Powell v. McCormack, supra, at 395 U. S. 549
297 Id. at 712, quoting Baker v. Carr, 369 U.S. at 369 U. S. 211
the Court notes that President Nixon’s defense was “absent a claim of need to protect military, diplomatic, or sensitive national security secrets,”\(^{298}\) and then goes on to specifically state that “He does not place his claim of privilege on the ground they are military or diplomatic secrets. As to these areas of Art. II duties, the courts have traditionally shown the utmost deference to Presidential responsibilities.”\(^{299}\) The executive branch took note, and never again would a claim of state secrets be made outside of the frame of national security.

Weaver and Escontrias found that “in practical terms the state secrets privilege never fails… and in no case has a court ordered the disclosure of classified material…even if the reasons for classifying the material are quite dubious.”\(^{300}\) As has been previously discussed, the government has been successful in using the state secrets privilege to avoid disclosure of even non-classified documents. In fact, there is just a single example of a judge directly rejecting an invocation of the state secrets privilege and attempting to proceed with a trial. In a warrantless wiretapping case that will be examined more closely, the executive branch was able to avoid this effort at judicial review only through a highly partisan act of Congress.

In a “rare act of constitutional independence,”\(^{301}\) Judge Vaughn Walker of the Northern District of California actually rejected the state secret privilege claimed in *Hepting v. AT&T*.\(^ {302}\) Unfortunately, the case was dismissed in 2009\(^ {303}\) following a Congressional act that granted retroactive immunity to wireless companies that aided the

\(^{298}\) Id. at 706
\(^{299}\) Id. at 710
\(^{300}\) Weaver & Escontrias (2008) p.7
\(^{301}\) Yamoaka (2007) p.3
\(^{302}\) Hepting v. AT&T 439 F. Supp. 2d 974, 982, 1010 (N.D. Cal. 2006)
\(^{303}\) “U.S. Court Dismisses Suits in Warrantless Wiretaps” – Reuters June 3, 2009
http://www.reuters.com/article/rbssWirelessTelecommunicationServices/idUSN0313472720090604
government in this particular element of the War on Terror.\textsuperscript{304} Without congressional intervention, it appears as though the Hepting case may have represented a rare failure of the state secrets privilege on the merits. However, the Supreme Court (and the executive branch) dodged the bullet yet again, as Judge Walker’s refusal to defer to the executive branch seemed to make a Court decision inevitable.

**Checks and Balances**

The Reynolds Court made it clear that the judiciary has the responsibility to scrutinize claims of the state secrets privilege and to balance that claim with the necessity of the individual seeking redress. Instead of following the court’s directive that “judicial control over the evidence in a case cannot be abdicated to the caprice of executive officers,”\textsuperscript{305} the courts have failed in their function to provide a constitutional check on executive power. Instead of determining whether there is a “reasonable danger” that disclosure of information will harm national security\textsuperscript{306} the courts have allowed the “mere utterance of the phrase ‘state secrets’ to end litigation.”\textsuperscript{307} Institutionally speaking, this has given the executive branch great confidence that their assertions of privilege will be accepted without questions. Thus, there are no costs associated with a claim of the state secrets privilege, and the protection of total secrecy to gain, making potential abuse practically inevitable.

In the wake of the state secrets cases of the 1970s, transparency surrounding the activities of the executive was a primary concern. Justice Stewart wrote in a case from the time, “In the absence of the governmental checks and balances present in other areas

\textsuperscript{304} See H.R. 6304 The FISA Amendments Act of 2008 http://www.opencongress.org/bill/110-h6304/text
\textsuperscript{305} U.S. v. Reynolds, 345 U.S. 1, 7 1953 at 9
\textsuperscript{306} Pallitto & Weaver (2002)
\textsuperscript{307} Zeigler (2008) p.13
of our national life, the only effective restraint upon executive policy and power in the areas of national defense and international affairs may lie in an enlightened citizenry - in an informed and critical public opinion which alone can here protect the values of democratic government.\textsuperscript{308} Contrary to the intent of \textit{Reynolds}, the current expansion of the state secrets privilege not only abdicates judicial responsibility, it obstructs the ability of the people to be fully informed as to the actions of the government and ultimately curtails the right to criticize and hold their elected officials accountable.\textsuperscript{309}

Scholars have referred to the state secrets privilege as one of the most influential privileges available to the President because it prevents both judicial and public checks on its power.\textsuperscript{310} The current interpretation of this privilege has allowed the executive to remove a substantial deterrent against governmental abuse of power.\textsuperscript{311} The fact is that if the executive branch knows that an assertion of the privilege leads directly to dismissal and that judges rarely order documents for \textit{in camera} review, then “there is great incentive on the part of the executive branch to misuse the privilege”\textsuperscript{312} because any cost for abuse will be minimal or nonexistent.\textsuperscript{313}

\textit{“Not to be lightly invoked …”}

Of the four principles of \textit{Reynolds} used to define the state secrets privilege, perhaps none has been more ignored than the admonition that the privilege is “not to be lightly invoked.”\textsuperscript{314} In this manner, the Court hoped to constrain the frequency of the executive’s use of the privilege. As Rozell notes, “executive privilege should be

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\item\textsuperscript{308} \textit{New York Times Co. v. United States} 403 US 713, Concurring Opinion, J. Stewart at 1
\item\textsuperscript{309} Lyons (2007); Glasinov (2009)
\item\textsuperscript{310} Zeigler (2008)
\item\textsuperscript{311} Glasinov (2009)
\item\textsuperscript{312} Zeigler (2008) p.8
\item\textsuperscript{313} Pallitto and Weaver (2007)
\item\textsuperscript{314} \textit{U.S. v. Reynolds}, 345 U.S. 1, 7 1953 at 8
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exercised only rarely and for the most compelling reasons.\textsuperscript{315} However, the use of the privilege increased steadily throughout most of the twentieth century, culminating with a sharp increase under the George W. Bush administration. In noting the gravity of the issue, Finchera writes, “the very danger inherent in the state secrets privilege lies in the fact that it can be used by the government to conceal illegal and unconstitutional activity, thereby limiting access to courts, undermining notions of separation of powers and checks and balances, and preventing public debate and official accountability.”\textsuperscript{316}

While the activities of the Bush administration’s War on Terror have thrown many of these issues into stark relief, it would be inaccurate to lay the blame for the expansion of the state secrets privilege wholly at the feet of the forty-third president. Chesney notes that the use of the state secret privilege has had a harsh impact on litigants for most of its history.\textsuperscript{317} Administrations have long interpreted laws and issued blanket denials for information with the precise intent to greatly expand the executive branch’s power to withhold facts from oversight of any kind.\textsuperscript{318}

Nevertheless, Telman finds that, under the Bush Administration, the state secrets privilege evolved in new ways.\textsuperscript{319} Under Bush, claims of privilege and demands for dismissal consistently came before discovery began, with the administration claiming that all relevant information was necessarily secret.\textsuperscript{320} As noted previously, this Mosaic Theory has, in essence, “transformed the privilege into a new and extraordinarily

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\textsuperscript{315} Rozell (2002) p.156
\textsuperscript{316} Finchera (2008) p.2
\textsuperscript{317} Chesney (2008)
\textsuperscript{318} Pallitto & Weaver (2007)
\textsuperscript{319} Telman (2007)
\end{flushright}
expansive doctrine of executive immunity,” an astonishing development “from an exceptional standard of evidentiary privilege into a rule depriving citizens of recourse against their government's wrongful conduct.” Both in quantity and quality, the trend associated with the state secrets privilege is one of broad concealment, with little to no recourse available to the citizen who dares question or cross paths with the national security policies of the executive branch.

321 Telman (2007) p.2
322 Zeigler (2008) p.11
323 See Secrecy Report Card 2007: At the height of the Cold War, the administration used the privilege only 6 times between 1953 and 1976. Since 2001, it has been used a reported 39 times—an average of 6 times per year in 6.5 years that is more than double the average (2.46) in the previous 24 years. http://www_openthegovernment.org/otg/SRC2007.pdf
324 Fisher (2006); Pallitto & Weaver (2007); Telman (2007); Zeigler (2008)
Chapter 3: The Bush Administration, 9/11 and the War on Terror

In 1987, future Vice President Dick Cheney sat on the Iran-Contra committee in the U.S. House of Representatives. Writing for the Minority Report, in defense of President Reagan, he said “…to the extent that the Constitution and laws are read narrowly, as [Thomas] Jefferson wished, the Chief Executive will on occasion feel duty bound to assert monarchical notions of prerogative that will permit him to exceed the law.” Cheney and other neoconservatives were reacting to what they believed was a weakening of the presidency in post-Watergate Washington. They touted an interpretation of a constitutional theory known as the “unitary executive.” It states that, (despite clear evidence to the contrary throughout the Federalist Papers and other constitutional era documents), the framers intended to give presidents complete control over the executive branch and to prevent the other branches of government from interfering with (or questioning) presidential actions, particularly those related to national security. Advocates of this approach derive such authority from a conviction that the list of powers of Congress in Article I of the Constitution is constrained by the specification of the language, while the lack of specific powers granted to the president in Article II is unconstrained and expansive.

326 For the purposes of this project, neoconservative is defined in a limited way, as an ideology that vigorously supports unitary, plenary presidential power, particularly in the area of national security and foreign affairs. (See Fisher 2014, p.166)
Those who subscribed to the unitary executive point of view feared that the end of the Cold War would diminish the ability of the presidency to maintain expanded definitions of executive power as Commander in Chief. The refusal of President George H.W. Bush to march to Baghdad, overthrow Saddam Hussein and take control of the vast Iraqi oil interests came as a crushing blow to the neoconservative dream of a post-Soviet national security state. And the Clinton Administration was eight long years of vexation.

Despite the choice of Dick Cheney as Vice President, the early administration of George W. Bush did not appear to be fertile ground for unitary executive theories of presidential power and national security. After all, Bush had been outspoken in the campaign regarding his focus on domestic issues and lack of interest in what he termed “nation-building” abroad. But the terrorist attacks on 9/11 changed everything. Suddenly, the president’s most salient role was Commander in Chief. The government and the public were reeling from the enormity of the assault on American soil, and the unitary executivists with Vice President Cheney in the Bush administration had theories of aggressive executive power ready to put into practice. Within days of the attack, lawyers for the Bush administration began constructing legal arguments to justify an unprecedented expansion of executive power. 329

They called it a “new kind of war” and a “new legal paradigm,” one that “rendered obsolete” all previous understandings of constitutional law, criminal law, international law, and customary international law. 330 Under this new interpretation of executive power, “the President enjoys complete discretion in the exercise of his

Commander-in-Chief authority and in conducting operations against hostile forces."\(^{331}\)

Thus, any effort to interfere with the president’s actions in such areas as “the detention and interrogation of enemy combatants”\(^{332}\) would be considered unconstitutional.

Still, as receptive as Congress and the public were to these relatively large expansions of executive power in the wake of 9/11, the Bush administration did not appear to believe that much of what they planned to implement would not stand up to public scrutiny. Therefore, administration lawyers declared that any attempt to constrain the president’s “constitutional authority to withhold information … which could impair foreign relations, the national security, the deliberative processes of the Executive, or the performance of the Executive’s constitutional duties”\(^{333}\) would also be labeled unconstitutional and, ultimately, disregarded.

The Bush lawyers grounded this constitutional authority in a new interpretation of the state secrets privilege. Within the *Reynolds* decision, the footnote to *Totten*, states that “‘where the very subject matter of the action was a matter of state secret’ the action must be dismissed on the pleadings.”\(^{334}\) As explored in the previous chapter, the *Totten* court articulated a very specific assumption, that when people enter into a contract for secret services with the government, they are willing parties in a privileged relationship (similar to a doctor/patient or spousal relationship).

The Bush administration used this footnote to craft the novel argument, that the state secrets privilege gave them the authority, not just to refuse to turn over evidence in

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332 Id.
334 See *Totten v. United States*, 92 U.S. 105 (1875)
discovery during a trial, but to demand the dismissal of any case inquiring into any area the executive branch deemed to be secret. In one fell swoop, the Bush administration expanded the realm of presidential power and positioned that expansion behind a solid wall of secrecy.

**Distinguishing Between *Totten* and *Reynolds***

A primary difficulty in properly implementing *Reynolds* has been the confusion between a case where the litigation bar of *Totten* applies and those where the evidentiary privilege of *Reynolds* is appropriate. Scholars have pointed out that many cases place undue emphasis on the *Totten* footnote in *Reynolds*.\(^{335}\) They suggest that the reference was intended to provide an example of an extreme case, where the state secrets privilege would overcome any necessity of the plaintiff, not to support the philosophy that dismissal is necessary whenever a plaintiff’s case involves a confidential matter.\(^{336}\) Thus, *Totten*-like claims represent a discrete number of state secrets cases that must be dismissed at the outset. The larger category of state secrets cases do not have to be categorically dismissed under *Reynolds* and can use the procedural guidelines to assess the evidentiary privilege.\(^{337}\)

The executive branch has sought to avoid this distinction completely by invoking the privilege before discovery begins, and demanding wholesale dismissal of the case rather than a limited discovery.\(^{338}\) While there may be cases where the proper invocation of the privilege makes it impossible for the plaintiff to establish a claim, the court cannot draw such a conclusion until it has determined, through discovery, that the plaintiff will

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335 Fisher (2006); Glasionov (2009)

336 Glasionov (2009)

337 Wells (2008) p.11

338 Wells (2008), Glasinov (2009)
not be able to establish the claim through evidence not legitimately subject to the privilege. Nonetheless, lower courts have interpreted the privilege in such a way that permits dismissal prior to discovery when, in fact, *Reynolds* provides no directive in this area.339

Often the courts treat all state secrets cases as though they were *Totten* cases, thus denying plaintiffs the opportunity to make their case – even from evidence that is within the public domain.340 Scholars agree that a *Totten* case “necessarily involves a plaintiff with a secret espionage agreement with the U.S. government, i.e. a spy.”341 Alternatively, cases where *Reynolds* is the appropriate authority do not involve secret spy contracts, but rather involve plaintiffs with claims against the executive branch that should be legitimately adjudicated by the courts. By blurring the standards between *Totten* and *Reynolds*, the government has elevated almost every act of the executive branch to the level of state secrets and solidified its grasp over a wide array of information.

**Affirming Totten: Tenet v Doe (2005)**

The most recent direct comment from the Supreme Court on the subject of the state secrets privilege came in *Tenet v. Doe* in 2005, 342 a case completely unrelated to the War on Terror. The Does were foreign citizens who performed espionage activities for and then defected to the United States, with the understanding that the CIA would provide them with financial assistance for the rest of their lives. The CIA provided them with new identities and a financial stipend, but discontinued the stipend when the Does employment income passed a certain threshold. After a time Mr. Doe was laid off and,

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339 Temlan (2007)
340 Id.
341 Lyons (2007) p.122
342 *Tenet v. Doe* 544 U.S. 1, 8 (2005)
due to restrictions imposed by the CIA, was unable to find other employment. They contacted the CIA to reinstate the stipend, but were told that it had been cancelled due to budget cuts. After being denied what they considered to be a fair appeal through an internal CIA process, the Does filed suit in district court.343

The CIA did not invoke the state secrets privilege; rather they demanded the case be dismissed before discovery could begin under the “Totten Rule,” which prevents the litigation of secret spy contracts. The district court denied that, and found that even if the court could not litigate the contract, they could certainly litigate the due process claims related to the internal appeals process of the CIA without damaging national security.344 The appellate court added that Totten was not controlling because the state secrets privilege announced in Reynolds had replaced it.345 “Instead, the instant case is governed by the state secrets privilege, a separate aspect of the decision in Totten that has evolved into a well-articulated body of law addressing situations in which security interests preclude the revelation of factual matter in court.”346 While the well-articulated body of law might be debatable, the court made it clear that at the very least, the government would have to make a formal invocation of the state secrets privilege in response to discovery requests, as indicated in Reynolds, and would not be granted an out-right dismissal under Totten.

The government disagreed that Reynolds had supplanted Totten, arguing

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344 Id. at 1289-94
345 Pallitto & Weaver (2007) at 1387
346 Doe v. Tenet, 329 F.3d. 1135, 1146 (9th Cir. 2003)
that Reynolds in fact confirmed that Totten represented a different and specific jurisdictional bar “where the very subject matter is a contract to perform espionage.”\(^\text{347}\)

The Supreme Court overturned the lower courts, and agreed with the government that Totten was the controlling case in this instance. The Court wrote, “there is, in short, no basis for respondents’ and the Court of Appeals’ view that the Totten bar has been reduced to an example of the state secrets privilege.”\(^\text{348}\) The unanimous opinion, written by Justice Rehnquist, went on to articulate the distinctions between a Totten case and one governed by the state secrets privilege noting that “the state secrets privilege, and the use of in camera judicial proceedings simply cannot provide the absolute protection we found necessary in enunciating the Totten rule.”\(^\text{349}\) While it is unclear what in camera inspections of state secrets claims the Court was referring to, this reinforces the theory that the state secrets privilege is not an Article II power of the presidency, but a common law evidentiary privilege to be invoked during discovery, while Totten is meant to dismiss cases on the pleadings before they reach that point.\(^\text{350}\)

The Court might have simply affirmed the narrow Totten rule that contracts for espionage activities could not be litigated. Instead, the decision seems to expand the jurisdiction of the ruling beyond contract cases to include “cases such as respondents’ where success depends upon the existence of their secret espionage relationship with the Government.”\(^\text{351}\) The government, and several legal scholars, read this language as precluding judicial review of “all claims related to secret agreements between the

\(^\text{347}\) United States v. Reynolds, 345 U.S. 1, 11 n.26 (1953)
\(^\text{348}\) Tenet v. Doe 544 U.S. 1, 8 (2005) at 1236-7
\(^\text{349}\) Id. at p. 2
\(^\text{350}\) Pallitto & Weaver (2007) at 1391
\(^\text{351}\) Tenet v. Doe 544 U.S. 1, 8 (2005) p. 7
government and third parties.”

For the Bush administration, almost immediately following 9/11, it became a short jump from a privilege that precludes judicial review of secret spying agreements to a privilege that precludes the review of secrets. This new privilege was even more effective in terminating cases at the earliest stages of litigation.

In a concurring opinion in *Tenet v. Doe* by Justice Stevens and Justice Ginsburg, the Court reiterated that dismissal should by no means be the standard outcome for invocations of the state secrets privilege. They suggest that in order to avoid such entanglements in the future “there may be situations in which the national interest would be well served by a rule that permitted similar commitments made by less senior officers (than the President, as in *Totten*) to be enforced in court, subject to procedures designed to protect sensitive information. If that be so, Congress can modify the federal common-law rule announced in *Totten.*” However, Congress has also abdicated responsibility for clarifying how such disputes should be handled under the law.

Until this case, legal scholars considered *Totten* to be the most direct legal progenitor of the state secrets privilege in *Reynolds*. But by releasing *Totten* from its legal anchor in contract law (and informed contractual relationships) the government has been able to successfully absorb and exponentially expand a presidential privilege to avoid disclosure of anything the executive branch deems to be secret. There is little doubt that the combined force of the state secrets privilege and the distinct *Totten* rule has provided expanded powers of secrecy to the presidency.

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353 Pallitto & Weaver (2007) at 1381
354 *Tenet v. Doe* 544 U.S. 1, 8 (2005) at 2
355 Pallitto & Weaver (2007) at 1405
Using a combination of the unitary executive theory and the protection of the newly broad state secrets privilege/Totten rule as its legal framework, the Bush administration recreated the zone of secrecy to expand its exclusive authority over a range of foreign and even domestic policies. This interpretation of executive power meant the president could create secret programs, refuse to report on such secret activities to Congress and ultimately shut down any judicial review through the invocation of the state secrets privilege. Any independent check on the executive could now be circumvented.

Inquiries into the legitimacy of such claims of executive power were treated as a direct threat by the executive branch and were therefore repelled through invocation of the state secrets privilege. Repeatedly, this action became an insurmountable obstacle to litigation and essentially placed activities of the executive branch outside the reach of judicial review. Each judicial acceptance of the privilege pushed the boundaries a little further, which allowed the administration to use it much more freely. Instead of being confined to a discreet group of cases, suddenly the state secrets privilege was being used as the first line of defense against every inquiry into the executive branch. Lawyers for the president were quick to recognize the benefits of such an advantage. “For those of us defending the government from the range of legal assaults, openness is like AIDS … one brief exposure can lead to the collapse of the entire immune system… [But] we can always play the trump card – state secrets – and close down the game.”\footnote{Armstrong, Scott. “Do You Wanna Know a Secret?” \textit{Washington Post}, February 16, 1997.}

Increasingly the Bush administration’s experience with the state secrets privilege showed them what little chance they had of being denied. It became a costless
privilege.\textsuperscript{357} As the War on Terror progressed, the scope of the state secrets privilege expanded to include everything from basic employment cases to torture. Even when atrocities committed in the name of national security were revealed publically and in the media, the state secrets privilege gave the president complete confidence that his techniques and methods were completely immune from judicial interference.\textsuperscript{358}

**Chasing the McGuffin: The Quantitative Snapshot**

The Bush administration’s adoption of the state secrets privilege as an affirmative defense was expansive and immediate. Even those scholars who are supportive of the increased use of the privilege reach for multiple explanations to find an alternative to executive abuse.\textsuperscript{359} Within the literature and the public discourse, there is little agreement on many of the quantitative aspects of the state secrets privilege, including the number of cases that actually qualify for inclusion.\textsuperscript{360} There is agreement on the myriad challenges posed by attempting a quantitative inquiry of the privilege. Even the broadest assessments of what qualifies as a state secrets case has provided a very limited dataset.\textsuperscript{361} Most studies have focused on the outcome of published cases in which the state secrets privilege was ruled upon. But this eliminates entire groups of cases where the privilege was invoked but not ruled upon, cases where an invocation of the privilege (or threat of an invocation) lead to parties dropping suits, and most importantly cases

\textsuperscript{357} Fisher (2006); Pallitto & Weaver (2007)
\textsuperscript{358} Statement by the President on the signing of H.R. 2417 the “Intelligence Authorization Act for Fiscal Year 2004” December 13, 2003
\textsuperscript{359} Chesney (2007) p.1292 “some of the expansion no doubt reflects a general increase in the number of lawsuits being filed during this period.”
\textsuperscript{361} Chesney (2007) p.1252
with unreported, unpublished or sealed opinions.\textsuperscript{362} Further, the number of cases that implicate the privilege varies from year-to-year, and such litigation is very much context dependent, making yearly comparisons less reliable for drawing general conclusions.\textsuperscript{363}

Chesney believes that “the quantitative inquiry is a pointless one in light of the significant obstacles to drawing meaningful conclusions from the limited data available.”\textsuperscript{364} But even recognizing that the reported cases represent a low estimate of all cases where the privilege is implied or invoked does not suggest that general conclusions cannot be made from the sample of cases available for study.\textsuperscript{365} Rather, the quantitative analysis should be the basis for the more significant and testable questions regarding the qualitative differences in how the state secrets privilege has functioned in the post-9/11 legal system.\textsuperscript{366} Chesney suggests three areas of inquiry: first, has the scope of the privilege broadened in terms of the kinds of information it protects? Second, has the analytical framework by which claims of privilege are assessed been modified by an increase in judicial deference to the executive branch? And third, has the nature of the relief sought by the government in state secret cases changed to increase the benefits and advantages afforded to the executive branch?\textsuperscript{367}

In support of this multi-method approach, two scholars have undertaken the Herculean task of bringing some empirical clarity to the study of the state secrets privilege. In 2009, Dr. Laura Donohue, in conjunction with the Georgetown University Law School Center on National Security and the Law, created the State Secrets

\textsuperscript{362} Donohue (2010) p.81
\textsuperscript{363} Chesney (2007) p.1252; Donohue (2010) p.84
\textsuperscript{364} Chesney (2007) p.1252
\textsuperscript{365} Palitto & Weaver (2007) p. 106
\textsuperscript{366} Chesney (2007) p.1252, 1302
\textsuperscript{367} Id. p.1302
Archive.\textsuperscript{368} Donohue conducted searches of WestLaw and Lexus-Nexus for opinions that cited \textit{Reynolds} and \textit{Totten} as well as supplemental searches that resulted in documents with citations “in pleadings, motions, briefs, memorandum opinions, judicial decisions, Headnote strings, legislative searches, and secondary source materials.”\textsuperscript{369} This research led to a database of over 400 cases since the \textit{Reynolds} decision in 1953 through 2009, with the caveat that there were many more cases where the “state secrets doctrine played a significant role” but were not included in the study.\textsuperscript{370} Other cases excluded by Donohue were those where private parties threatened to invoke the privilege but the government did not intervene, or where it was invoked but not ruled upon in the final judicial opinion.\textsuperscript{371}

The resulting Archive is a boon to scholars of the state secrets privilege, but the data are not well suited for statistical analysis.\textsuperscript{372} In light of that Daniel Cassman, at Stanford Law School, updated the database in 2014 and made some additions in order to make the data more usable. First, Cassman updated the Archive to include cases between 2009 and 2014; he then conducted additional research to replace missing data and correct errors.\textsuperscript{373} Cases in which the state secrets privilege was raised but not ruled upon were also included. Although the Archive includes multiple entries for individual cases at

\begin{itemize}
\item \textsuperscript{368} \url{http://apps.law.georgetown.edu/state-secrets-archive/}
\item Donohue (2010) p.85
\item \textit{Id.}
\item \textit{Id.} p.87
\item \textit{Id.} p.14 see note 44 “To find additional cases, I relied primarily on three Westlaw searches. First, I searched for the term “state secrets.” That search returned thousands of results, most of which were not actually state secrets cases. However, beginning with such a broad search provided a valuable point of reference for subsequent searches. Next, I searched for any documents citing \textit{Reynolds} or \textit{Totten}. These searches were important because the state secrets doctrine was not always referred to by that name. I conducted the search for cases citing \textit{Totten} last, and that search turned up only one state secrets case that was not already in my data set. The results of these searches make me confident that my data set represents a fairly complete picture of the history of American state secrets jurisprudence.”
\end{itemize}
different levels of the court system, in order to limit over-estimation Cassman includes only the most final disposition (if any) on the state secrets privilege.\footnote{Id. p.15} The Cassman data set contains 307 cases, the vast majority of which come from the federal court system, as the privilege provides federal jurisdiction when asserted as an affirmative defense, or when the government is a party to the litigation.\footnote{Id.} My empirical analysis is based on the Cassman update to the Donohue Archive.

The unprecedented use of the state secrets privilege in the aftermath of 9/11 by the Bush administration did not go unremarked upon by the legal community. Since 2001 there have been more than 120 law review articles on the subject, although most focus on roughly two-dozen judicial opinions and highly visible suits.\footnote{Donohue (2010) p.86, p.78 note 26} The central question guiding these inquiries has been whether the Bush administration “quantitatively or qualitatively used the privilege differently from its predecessors.”\footnote{Donohue (2010) p.86} The results have been consistent. Prior to 1975, an invocation of the state secrets privilege was an extraordinary event.\footnote{Six opinions considering assertions of the privilege were published from 1954 through the end of 1972 (Chesney 2007 p.1297)} Following the Nixon administration, use of the privilege became more common,\footnote{Sixty-five opinions published between 1973 and 2001 (Chesney 2007 p.1297)} with responsibility for its invocation shifting from the “heads of department” as specified in \textit{Reynolds} to the presidentially appointed Attorney General’s office.\footnote{Statement of Dr. William Weaver, before the Committee on the Judiciary, U.S. Senate, February 13, 2008 p. 208} But following 9/11, “use of the state secrets privilege exploded.”\footnote{Cassman (2015) p.10} Under George W. Bush, the privilege expanded in two ways: the absolute number of cases in
which the privilege was invoked; and the number of those cases in which the government sought dismissal of the entire case.\footnote{Stilp, Erin M. (2006) Note, The Military and State-Secrets Privilege: The Quietly Expanding Power, 55 Cath. U. L. Rev. p.839-41}

A primary reason for the expansion was the significant role the state secrets privilege played in President Bush’s national security litigation strategy.\footnote{Donohue (2010) p.87} As the War on Terror began to rely on covert tactics such as extraordinary rendition, torture and warrantless surveillance, it “was inevitable that the state secrets privilege would become a prominent litigation” tool.\footnote{Chesney (2007) p.1299} Zeigler notes that, in these cases, the government was not seeking to avoid turning over evidence as is indicated by Reynolds, but was attempting to “entirely avoid defending its actions.”\footnote{Zeigler (2008) p.11}

Beyond the area that Donohue calls “the conduct of war,” the state secrets privilege has become part of broader framework by which the government limits its vulnerability to litigation and judicial review.\footnote{Donohue (2010) p.95} In her initial survey of the Archive, Donohue found that the privilege had evolved as a powerful litigation tool that was wielded by both the executive branch and private actors. “It has been used to undermine contractual obligations and to pervert tort law, creating a form of private indemnity for government contractors in a broad range of areas. Patent law, contracts, trade secrets, employment law, environmental law, and other substantive legal areas have similarly been affected, even as the executive branch has gained significant and unanticipated advantages over opponents in the course of litigation.”\footnote{Id. p. 91}
Weaver notes that the Bush administration appeared to “employ the privilege in support of executive branch policy, rather than out of a main concern to protect against the disclosure of information that would harm the national security if made public.”\footnote{388} Other scholars suggest that this trend is coupled with an increase in judicial ambivalence in the face of executive secrecy claims that led to an expansion in the scope of the privilege.\footnote{389} While this analysis is not disputed by the empirical evidence, Chesney is correct that it unlikely that there is a single causal mechanism behind the expansion.\footnote{390}

A primary difficulty faced by all those who have attempted to apply quantitative analysis to the state secrets privilege, is in-case attribution to presidential administration.\footnote{391} The lifespan of a state secrets case is very long and often overlaps multiple administrations. In many cases the invocation is made by one administration, with the final judicial opinion not being given until the next president is in office. Donohue has found that a distinctive characteristic of the privilege is that once it is invoked, it is upheld by subsequent administrations, although there is not a legal obligation to do so.\footnote{392} In this way, many of the cases that arose under the Bush administration, or in response to Bush administration policies, were not ruled upon until the Obama administration.

The following analysis is based on data that include cases decided through the end of the Bush administration in 2008. While this naturally excludes a large number of cases in which the Bush administration invoked the state secrets privilege in the later years of his term, it is useful to examine the variations illuminated even by Bush’s nascent use of

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\begin{itemize}
  \item \footnote{388}{Weaver (2008) p. 208}
  \item \footnote{389}{Chesney (2007); Fisher (2007); Palitto & Weaver (2007)}
  \item \footnote{390}{Chesney (2007) p.1300}
  \item \footnote{391}{Donohue (2010) p.87; Chesney (2007) p.1301; Weaver (2008); Cassman (2015)}
  \item \footnote{392}{Donohue (2010)}
\end{itemize}
the privilege in the immediate aftermath of 9/11. When Barack Obama was elected in November 2008, there was little expectation that the Bush use of the state secrets privilege would continue. The early trends that become apparent in cases ruled on by 2008 were potentially unique and might have been stopped short by the significant change in the political environment. The fact that these policies did continue means that the relationships analyzed below only grow and become more significant over time; and will be discussed more fully in the next chapter.

Analysis

Figure 1: State Secrets Privilege Cases by Year 1953-2008

The first question that must be addressed is the most basic one. Did the use of the state secrets privilege increase under the Bush administration? The answer is a resounding, yes. During the 65 years from 1953 to 2001, the privilege was asserted in 148 cases, for an average of about three cases per year. In no year was the number of cases

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393 See author’s dataset in Appendix B
involving the privilege greater than 12 (in 1991 – under the first President Bush). From 2002-2008, the privilege was asserted 72 times, for an average of 10 cases per year. In other words, the average number of state secrets assertions per year in the aftermath of September 11 was closer to the maximum number of assertions in any year during the since Reynolds articulated the privilege.

Chesney has suggested that one cause of the increase in state secrets assertions is the general increase in the size of the federal docket. Cassman investigated this possibility directly. First, he notes that Chesney, Weaver and Palitto and Donohue all observe “an apparently large and enduring increase in the use of the state secrets privilege occurred in the mid-1970s.” He therefore compared the period from 1974-2001 with the post-9/11 period to assess if the increase in the federal docket and use of the state secret privilege before 9/11 has explanatory value post-9/11. When controlling for the post-9/11 era, Cassman found that the size of the federal docket had no statistically significant effect on the number of state secret cases per year ($p = 0.63$). This indicates that the increased use of the state secrets privilege after 9/11 is not likely associated with the growth of the federal docket. What correlation exists seems to be due to the fact that before 1974, the federal docket was both relatively small and the use of the state secrets privilege was very rare.

While the size of the federal docket does not explain the growth in use of the privilege, the nature of the federal docket in the post-9/11 era is illuminating. Many have suggested that the national security policies implemented by the Bush administration

394 Chesney (2007) p.1292
395 Cassman (2015) p.17
396 Id. Cassman’s analysis here of the post-9/11 period includes the years 2009-2014.
397 Id. p. 15
essentially created new areas of litigation and that these lawsuits by their very nature frequently touch upon sensitive matters. These cases, which range from warrantless wiretapping to torture and extraordinary rendition, represent the most troubling constitutional challenges where the state secrets privilege was used to circumvent judicial review.

But while this group of cases might represent the most substantively significant increases in the scope of the privilege, the group of cases most responsible for the increase of state secrets assertions is lawsuits in which the government was not even a party to the litigation. Before 9/11, use of the privilege was almost unheard of in private suits, averaging less than once every two years. (See Figure 2) From 2002 to 2008, the privilege was raised in 33 cases to which the government was not a party, for an average of 4.7 cases per year (about 1000% increase). This post-9/11 increase appears to represent in part the enhanced in use of private military contractors in the War on Terror, and therefore a higher number of private lawsuits that implicate national security issues.

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398 Id. p. 18; Chesney (2007); Donohue (2010)
399 Id. p.25
400 Cassman (2015) p.18
401 Id.
If the government is a party to litigation, the expectation is that the courts would be more willing to uphold the privilege.\textsuperscript{403} Besides the increase in the sheer number of cases, in civil litigation to which the government is a party, courts actually ruled similarly before and after 9/11. Between 2001-2008, the percentage of state secrets claims that were upheld, in fact declined by 4%, while the number of claims that were upheld in part increased 4%. The number of claims that were denied in full declined by 8% and the number of cases in which there was no ruling on the privilege increased by 8%.

But in the category of cases in which the state secrets privilege was denied, the numbers are slightly misleading. In only one of these cases was the privilege actually denied on the merits. But, in \textit{Hepting v. AT&T},\textsuperscript{404} the denial of the privilege was made moot by the Congressional act of retroactive immunity. Most of these denials were in cases where the privilege was not properly invoked and the government was given the opportunity to adjust their claim and resubmit it to the court, or in cases where the

\begin{figure}[h]
\centering
\includegraphics[width=\textwidth]{figure2.png}
\caption{Distribution of State Secrets Privilege Cases by Government Role\textsuperscript{402}}
\end{figure}

\begin{table}[h]
\centering
\begin{tabular}{|c|c|c|c|c|c|}
\hline
 & Party Before (Civil) & Party After (Civil) & Non-Party Before 9/11 & Non-Party After 9/11 \\
\hline
Upheld & \multicolumn{2}{c|}{\cellcolor{blue!25}} & \multicolumn{2}{c|}{\cellcolor{blue!25}} & \multicolumn{2}{c|}{\cellcolor{blue!25}} \\
In Part & \multicolumn{2}{c|}{\cellcolor{red!25}} & \multicolumn{2}{c|}{\cellcolor{red!25}} & \multicolumn{2}{c|}{\cellcolor{red!25}} \\
Denied & \multicolumn{2}{c|}{\cellcolor{green!25}} & \multicolumn{2}{c|}{\cellcolor{green!25}} & \multicolumn{2}{c|}{\cellcolor{green!25}} \\
No Ruling & \multicolumn{2}{c|}{\cellcolor{purple!25}} & \multicolumn{2}{c|}{\cellcolor{purple!25}} & \multicolumn{2}{c|}{\cellcolor{purple!25}} \\
\hline
\end{tabular}
\end{table}

\textsuperscript{402} See author’s dataset in Appendix B
\textsuperscript{403} Cassman (2015) p.18
\textsuperscript{404} Hepting v. AT&T 439 F. Supp. 2d (N.D. Cal. 2006)
government did not invoke the privilege at all.\textsuperscript{405} “The test for determining the constitutionality of the government's action in a case in which the state secrets privilege has been invoked is significantly different from the test to be applied in cases in which the government has not invoked that privilege, and defendants are not entitled to the insulating benefit of that exceptional privilege without going through the process mandated by the courts for invoking it. This Court can not overstate the fact that the government has not asserted the state secrets privilege here, and it is unclear at this point whether it would or could.”\textsuperscript{406}

In terms of cases in which the government was not a party, the changes in disposition following 9/11 become more distinct. Lawsuits in which the state secrets privilege was upheld declined by 42%, and cases in which the privilege was denied also declined, but only by 8%. Again, these denials tend to represent cases in which the government ultimately did not intervene, and the privilege was thus not properly invoked.\textsuperscript{407} Between 2002-2008 there were no cases in which the privilege was upheld in part, representing a 6% decline from the pre-9/11 era. But the number of cases in which the state secrets privilege was asserted but not ruled upon represents 60% of all invocations (and a 57% increase from before 9/11.)

This finding suggests that one of the major increases in state secrets cases following 9/11, represents private parties invoking a privilege (that belongs only to the government) at significantly higher rates. These are not necessarily cases where the privilege is being upheld at higher rates, but where the courts are not ruling on the issue

\textsuperscript{405} See, for example \textit{U.S. ex rel Schwartz v. TRW, Inc.} (CV 96-3065-RSWL(RCx)); \textit{U.S. v. Libby} (CRIM.05-394(RBW).); \textit{Stillman v. Department of Defense} (01-1342(EGS))
\textsuperscript{406} \textit{Stillman v. Department of Defense} (01-1342(EGS))
\textsuperscript{407} See for example, \textit{McMahon v. Presidential Airways, Inc.} (6:05-cv-1002-Orl-28JGG); \textit{Eastman Kodak v. Speasl} (05-039164); \textit{Amason v. KBR, Inc.} (4:2005-cv-03029)
at all. This trend applies to all civil litigation, but is much stronger in cases where the
government is not a party. This implies that private corporations are using the state
secrets privilege as a standard element of “all potential affirmative defenses” whether or
not they actually intend to rely on it.  

The fact that courts are not ruling on these assertions of the privilege might imply
that judges are resisting the effort of private parties to use the privilege as a liability
shield. But Donohue argues that the very act of invoking state secrets provides a
significant set of benefits to the party. She notes that an assertion of the state secrets
privilege “shapes litigation in important and prejudicial ways” including, prolonging the
life span of the litigation, and immediate removal to federal jurisdiction where it is much
more expensive to litigate a claim. Donohue suggests that these conditions serve to scare
off potential litigants. Cassman observes that this is a difficult claim to assess
empirically, but it does potentially explain why so many private parties are including
state secrets claims when there is such a low probability of it being upheld in court.

**Unintended Consequences: Graymail**

Whether one accepts an expansive or limited view of the state secrets privilege,
*Reynolds* did articulate some specific, if nominal, restrictions on the privilege. Premier
among them is the requirement that the privilege “belongs to the Government and must
be properly asserted by it.” While much has been made over what “properly asserted”
means, there is little ambiguity over the fact that the privilege belongs to and can only be
asserted by the government. As we have seen, these cases are largely responsible for the

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408 Cassman (2015) p.26
409 *Id.*; Donohue (2010) p.99
410 *Id.* p.99
411 Cassman (2015) p.30
412 *U.S. v. Reynolds*, 345 U.S. 1, 1953 at 10
total increase in state secrets privilege invocations. In some cases, the contractors infer that state secrets would be revealed if a particular case were to proceed and then request that the government intervene by making a formal invocation. When the executive branch indicates that it might not intervene, these corporations often engage in a form of extortion, called “graymail” to ensure that the government ends the litigation.

Between 2001 and 2010, the amount of money the U.S. Department of Defense spent on contractors more than doubled. These contractors have become deeply embedded within the national security infrastructure of the United States, creating an increasingly complex relationship between the government and private corporations. If the government refuses to intervene in these cases, the contractors threaten to reveal legally or politically damaging information that they possess. Typically, the executive branch swoops in with claims of secrecy in order to abort any litigation and protect the corporation from responsibility.

In 2006, an errant Patriot Missile shot down a U.S. Navy combat pilot, Lt. Nathan White, who was on patrol in Iraq. White’s family brought a wrongful death suit against Raytheon, the manufacturer of the faulty missile. Raytheon did everything it could to get the case dismissed, but by the time the discovery process began in 2007, the government had not yet intervened. Like so many other private companies, Raytheon had intimate access to a broad range of sensitive government data. When the executive branch hesitated to get involved in the case, Raytheon began serving the U.S. Army with subpoenas for numerous secret documents. The “encouragement” was effective, and in

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414 White v. Raytheon Co. 576 F.3d 95, *; 2009 U.S. App. LEXIS 17380
2008, the case was dismissed following the executive branch’s successful invocation of the state secrets privilege.

In 1961, President Eisenhower warned that, “only an alert and knowledgeable citizenry can compel the proper meshing of the huge industrial and military machinery of defense with our peaceful methods and goals, so that security and liberty may prosper together.” Unfortunately, as the military industrial complex grew, so did the government’s enthrallment with secrecy. Private Military Corporations (PMCs) such as Halliburton fight in wars, train U.S. and foreign forces, collect and analyze intelligence, and carry out covert special operations under contracts with the government. But the truth is that any corporation that owns any part of the defense infrastructure (such as phone and data companies, bio-tech companies that engineer vaccines, high-tech companies that manufacture communications technology and private aircraft companies) can be considered central to national security.

Private corporations, such as Boeing and Raytheon, whose commercials air during Meet the Press, consistently leverage state secrets as a legal tactic to avoid responsibility in cases that range from patent infringement and breach of contract to chemical warfare and toxic dumping. Just the threat of the state secrets privilege has given corporations a demonstrable advantage in litigation. Few plaintiffs can afford the legal fees needed to cover the delays caused by an invocation of the privilege and many cases implode under that financial burden long before an official claim of privilege is ever made. This prospect alone has the power to deter potential litigants from filing at all.

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415 President Dwight D. Eisenhower, Farewell Address, January 17, 1961
416 See Donohue (2010) pgs. 89; 91; delays in litigation makes it impossible for many plaintiffs to sustain litigation, p.198; Montgomery v. eTreppid Tech., LLC, No. 06-0056, 2009 WL 910739, at *1 (D. Nev. Mar. 31, 2009), gave the state access to opposing counsel’s files p.202
The executive branch has a myriad of incentives to protect its corporate partners in such cases. If a contractor were found to be financially liable and forced into bankruptcy, the government could lose key services it depends upon in wartime. Companies are so embedded in government operations that, even without an overt threat, the executive branch may fear what compromising information might be revealed or which official might be embarrassed in a trial.

U.S. soldiers and their families are often the big losers of this use of the state secrets privilege (as was the case for Lt. White’s family). There are now lawsuits from soldiers alleging (among other things) failures in military base and convoy security in Iraq and Afghanistan. It is unlikely that any of these soldiers or their families will have their day in court. The use of contractors in place of members of the military in war has led to individual assaults and wide-scale human rights abuses. These contractors have neither the discipline nor the oversight of the U.S. military, but again and again, the executive branch has protected private companies, often at the expense of its own soldiers and officers.

The use of the state secrets privilege by private corporations, either directly or through graymail, has expanded the privilege far beyond the confines of Reynolds. The current foreign policy priorities will only continue to expand the private sector’s involvement in national security. And as the fight against terrorism moves closer to home, these companies will become even more embedded in daily American life.

Analysis (continued)

Now that we have examined changes in the ways private litigants are treating the state secrets privilege in the post-9/11 era, it is time to turn our attention to how the courts are responding to assertions of the privilege. Figure 3 looks at the distribution of cases in which claims of the state secrets privilege were ruled upon.

Figure 3: Distribution of Cases in Which State Secrets Privilege Was Decided\(^{118}\)

Both before and after 9/11, the courts upheld the majority of state secrets claims, although the percentage increased by 14%, from 66% to 80%. At the same time, the percentage of claims that were upheld in part decreased by 14%, from 20% to 6% following 9/11. The percentage of cases in which the privilege was denied decreased only by 1%, from 14% to 13%.

Cassman parsed out the differences in outcomes between civil and criminal cases, and I did the same. The civil cases result in a slightly smaller percentage of state secrets assertions that were upheld, increasing from 68% to 79% after 9/11. Civil cases resulting

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\(^{118}\) See author’s dataset in Appendix B
in a denial of the privilege remained unchanged at 18%, but the number of cases in which the privilege was upheld in part decreased from 15% to 3%.

But a more stark distinction became apparent when criminal cases were examined alone. In criminal cases, assertions of the state secrets privilege by the government were upheld in 85% of cases, representing an increase of 25% following 9/11. Criminal cases in which the privilege was upheld in part increased by only 4%, but between 2002-2008 there was only a single case in which the privilege was denied.\textsuperscript{419} The fact that criminal defendants were almost completely unsuccessful in challenging the state secrets privilege under the Bush administration has far reaching consequences, and should be the next area of state secrets research.\textsuperscript{420}

One of Cassman’s most useful updates of the Donohue archive was the inclusion of the group of cases in which the privilege is raised but not ruled upon. Figure 4 compares the full distribution of state secrets cases in the periods between 1953-2001 and 2002-2008, including the claims that were not ruled upon.

\textsuperscript{419} see \textit{U.S. v. Libby} (CRIM.05-394(RBW))
\textsuperscript{420} Cassman (2015) p.21
In cases in which the privilege is upheld or upheld in part, judicial behavior before 9/11 does not vary much after the fact, and actually the number of cases in each category decreased by 5%. Following 9/11, judges denied claims of the state secrets privilege at a much lower rate, decreasing from 17% before 9/11 to only 4% after. But the most significant change in judicial response to the privilege comes in the percentage of cases in which they do not rule. Before 9/11, judges did not rule on the privilege 12% of the time. Following 9/11 that proportion of cases nearly tripled to 35%. This suggests that courts might be treating the privilege the same way they did before 9/11, although the likelihood of the court ruling on the issue at all is significantly lower.  

One explanation for why the courts do not rule on the privilege, as discussed above, is the increase in private litigants who invoke the privilege as one affirmative defense among many. Another explanation in cases in which the government is a party, is that cases related to national security are “unusually vulnerable to dismissal or summary

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421 See author’s dataset in Appendix B
422 Cassman (2015) p.22
judgment on other grounds” including standing and sovereign immunity. But this hesitancy to make definitive rulings on the state secrets privilege is built into the very jurisprudence of the privilege itself. From Burr on down through history, judges have actively sought any and all legal alternatives to defining the nature and scope of an executive secrecy privilege. This tendency has only been heightened in the post 9/11 era. But allowing these claims to go unanswered has not discouraged either private parties or the government from invoking the privilege in increasingly broad categories of litigation, rather it has allowed use of the privilege to increase across the board.

Are judges more inclined to rule in some kinds of cases and not others? Figure 5 looks at the disposition of state secrets cases by issue, through the end of the Bush administration in 2008. State secrets cases often involve multiple issues, as such they are included in the analysis for all issues that apply.

Figure 5: Disposition of State Secrets Privilege Cases By Issue After 9/11

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423 ld. p.21
424 See author’s dataset in Appendix B
In almost every type of case, judges are more likely to uphold the privilege in full or in part by a fairly wide margin. Only in personal injury and torture cases do these rates fall beneath 50%. In Constitutional cases, those touching on the First or Fourth Amendments, the likelihood of being upheld in full or in part is 64% and 72% respectively, and the likelihood of being denied only 9% and 13%. This supports the conclusion of Fisher and others that to invoke the privilege in, even in these most serious of cases, is costless for the government in all cases and highly beneficial in most.

Discussion

Even when examining only those cases that were ruled upon under the Bush administration, between 2002-2008, three trends become quickly apparent. First, the number of invocations of the state secrets privilege has significantly increased since 9/11. Much of this increase is a result of a rise in state secrets claims from private litigants, when the government is not a party, but the number of claims initiated by the government has also increased in a significant way. Second, these cases do not represent a large increase in state secrets assertions that are being upheld, but rather a significant increase in the number of cases in which the courts are not ruling upon the privilege at all. The third trend represents criminal cases, in which defendants have been almost completely unsuccessful in challenging the use of the state secrets privilege, despite the most basic violations of fundamental civil liberties that this implies. Under CIPA (Classified Information Protection Act) the court is required to examine evidence in camera, but the defense is almost always excluded from hearings regarding what is discoverable. The

\(^{425}\) All of these conclusions concur with Cassman’s (2015) assessment of the full post 9/11 period, 2002-2014, p.29
major concern is that “the state secrets privilege effectively transforms certain evidentiary inquiries in criminal cases from adversarial processes into *ex parte* proceedings between the prosecutors and the judge.”426

As noted previously, this bare statistical analysis is only a small part of the story of the state secrets privilege. State secrets cases vary across broad categories of law, from employment and trademark law to torture and extraordinary rendition. But this dataset treats all cases equally.427 Quantitatively, a contract dispute between a weapons manufacturer and the government is represented in the same way as a case seeking judicial review of executive programs that potentially violate the constitution. Acknowledging this limitation still provides important insights and allows us to identify broad trends and examine more closely how the state secrets privilege operates.428

Ultimately the data provide little evidence clarifying whether the courts are intentionally allowing the power of the state secrets privilege to expand. Chesney argues that since the proportion of cases in which the privilege was upheld is not the largest group to increase, the data suggest that courts have treated state secrets claims with an appropriate amount of skepticism both before and after 9/11.429 But the fact that the courts have been able to successfully avoid ruling on the privilege in so many cases has clearly discouraged no one from making the state secrets privilege a go-to defense.

It is also clear that the government (as well as a growing group of private corporate litigants) has successfully utilized the privilege to shield executive programs that involve

426 *Id.* p.38
427 *Id.* p.21
428 *Id.* p. 21; Donohue (2010) p.85
429 Chesney (2007)
torture, rendition, detention and warrantless surveillance from judicial review.\textsuperscript{430} The lack of affirmative constraint of the privilege in these areas of presidential power has simply taught the government that secrecy is a very powerful tool to protect a range of questionable behavior from scrutiny. Even in cases where the privilege is denied, it does not appear to result in any meaningful judicial review.\textsuperscript{431}

Weaver notes that the increased use of the state secrets privilege after 9/11 represents “a significant alteration of the privilege’s effect” on the government.\textsuperscript{432} While the privilege is necessary to protect actual state secrets from certain kinds of disclosure, it is clear that the state secrets privilege took on a new dimension under the Bush administration in the wake of 9/11. Rather than a specific evidentiary privilege, it became a tool to advance and protect the ends of executive policy, “detached from the pragmatic moorings announced in Reynolds.”\textsuperscript{433} Despite the direct admonition of the court in Tenet that the Totten bar for dismissal was distinct from the state secrets privilege, the Bush administration continued to conflate the two principles demanding that any case that touched on their expansive interpretation of national security must be dismissed at the pleadings, thus creating a “super-privilege.”\textsuperscript{434} In the next section, we will explore several of the more notable cases in which the Bush administration made such claims.

**Policies Concealed: Extraordinary Rendition and Torture**

Khaled el-Masri was having a bad week. The unemployed car salesman from Frankfurt, Germany had been having a very stressful holiday season. He had fought with his wife and his five children were making him crazy, so he decided to get away for a

\textsuperscript{430} Cassman (2015) p.50
\textsuperscript{431} Id. p.47
\textsuperscript{432} Weaver (2008) p. 208
\textsuperscript{433} Id.
\textsuperscript{434} Id.
couple of days of quiet. A friend recommended an inexpensive holiday to Macedonia, and on December 31, 2003 he got on a bus. At the Macedonian border, he was detained by officials who suspected him of being a terrorist named Khaled al-Masri. As it turned out, el-Masri was not a terrorist, but a very unlucky German citizen of Lebanese descent. He was held incommunicado and interrogated by the Macedonian officials for 23 days. During this time, the Macedonian government alerted the CIA that they had a potential high value target in custody. Within moments of being released by the Macedonians, el-Masri was grabbed off the street by a team of men dressed in black clothes and masks. El-Masri’s clothes were cut off of him and he was put in a prisoner’s jumpsuit, handcuffed and blindfolded. He was taken to an airplane where he was handcuffed, spread-eagle on the floor and sedated by injection. He awoke to find himself in CIA custody in the prison known as the “Salt Pit” in Kabul, Afghanistan. This process was a controversial program utilized by the Bush Administration known as “extraordinary rendition.” This policy is, by its very definition, illegal under United States law, not to mention various international laws, customs and treaties to which the United States is a signatory (if not the primary author).

In the “Salt Pit,” el-Masri was kept in squalid conditions, tortured, raped and repeatedly interrogated about his purported role in 9/11. He was told, “You are here in a

436 “Persons suspected of criminal or terrorist activity may be transferred from one State (i.e., country) to another for arrest, detention, and/or interrogation. Commonly, this is done through extradition, by which one State surrenders a person within its jurisdiction to a requesting State via a formal legal process, typically established by treaty. Far less often, such transfers are effectuated through a process known as ‘extraordinary rendition’ or ‘irregular rendition.’ These terms have often been used to refer to the extrajudicial transfer of a person from one State to another.” Definition from the Congressional Research Service “Renditions: Constraints Imposed by Laws on Torture.” September 8, 2009. http://www.fas.org/sgp/crs/natsec/RL32890.pdf
437 see, for example, the Federal Torture Statute 18 U.S.C. § 2340; the International Covenant on Civil and Political Rights, the UN Convention Against Torture, and Common Article 3 of the Geneva Convention.
country where no one knows about you, in a country where there is no law. If you die, we will bury you, and no one will know.”438 By February 2003, the CIA in Kabul began to suspect that el-Masri was just the car salesman he claimed to be, and not an al-Qaeda affiliated terrorist. By March, the CIA had confirmed that el-Masri’s passport was genuine. They had the wrong man.

The CIA was now at a loss. El-Masri was slowly starving to death in a hunger strike. Admitting their error and making amends to their victim was obviously not an option. In a stunning display of cloak and dagger creativity, the CIA decided that the answer to their dilemma was a sort of reverse rendition. El-Masri was told that he had been detained because of his “suspicious name” and that he would be released, but that the U.S. would never admit he had been their prisoner.439 On May 28, 2003, five months after he was originally detained, he was handcuffed, blindfolded and transported through the night to rural Albania. He was dropped on a deserted road and told to walk into the darkness, where he feared he would be shot in the back. He was picked up by Albanian officials and escorted to an airport where he flew back to Germany.440

By December 2005, detailed accounts of el-Masri’s ordeal had been published in The Washington Post, among other places. And el-Masri’s story was not unique. European allies were beginning to grow wary of what was being done with their assistance in the War on Terror. In order to stem criticism of the U.S.’s use of extraordinary rendition, Secretary of State Condoleezza Rice was compelled to issue a

439 Id.
detailed public statement defending the program.\textsuperscript{441} At best, the statement reads like a fine piece of legal bait-and-switch. At worst, and with the hindsight provided by the 2014 Senate Torture Report, it is little more than a tissue of lies.\textsuperscript{442}

Rice begins with this rather dubious claim, “For decades, 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.”\textsuperscript{443} This statement obscures the fact that before the Bush administration, rendition referred to “the return of a fugitive from one state to the state where the fugitive is accused or convicted of a crime.”\textsuperscript{444} It specifically applied to the transportation of criminals with outstanding legal charges to another jurisdiction for the sole purpose of being brought to trial, and was reinforced by statutory boundaries and judicial processes.\textsuperscript{445}

Following 9/11, the term “extraordinary” was placed in front of rendition, thus to the White House, rendition was now uncoupled from its legal boundaries and given a new purpose.\textsuperscript{446} No longer were criminals being rendered into a judicial process for trial, now suspected terrorists (and their namesakes) were being abducted and transported simply for the vague purpose of being “held or interrogated.” This process was now governed only by executive power, new legal theories of the laws of war and ultimately barred from judicial review by the state secrets privilege.

\textsuperscript{441} U.S. Secretary of State, Condoleezza Rice, “Remarks Upon Her Departure for Europe,” December 5, 2005. Full text available at http://news.bbc.co.uk/2/hi/4500630.stm
\textsuperscript{442} Committee Study of the CIA’s Detention and Interrogation Program, Senate Select Committee on Intelligence, December 9, 2014
\textsuperscript{443} U.S. Secretary of State, Condoleezza Rice, “Remarks Upon Her Departure for Europe,” December 5, 2005.
\textsuperscript{444} Black’s Law Dictionary 1322 (8\textsuperscript{th} ed. 2004)
\textsuperscript{445} Fisher (2010) p.321
\textsuperscript{446} Id. p.328
Rice went on to say that “torture is a term that is defined by law. We rely on our law to govern our operations. The United States does not permit, tolerate, or condone torture under any circumstances.” But this statement reflects neither the actions of the CIA being perpetrated against detainees, nor the actual legal stance of the Bush administration. A year before, attorney for the Office of Legal Counsel (OLC) John Yoo, wrote that presidential power in this realm is subject to “certain constraints” including statutes, treaties and international law. However, these “statutes and treaties must be interpreted so as to protect the President’s constitutional powers from impermissible encroachment and thereby avoid any potential constitutional problems.” For all of the lip service paid to the primacy of law, the White House had created a legal framework that claimed that this new kind of war on terrorism “changes the law’s form and substance.” In other words, the U.S. “does not permit, tolerate or condone torture under any circumstances,” but it also does not recognize the legal authority of any statute or treaty that might prevent it.

Yet again, the Bush administration was unwilling to test these legal theories before the judiciary. On December 6, 2005, el-Masri filed suit against the CIA, its former director George Tenet, and others. The Bush administration immediately invoked the state secrets privilege and demanded that the case be dismissed. Echoing the language of Totten, new CIA Director, Porter Goss, insisted that intelligence activities “by their very nature” are secret and any disclosure to the court would cause “damage to the national

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448 Id. p.1235
450 El-Masri v. Tenet 479 F.3d 296, 303 (4th Cir. 2007)
security and our nation’s conduct of foreign affairs.” On May 12, 2006, the federal district court upheld the state secrets privilege and dismissed the case.

The decision issued by Judge Thomas S. Ellis, is somewhat bipolar, but par-for-the-course in state secrets jurisprudence. First he indicates that courts “must not blindly accept the Executive Branch’s assertions…but must instead independently and carefully determine whether, in the circumstances, the claimed secrets deserve the protection of the privilege.” However, “whenever its independent inquiry discloses a ‘reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged.’” This, despite the fact that these matters had already been exposed in the press, and that German Chancellor Angela Murkle publically stated that the U.S. had confirmed that they had “taken this man [el-Masri] erroneously.”

Judge Ellis did state that his acceptance of the state secrets privilege should not be “taken as a sign of judicial approval or disapproval of rendition programs.” But if the courts are not going to independently scrutinize “abusive, illegal and unconstitutional activities by the executive branch,” then who is? Finally, Ellis noted that if el-Masri’s claims were even “essentially true, then all fair-minded people, including those who believe that the state secrets must be protected that this lawsuit cannot proceed, and that renditions are a necessary step to take in this war, must also agree that el-Masri has

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453 Id. at 536
454 Id. citing U.S. v. Reynolds, 345 US 1, 10 (1953) (emphasis added by district court)
suffered injuries as a result of our country’s mistake and deserves a remedy.”

Unfortunately, he denied that the judicial branch could not provide such a remedy, and he suggested el-Masri try the executive or legislature for relief.

El-Masri appealed to the Fourth Circuit, where the dismissal was upheld on March 2, 2007. But, writing for the panel, Judge Robert B. King went further and advanced the theory that the state secrets privilege “performs a function of constitutional significance.” The court suggested that the “Executive’s constitutional mandate encompasses the authority to protect national security information,” because such secrecy is “necessary to [the Executive’s] military and foreign affairs responsibilities.”

Since “the Executive’s constitutional authority is at its broadest in these areas, “the judiciary's role as a check on presidential action… is limited.”

In the time between the original dismissal and the appeal two public developments occurred that were noted in the decision. The first was a Council of Europe report that confirmed el-Masri’s account of his rendition and torture in June 2006, and the admission by President George W. Bush three months later, that the CIA program existed. Together, these events turned extraordinary rendition into less of a state secret and more of a PR nightmare. However, despite these very public disclosures, the court insisted that even in camera examination of any documents in this case would result in an unreasonable disclosure, and the case could not proceed.

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458 El-Masri v. Tenet, 437 F.Supp.2d 530, 539 (E.D. Va. 2006) at 541
459 El-Masri v. Tenet 479 F.3d 296, (4th Cir. 2007) at 303
460 Id. at 304
461 Id. at 303
462 Id.
463 Id.
464 Id. at 302
In his Supreme Court appeal, el-Masri’s lawyers argued that the lower courts had allowed the state secrets privilege to “become ‘unmoored’ from its origins as a rule to be invoked to shield specific evidence in a lawsuit against the government, rather than to dismiss an entire case before any evidence was produced.”

But the Supreme Court refused to hear the case, without comment. In a remarkable abdication of judicial responsibility, the Court declined to even examine the classified declaration that the government filed in support of their invocation of the privilege, simply taking their claims at face value.

**Policies Concealed: Warrantless Surveillance**

In February 2001, one month after George W. Bush was inaugurated as the 43rd president and seven months before 9/11, the NSA met with private telecom companies and demanded that they provide the government with access to the phone lines of customers in the United States. The NSA did not have a warrant and relied solely on President Bush’s definition of executive power. Later, when *The New York Times* revealed the Terrorist Surveillance Program (TSP), the administration made it appear as though 9/11 was the impetus for the warrantless wiretaps. But the facts say otherwise. This blatant disregard for laws prohibiting the government from monitoring the

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466 The epilogue to *El Masri* is yet another indictment of the use of the state secrets privilege in U.S. courts. In December 2012, the European Court of Human Rights ruled that Macedonia was responsible for his abuse in that country, and that they knowingly transferred him to the CIA where he would be tortured. The court awarded him financial compensation. This was the first time “enhanced interrogation techniques” were legally declared to be torture. Singh, Amirt. “European court of human rights finds against CIA abuse of Khaled el-Masri,” *The Guardian*. December 13, 2012
communications of U.S. citizens illustrates the absolute confidence the Bush administration had that such actions would never be challenged in court.

In 2006, it seemed as though the public debate of these (not so) secret activities was about to take place. In January 2006, the Electronic Frontier Foundation (EFF) filed suit against AT&T alleging that the telecom giant assisted the NSA in unlawfully monitoring the communications of American citizens through their networks and internet services.\footnote{Hepting v. AT&T 439 F. Supp. 2d (N.D. Cal. 2006)} In a deposition, former AT&T engineer Mark Klein testified that the NSA installed specialized equipment in a “secret room” in AT&T’s switching center in San Francisco, where he was employed. He also attested to personal knowledge of similar machines that had been installed in other switching centers throughout the western U.S. From that network, the NSA was collecting client data that included incoming and outgoing phone calls, email and internet searches.\footnote{Declaration of Mark Klein, No. C-06-0672-VRW June 8, 2006}

Although the federal government was not a party to this litigation, on May 13, 2006 the Bush administration intervened to invoke the state secrets privilege in \textit{Hepting v. AT&T}.\footnote{Hepting v. AT&T 439 F. Supp. 2d (N.D. Cal. 2006)} On July 20, 2006, the privilege was rejected by Judge Vaughn Walker of the Northern District of California who noted that both the Bush administration and AT&T had publically acknowledged the program and defended its legality. The administration could not have it both ways. The “very subject matter” of the case cannot be considered a state secret if “significant amounts of information about the government’s monitoring of communication content and AT&T’s intelligence relationship with the government are
already non-classified or in the public record… the court cannot conclude that merely maintaining this action creates a ‘reasonable danger’ of harming national security.”

A primary criticism of the TSP was that a legal framework already existed for the president to seek secret warrants through the (also secret) Foreign Intelligence Surveillance Court (FISC). The Bush administration found such a limitation to be a challenge to the unitary power of the presidency and simply ignored the constraints of the Foreign Intelligence Surveillance Act (FISA), regarding them as unconstitutional. Indeed, administration attorney Jack Goldsmith best described the attitude of the Bush administration toward the legal constraints on presidential surveillance. White House lawyer David Addington told him that “we’re one bomb away from getting rid of that obnoxious [FISA] court.” Goldsmith found that the Bush administration “dealt with FISA the way they dealt with other laws they didn’t like: they blew through them in secret, based on flimsy legal opinions that they guarded closely so no one could question the legal basis for the operations.” George W. Bush claimed that the power to collect intelligence emanated directly from the president’s power as Commander in Chief and therefore didn’t require authorization from the court. Judge Walker disagreed and found no exception to the Fourth Amendment requirement that a warrant be issued by a judge. The court noted the direct analogy to the wiretapping cases of the 1970’s citing Keith where the Court ruled that there is no exception to the warrant requirement of the Fourth Amendment for “domestic security,” and found that the actions of AT&T (in

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472 Id. at 34
474 Id.
476 Hepting v. AT&T 439 F. Supp. 2d (N.D. Cal. 2006) at 68
477 United States v. United States District Court 407 U.S. 297; 92 S. Ct. 2125; 32 L. Ed. 2d 752; (1972) at 16
collusion with the NSA) “violated the constitutional rights clearly established in
Keith.”

In Hepting, the court made an effort to return to the principles established in
Reynolds – specifically, a rational balancing test of the interests involved and a
mindfulness of the role of the judiciary as a co-equal branch of government with the right
and obligation of oversight. Judge Walker wrote, “It is important to note that even the
state secrets privilege has its limits. While the court recognizes the executive's
constitutional duty to protect the nation from threats, the court 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.”

By explicitly noting the limitation of the state secrets privilege, Judge Walker
seemed to be paving the way for a conclusive statement from the Supreme Court. Despite
the administration’s fervent defense of this presidential power to surveille, after the court
denied the state secrets privilege, President Bush chose not to test his theory of executive
power in court. Instead, the president did an end run around the specter of judicial review
and demanded that Congress grant him the explicit power to collect such intelligence.

Instead of debating the issue of domestic surveillance on the floor of Congress,
the revision of FISA in 2007 allowed President Bush to engage in many of the (formerly
illegal) practices that he previously conducted under his own claimed constitutional
authority. It also granted retroactive immunity to the telecom companies that had
participated in the TSP, thus ending the Hepting lawsuit and the lone judicial challenge to

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478 Hepting v. AT&T 439 F. Supp. 2d 974, 982, 1010 (N.D. Cal. 2006) at 68
479 Id. at 36
the state secrets privilege.\footnote{See H.R. 6304 The FISA Amendments Act of 2008 http://www.opencongress.org/bill/110-h6304/text}{\footnote{\textit{U.S. Court Dismisses Suits in Warrantless Wiretaps} – Reuters June 3, 2009}{\footnote{Cassman (2015) p.47}} The case was dismissed in 2009.\footnote{“U.S. Court Dismisses Suits in Warrantless Wiretaps” – Reuters June 3, 2009}} Without congressional intervention, it appears as though the \textit{Hepting} case may have represented the first of the War on Terror state secret cases to be heard on the merits.

\textbf{Conclusion}

In an open democracy, the state secrets privilege presents a conundrum. On the one hand it is crucial to protect legitimate national security secrets from those who would use that information to do actual harm. On the other hand, it has come to be a legal and political tool that precludes judicial review and public oversight over a range of executive actions that infringe upon the most fundamental constitutional and human rights.\footnote{Cassman (2015) p.47} The transformation from the common law evidentiary privilege articulated in \textit{Reynolds} to the constitutional privilege to bar litigation espoused by the Bush administration was neither accidental nor inevitable.

The clarification in \textit{Nixon}, that the state secrets privilege could not be applied to domestic security activities was instructive. Political actors who supported the Nixonian style of unitary executive power began crafting a new ideology, known as neo-conservatism, which shifted massive amounts of executive power into the realm of national security, where they believed the power of the presidency was supreme. The terrorist attacks of 9/11 provided the neo-conservative actors who made up the Bush administration with the perfect environment in which to put these ideas into practice. This unprecedented expansion of executive power could not take place under pesky conditions like public accountability, judicial review, or congressional oversight so a mechanism must be developed to deflect such challenges. Thus, behind every attempt to question the
legality of the Bush administration’s dubious national security activities there is an invocation of the state secrets privilege that shields both the executive branch and those it employs from liability. Because, despite expansive legal justifications touted by the president’s lawyers, the Bush White House apparently believed that public awareness of these programs would produce such outrage that it would lead to constraints against the expansion of executive power; a fear that would be validated in 2013 by Edward Snowden.

The quantitative data examined in this chapter shed light on the expansive use of the state secrets privilege in the post-9/11 era, both by the executive branch and private litigants. Every time the courts refused to investigate claims of secrecy, it reinforced the efficacy and costless nature of the privilege. The Bush administration successfully conflated the Reynolds and Totten doctrines into a single super-privilege that required the dismissal of all litigation whenever the government claims that the “very subject matter” of the case is a secret. In doing so, the state secrets privilege became institutionalized as the first and last legal defense against any objection to executive national security power.

The Bush administration was particularly successful in deploying the state secrets privilege to conceal many of the most controversial programs and partners involved in the War on Terror. From warrantless surveillance to torture and extraordinary rendition, to date, only a single case of this kind even has a chance of being heard on the merits.

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484 See ACLU v. James Clapper, Docket No. 14-42-cv, May 7, 2015. This case challenges the collection of bulk metadata by the NSA. In May 2015 a 3-judge panel for the Second Circuit found that “the telephone metadata program exceeds the scope of what Congress has authorized and therefore violates [Section 215 of the Patriot Act]. Accordingly, we VACATE the district court’s judgment dismissing the complaint and
The end of the Bush administration in 2009 might have been the conclusion to the story of the expansive state secrets privilege. The contemporary literature pointing to Bush’s embrace of secrecy as idiosyncrasy might have been the whole tale. The significant change in both the ideology of the political actors, and the political environment of the new Obama administration might have returned the privilege to the more rarified use typical of the pre-9/11 era. But as we shall see in the next chapter, the wall of secrecy provided by state secrets privilege would not crumble quite so easily.

REMAND the case to the district court for further proceedings consistent with this opinion.” I anticipate that the government will invoke the state secrets privilege to prevent any further proceedings.
Chapter 4: The Obama Doctrine - The Dilemma of Policy Continuity

“No more secrecy. That is a commitment that I make to you.” – Barack Obama, 2008

In 2008, the state secrets privilege was approaching another critical juncture. While in the Senate, Barack Obama railed against the Bush administration’s use of the state secrets privilege to shield entire government programs from judicial scrutiny. Along with the rest of the Democrats in the Senate, he supported the State Secrets Protection Act. The bill was co-sponsored by soon-to-be-Vice-President Joe Biden and soon-to-be-Secretary of State Hillary Clinton, and designed to constrain and codify executive use of the privilege.

As a presidential candidate, Barack Obama publically criticized the Bush administration for having invoked the state secrets privilege “more than any other administration.” His campaign website pledged to reform the use of the privilege, and specifically to end the practice of demanding wholesale dismissal of national security related litigation. This was the first time the state secrets privilege (this obscure legal instrument) was mentioned in the context of a presidential campaign. President Obama also focused on the dangers of executive secrecy in his first inaugural address. The newly

486 S.2533 State Secrets Protection Act. It passed the Judiciary Committee in April 2008 but was never brought for a full Senate vote.
sworn in President declared, “that transparency and the rule of law will be the touchstones of this presidency.”

Barack Obama was demonstrably aware of the Bush administration’s expanded use of the state secrets privilege and was outspoken in his condemnation of its use. His critique echoed the contemporary scholarship that the explanation for such expansion rested in the specific conditions following 9/11 and the overreach of an administration built upon the unitary executive theory. All signs indicated that the absence of such actors in the new Obama administration, as well as the temporal distance from the existential threat, would have a negative impact on the use of the state secrets privilege. But such optimism would be misplaced. One president’s individual activities become another’s institutional power; and when one president stretches the constitutional limits of executive power, all future presidents can claim that expanded power.

In *Mohamed et al. v. Jeppesen Dataplan Inc.*, the ACLU filed suit on behalf of victims of kidnapping and torture, against a private aircraft company (a subsidiary of Boeing) charging that it knowingly transported kidnapped victims through the CIA’s extraordinary rendition program. The government was not the target of the suit, but in February 2008, in the middle of the presidential campaign, it intervened to halt litigation through another successful invocation of the state secrets privilege. By the time the ACLU’s appeal could be heard, the new president had been elected.

President Obama had not only campaigned against the extraordinary rendition program and the illegal detention and torture of terrorist suspects, he had specifically campaigned against this very use of the state secrets privilege. The ACLU was

489 President Barack Obama. “Inaugural Address” January 21, 2009
certainly hopeful that the president would not choose to invoke the privilege. At the very least, they hoped the administration would not insist that the case be dismissed before a trial. Even the judge overseeing the case expected that there would be a shift in legal strategy. So all involved were shocked when, in February 2009, just two weeks into the Obama administration, the new government reaffirmed the Bush invocation of the state secrets privilege and demanded dismissal.

“Is there anything material that has happened that might have caused the Justice Dept to change its legal position?” Judge Mary Schoreder, an appointee of President Jimmy Carter asked – obviously referring to the recent election. “No, Your Honor,” Douglas Letter (DOJ attorney, and later to be Obama’s Solicitor General) replied. He added that these were “authorized positions” that had been “thoroughly vetted with the appropriate officials within the new administration.”

It is unclear with whom Mr. Letter had vetted these positions. Daniel Klaidman reports that President Obama only learned of the invocation of the state secrets privilege after the fact … from the front page of the New York Times. “‘What the fuck?’ Obama squawked. ‘This is not the way I like to make decisions,’ he icily told an aide. At a February 20 Oval Office meeting, Obama pushed his lawyers to find a commonsense middle ground: ‘There should be a way to let cases go forward without revealing state secrets,’ he said, prodding them to ‘think proactively’ and be ‘surgical.’”

Unlike the Fourth Circuit in El-Masri, the three-judge panel of the Ninth Circuit refused to extend the Totten Bar for dismissal at the pleadings, unless the case involved a

492 Klaidman (2012) p.45-46
contract for espionage between the plaintiff and the government. This was clearly not the case in *Jeppesen*.

Arguing that “the Executive's national security prerogatives are not the only weighty constitutional values at stake,” the court rejected the privilege as grounds for dismissal and sent the case back for trial. The Obama administration could have let the discovery phase of *Mohamed et al. v. Jeppesen Dataplan Inc.* begin and request that specific pieces of evidence be withheld under the state secrets privilege (the way Senator Obama suggested the privilege should be used).

Instead, the administration demanded a special hearing to appeal the ruling.

In an attempt to limit the expansion of the state secrets privilege, the federal appeals court panel reasoned that the privilege, as articulated by *Reynolds*, could not be used to dismiss the litigation at the pleadings. Rather, they reiterated that it was an evidentiary privilege, used within a trial that must be evaluated by the court on a case-by-case basis. To do otherwise would give the executive branch unlimited power over what can or cannot be litigated.

“If the judiciary could not hear cases involving matters the executive deemed classified, then this would violate the judiciary's role to ‘say what the law’ is.” The panel insisted that *Reynolds* could only apply to evidence in discovery, and not the underlying facts of the case.

Whatever “constitutional significance” the state secrets privilege had risen to, “the *Reynolds* framework accommodates these division-of-powers concerns by upholding the President's secrecy

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493 *Mohamed v. Jeppesen Dataplan, Inc.*, 579 F.3d 943 (9th Cir. 2009) at 954
495 Id. at 956
497 *Mohamed v. Jeppesen Dataplan, Inc.*, 579 F.3d 943 (9th Cir. 2009) at 952
interests without categorically immunizing the CIA or its partners from judicial scrutiny.\textsuperscript{500}

The government insisted upon an en banc rehearing of the case before the full Court of Appeals. It took a year for the hearing to take place, and another 10 months after that for the court to rule. The Ninth Circuit stated their purpose in rehearing the case was to “resolve questions of exceptional importance regarding the scope and application of the state secrets doctrine.”\textsuperscript{501} In what has been called a highly controversial decision, the majority of the Ninth Circuit applied a broad, new interpretation of the privilege that essentially shields alleged human rights abuses from judicial review.\textsuperscript{502}

While the Ninth Circuit acknowledged that “some of the plaintiffs’ claims might well fall within the Totten bar,” the majority used Reynolds to justify the dismissal of the plaintiff’s case.\textsuperscript{503} The court described three conditions under which the privilege, as articulated under Reynolds, could be used to terminate the litigation at the pleadings. First, “if the plaintiff cannot prove the prima facie elements of her claim with non-privileged evidence.”\textsuperscript{504} As noted above, this was not the case, as the plaintiffs relied upon unclassified, publically available information in their complaint. Second, “if the privilege deprives the defendant of information that would otherwise give the defendant a valid defense to the claim,” and third, if privileged information is “inseparable from non-privileged information that will be necessary to the claims or defenses… and litigating the case to a judgment on the merits would present an unacceptable risk of disclosing

\textsuperscript{500} Id. at 956
\textsuperscript{501} Jeppesen II, 614 F.3d at 1077
\textsuperscript{503} Jeppesen II, 614 F.3d at 1084
\textsuperscript{504} Id. at 1083
state secrets.” At this point, it is important to note that the government invoked the state secrets privilege before Jeppessen had responded to the complaint in any way. The court could only make assumptions about what claims or defenses they would raise. The plaintiffs required no discovery from the government in order to establish a factual basis for their claims, and yet the government asserted that the public information was still privileged.

Despite appearing to have a case to which none of these conditions applied, the court found that “dismissal [was]… required under Reynolds because there [was] no feasible way to litigate Jeppesen’s alleged liability without creating an unjustifiable risk of divulging state secrets… and that further litigation presented an unacceptable risk of disclosure of state secrets no matter what legal or factual theories Jeppesen would choose to advance during a defense.” This outcome projects conjecture onto presumption until the case was dismissed because “the government claims, but does not need to prove with actual evidence, that any argument that the defendant might make in establishing its affirmative defenses would implicate information subject to the state secrets privilege.”

The decision split the panel 6-5 and inspired a vigorous dissent from the minority. The dissent opens by calling attention to the basic tension of state secrets jurisprudence. “The state secrets doctrine is a judicial construct without foundation in the Constitution, yet its application often trumps what we ordinarily consider to be due process of law.” It insists that the state secrets privilege should “sweep no more broadly than clearly

505 Id.
506 Telman (2011) p.64
507 Jeppesen II, 614 F.3d at 1089, emphasis added
508 Telman (2011) p.53
509 Jeppesen II, 614 F.3d at 1094
necessary." In this case, they reprimand the majority specifically for expanding the bar to litigation, noting that while they claim not to be using *Totten* as the justification for dismissal, in practice they nonetheless embrace that logic. The *Totten* bar “simply cannot be stretched to encompass the claims here, as they are brought by third-party plaintiffs against non-government defendant actors for their involvement in tortious activities.”

There is nothing specified in *Reynolds*, or any rule of evidence, that “allows an evidentiary privilege to expand into an immunity doctrine.”

The privilege in *Reynolds*, they reiterated, is an evidentiary privilege and cannot be applied to the general facts of the case. “It cannot be invoked to prevent a litigant from persuading a jury of the truth or falsity of an allegation by reference to non-privileged evidence, regardless whether privileged evidence might also be probative of the truth or falsity of the allegation.” The minority did not dispute the fact that some of the evidence in the case might be privileged as state secrets, but they insisted that the decision to dismiss the case at the pleadings was premature. They believed that the case should be remanded to district court for the government to assert the state secrets privilege over specific documents and information, and for the judge to then actually determine “what evidence is privileged and whether any such evidence is indispensable to the claims or defenses.” Instead, the Ninth Circuit “fail[ed] to undertake” any analysis of the “voluminous public record” supplied by the plaintiff in support of their

510 *Id.* at 1093
511 *Id.* at 1097
513 *Jeppesen II*, 614 F.3d at 1099
514 *Id.* at 1101
case, while relying upon pure conjecture by the government about what “might be divulged in future litigation.”

The decision in *Jeppessen II*, thus represented a critical juncture in the jurisprudence of the state secrets privilege. It illustrated the final conflation of the *Totten* bar and the *Reynolds* privilege into a single, “immunity doctrine that applies to the government and to civilian contractors complicit in the government’s allegedly tortuous activities.” No longer would *Totten* bar the litigation of only secret espionage contracts and *Reynolds* protect evidence within a trial. The state secrets privilege had finally become a super-privilege based on “the general proposition that courts should dismiss suits whenever the government claims that the ‘very subject matter’ of the suit is a state secret.” The court had managed to simultaneously drastically expand executive power over what could be litigated and diminished the power of the judiciary to check any exercise of that power. And President Obama did little to change the tide. The ACLU appealed to the Supreme Court, which again refused to hear the case without comment. To date, no victims of illegal detention and torture in the ongoing War on Terror have been allowed their day in court, due almost entirely to the use of the state secrets privilege.

In September of 2009, President Obama did take a public step to uphold his campaign promise and address the expanding privilege. The Department of Justice issued a memorandum of new policies and procedures governing invocations of the state secrets privilege. The intent of the memo was to “strengthen public confidence that the U.S.

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515 Id. at 1095-6, emphasis added
516 Telman (2011) p.12
517 Id.
518 Id.
Government will invoke the privilege in court only when genuine and significant harm to national defense or foreign relations is at stake and only to the extent necessary to safeguard those interests.” 519

The Attorney General’s memo opens with the pledge that the DOJ would only “defend an assertion of the [state secrets privilege] in litigation when a government department or agency seeking to assert the privilege makes a sufficient showing that assertion of the privilege is necessary to protect information the unauthorized disclosure of which reasonably could be expected to cause significant harm to the national defense or foreign relations (‘national security’) of the United States.” 520 The memo also announced that the “privilege should be invoked only to the extent necessary to protect against the risk of significant harm to national security. The Department will seek to dismiss a litigant’s claim or case on the basis of the state secrets privilege only when doing so is necessary to protect against the risk of significant harm to national security.” 521

On the surface this would appear to constrain use of the privilege by the executive branch. The policy claimed to create a “more rigorous standard” 522 than had been used by previous administrations to govern invocations of the privilege. Further, it explicitly addressed the dilemma of early dismissal, stating that “the Department will narrowly

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520 Memorandum for Heads of Executive Departments and Agencies; Memorandum for the Heads of Department Components; “Policies and Procedures Governing Invocation of the State Secrets Privilege” (September 23, 2009); emphasis added
521 Id; emphasis added
Attorney General Holder further clarified how the state secrets privilege would not be used by the Obama administration. “The Department will not defend an invocation of the privilege in order to: (i) conceal violations of the law, inefficiency, or administrative error; (ii) prevent embarrassment to a person, organization, or agency of the United States government; (iii) restrain competition; or (iv) prevent or delay the release of information the release of which would not reasonably be expected to cause significant harm to national security.” This would also appear to address many of the concerns raised by the Bush administration’s use of the privilege.

The new policy was met with skepticism by civil libertarians for having several glaring flaws. Most significantly, it did not establish any external check on executive use of the privilege, or mechanism to ensure accountability. “Nothing in the policy, for example, requires that executive officials provide to courts any of the justifications or evidence ostensibly required during administrative review. Given that the privilege is actually raised in court proceedings, lack of such requirements is notable.” Thus, the policy still permitted the executive branch to make broad assertions of secrecy to the courts without having to provide any evidentiary support to a judge. As has been illustrated in the Jeppesen case, this was already the Obama legal strategy and there was...
nothing in the new policy to actually change it.

Setty found that “this internal review process has resulted in little difference between the Bush and Obama administrations with regard to the invocation of the privilege at the pleadings stage” particularly “in cases that allege serious constitutional violations and human rights abuses.”\textsuperscript{527} The Obama administration has continued to conclude that any legal challenge to any national security program would necessitate a disclosure “which reasonably could be expected to cause significant harm.”\textsuperscript{528} And, even more alarmingly, both the Bush and Obama Justice Departments have “made almost identical arguments regarding the need for dismissal” in cases alleging major constitutional violations.\textsuperscript{529}

It appears as though the new state secrets privilege policy guidelines were mere window dressing from the very beginning. By the time the new policy was announced, the Obama administration had already taken another legal step to undermine any constraints on the privilege otherwise suggested by President Obama. In July 2009, Solicitor General (and soon-to-be Supreme Court Justice) Elana Kagen submitted an amicus brief in a fairly obscure case between two private litigants, involving a furniture manufacturer in upstate New York. The case had an appeal that had been accepted by the Supreme Court.

In \textit{Mohawk v. Carpenter},\textsuperscript{530} the question before the Court was “whether a party has the right to an immediate appeal… from a district court’s order finding waiver of the

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\textsuperscript{527} Setty (2012) p.1631  
\textsuperscript{528} Chehab (2011) p. 340  
\textsuperscript{529} Id. p. 345  
\textsuperscript{530} \textit{Mohawk Industries, Inc. v. Carpenter}, 558 U.S. 100 (2009)
\end{flushleft}
attorney-client privilege and compelling production of privileged materials.”

The facts of the case had nothing to do with national security, but the Obama administration felt that the “resolution of the question presented has potential implications for the immediate appealability of orders pertaining to unique governmental privileges,” specifically the state secrets privilege.

As we have already seen, much of the judicial history of the privilege relies on legal slight-of-hand: an evidentiary privilege becomes a constitutional privilege; the Reynolds balancing test becomes the Totten bar. This has largely been facilitated by the fact that for 200 years, the Supreme Court has avoided making a definitive statement on the nature and dimensions of the state secrets privilege. But that has not stopped presidents from making self-aggrandizing assertions regarding the privilege. And the newly elected President Obama was no exception.

In Mohawk, the Obama administration decided that a potential ruling on the question of attorney-client privilege could be a backdoor to a favorable ruling on the state secrets privilege. Buried on page 30 of a 42-page brief, is the rather dubious interpretation that the state secrets privilege does not turn “on the merits of the action in which they arise, but rather on the nature of the constitutional prerogatives of the Executive Branch,” a suggestion which is in direct conflict with both the principles established within Reynolds, and the text of the Constitution. Kagen trots out the favored executive claims that the privilege has “origins [that] extend to early Anglo-American

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532 Id.
533 Id. at p.30
law” and has been “long-recognized” by the Supreme Court. 534 As has been expanded upon in chapter 2, this is debatable at best. She cites to the El-Masri decision that the privilege “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.” 535

The brief reiterates the executive branch’s view that it is a “constitutionally rooted privilege” 536 and suggests that the prescriptions in Reynolds (specifically that the privilege only be asserted by the head of an executive department) impose an effective “restraint on its invocation.” 537 The brief concludes its assertions regarding the state secrets privilege with an argument the government often relies upon that “once that information is released, a reversal of judgment cannot mitigate the harm to the national interest.” 538 It does not elaborate on how in camera disclosure to a federal judge would harm the national interest.

The decision, which was unanimous, ended up being notable for two reasons. It was both the first Supreme Court Opinion penned by Justice Sonia Sotomayer, and the first time the term “undocumented workers” was used in place of “illegal immigrants.” 539 In the entire 22-page decision, there is a single reference to the state secrets privilege, in a footnote. Justice Sotomayer wrote, “Participating as amicus curiae in support of respondent Carpenter, the United States contends that…appeals should be available for rulings involving certain governmental privileges ‘in light of their structural

534 Id. at p.29
535 El-Masri v. United States, 479 F.3d 296, 303 (4th Cir.), cert. denied, 128 S. Ct. 373 (2007) in Id. at p.29
536 Id. at p.31
537 Id. at p.29
538 Id. at p.32
539 Mohawk Industries, Inc. v. Carpenter, 558 U.S. 100 (2009)
constitutional grounding under the separation of powers, relatively rare invocation, and unique importance to governmental functions.’ We express no view on that issue.”540 The president’s attempt to have the state secrets privilege permanently declared to be a constitutional privilege ran headlong into the Supreme Court’s attempt to permanently avoid ruling on the state secrets privilege.

Theory

How can we explain this distance between Barack Obama’s public rhetoric around the state secrets privilege and the legal maneuverings of his administration? Ambinder and Grady report that “‘the president would roll his eyes at first, but this stuff really agitated him. He had a lot less discretion than he thought he would.’ In many of the cases… Obama would ask for briefing books with the relevant information, take them to bed with him, and return the next day having concluded that he hadn’t been able to come up with a new way forward.”541 Had he, as Glenn Greenwald accused, “been captured by the culture of secrecy or been tempted by the allure of unchecked executive power?”542 Was it simply that “it is clearly not in the interest of the executive branch to initiate any tinkering with the state secrets privilege?”543 What is clear, is that “no administration seriously wishing to claim the mantle of most transparent can defend the current policy on the state secrets privilege.”544

During President Bush’s final months in office, he was asked what had surprised him most about the presidency. “Bush answered without hesitation. ‘How little authority

540 Id. at p.15, note 4.
541 Ambinder and Grady (2013) Location: 4682
543 Setty (2012) p.1638
544 Ellington (2013) p. 144
I have,’ he said with a laugh.” In a magazine cover story in 2015, President Obama said much the same thing. Whatever intentions they come to the office with, presidents are unanimously disappointed with what they are actually able to do. As we have seen, individual presidents tend to operate within certain latitudes of freedom that are constrained by forces that are institutional, political and temporal.

There are several theoretical approaches to analyze what forces have constrained President Obama, resulting in the continuity and expansion of the state secrets privilege under his administration. The “rational actor” model predicts that regardless of the policy maker, decisions will be made rationally based on objective assessment of the relative costs and benefits of competing options. In this case, the rational actors of the Bush administration enacted a rational policy by maximizing the utility of the state secrets privilege. When faced with similar conditions, the rational actors of the Obama administration made the same rational decision.

This might be the case. In an illustration of the conventional wisdom that “where you stand depends on where you sit,” the preferences of President Obama may have changed when his institutional interests changed. But the rational actor model makes several assumptions that oversimplify the reality of governing. First, the government is not a single, rational actor, with a single purpose. It consists of hundreds of individuals with multiple, often competing interests. Second, although the conditions might be similar, the variables always differ over time. “The same information, opportunity for deliberation

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546 Simmons, Bill. “President Obama and Bill Simmons: The GQ Interview.” Gentlemen’s Quarterly. November 2015
and decisional context are never present from one administration to the next."\textsuperscript{548} One need not examine American politics too closely to recognize that what seems rational to one actor in one context is distinctly irrational to the next actor, even in the same circumstances. In the rational actor model “ends are inferred from action that is inevitably ambiguous and capable of supporting multiple, conflicting inferences.”\textsuperscript{549} Whatever the merits of any one Bush/Obama invocation of the state secrets privilege, the contention that the vast and continued expansion of the privilege is the only rational response to the changing conditions of the past 15 years is unconvincing at best. “These deficiencies in the rational actor model undermine its capacity to explain and predict policy continuity.”\textsuperscript{550}

If the rational actor model is too narrow in its focus, the “government politics” model makes up for it with the breadth of its approach. Rather than suggesting that policy is the result of rational but non-specific actors maximizing utility, the government politics model posits that “decisions result from bargaining among individual governmental actors, focusing on characteristics such as their perceptions, preferences, position, and clout.”\textsuperscript{551} The strength of this model is that it recognizes the reality of the chaos inherent in policymaking, and the difficulties in identifying what is causally relevant.\textsuperscript{552} The identities of the “players” are of particular importance, as are their interests, hierarchies and unequal influence, and the legal and cultural rules that constrain them.\textsuperscript{553} The benefit of this model is that it takes into account the personalities and political context

\textsuperscript{548} Glennon (2015) p.76; Allison & Zelikow (1999)
\textsuperscript{549} Glennon (2015) p.75; Allison & Zelikow (1999)
\textsuperscript{550} Glennon (2015) p. 79; Allison & Zelikow (1999)
\textsuperscript{551} Glennon (2015) p. 4; Allison & Zelikow (1999)
\textsuperscript{552} Glennon (2015) p.80; Allison & Zelikow (1999)
\textsuperscript{553} Id.
surrounding the policy decision. However, it suffers from an over-abundance of seemingly relevant factors and “incorporates so many variables that it is an analytic kitchen sink.”\textsuperscript{554} The government politics model is particularly unsatisfying in analyzing state secrets privilege policy because the major change in policy makers from the Bush to Obama administration would predict a change in policy rather than the continuity.

A constructivist analysis concluded that the continuity of national security policy from Bush to Obama could best be explained through the embedding of ideas about the nature of the terrorist threat within the executive branch as well as American culture in general. Jackson found the Bush administration institutionalized and normalized the War on Terror by restructuring the national security infrastructure and establishing the terror threat as the center of American foreign policy for generations to come.\textsuperscript{555} McCrisken suggests that “the continuities in US counterterrorism do not indicate that Obama is trapped by Bush’s institutionalized construction of a global war on terror so much as he shares a conception of the imperative of reducing the terrorist threat.”\textsuperscript{556} In the case of the state secrets privilege, this explanation falls short because even if the Bush and Obama administrations shared the goal of eliminating the terrorist threat, their agreement certainly ended at the legal means with which to do that.

Glennon advances the argument a step further. He identifies the emergence of the national security infrastructure as a distinct institution, within the institution of the

\textsuperscript{554} Id.  
executive branch. In 2010, *The Washington Post* did a comprehensive study called “Top Secret America” that identified 46 departments and agencies of the executive branch tasked with national security activities, as well as almost 2,000 private corporations that support those efforts. This national security network consists of several hundred executive officials who run the military, intelligence, diplomatic and law enforcement agencies. Their mission is to protect the international and national security of the U.S., and their operations include everything from the military, intelligence gathering and analysis, weapons development and manufacturing, cybersecurity, as well as other security related actions.

This powerful network is not the shadowy cabal of fiction or primetime TV. Nor, was its emergence purposeful and straightforward. Rather, this “national security framework has evolved gradually in response to incentives woven into the system’s structure as that structure has reacted to society’s felt needs.” Glennon posits that the national security infrastructure (whom he calls the Trumanites because of the major increase in national security under President Truman) is best described as a single “network that straddles multiple organizations,” and that the continuity in national security policy over the past two administrations can best be explained by analysis of the emergence of this network.

He borrows from organizational behavior theory to investigate the impact of several aspects of development including: “how membership and the culture of its members’ home organizations (primarily the Department of Defense and the Intelligence Community) shape the greater network’s purposes; how standard operating procedures

557 Glennon (2015) p.15  
http://projects.washingtonpost.com/top-secret-america/  
559 Glennon (2015) p.36  
560 Id. p. 85
limit its capacity for change; how the network assesses risk; how power within the network is allocated and enhanced; and how information flows and affects network outputs.”

Glennon finds that each of these dynamics tends to reinforce both policy status quo and enhanced secrecy.

Unlike the visible members of the executive branch, the members of the national security network do not come and go with presidential administrations. Of the 668,000 civilian employees in security related agencies in 2004, only 247 were political appointees. With long-term membership comes loyalty to other members as well as existing decisions, and commonly shared values and assumptions. Glennon argues that these officials are therefore predisposed toward policy preferences that support their standard operating procedures and maintain the status quo.

“They define security more in military and intelligence terms than in political or diplomatic ones,” which reinforces a powerful structural dynamic. “Overprotection of national security creates costs that the network can externalize; under-protection creates costs that the network must internalize.” As a result, members of the national security network tend to “exaggerate potential threats and downplay trade-offs that must be accepted to meet those threats.”

One primary source of the national security network’s power has been the sense of imminent emergency following 9/11, and the fear of uncertain threats that must be urgently addressed. Another source of the network’s power is the fact that “members
are seen as experts but also as smart generalists."568 Their expertise in all things national security is presumed to be far superior to all non-members, including presidents, members of congress and the courts. The network maintains this façade most effectively through the control of information. Access to information reduces uncertainty, and thus the power of the network. Therefore information “is not shared with real or potential competitors, leading to secrecy, equivocation, and exclusivity.”569 Within the network, “dissent is suppressed in a continuing drive for consensus that values loyalty” to the group above all else.570 In this way, network outputs constrain the options available to policy makers to a limited selection.571

Glennon believes that the network has thrived in the 21st century as a direct result of the nature of the terrorist threat. “The terrorist threats that the [network has] confronted are nimble, shadowy, and quick-footed adversaries too agile to be fought by a bureaucracy strangling in its own red tape.”572 But its emergence has been predicated upon secrecy. Oversight or public inquiry would destroy the efficiency so necessary to the national security network. Transparency must be avoided at all costs. For the national security network, the conception of the state secrets privilege under President Bush was a windfall. With it, the network was able to insulate itself not only from any external constraints but also, it would seem, from any new preferences of incoming policy makers. “Secrecy, once accepted, becomes an addiction.”573

568 Id. p.86
569 Id. p.84
570 Id. p.87
571 Id. p.85
572 Id. p.87
In this way, many of the causes of the Obama state secrets privilege policy are path dependent. Path dependence refers to the way in which the future trajectory of a policy is defined by antecedent conditions that allow a finite group of contingent choices. Those conditions may no longer be applicable and the choices ill considered, but once the policy has consolidated it is very difficult to reverse.574 Page finds four related causes that explain the way certain policies are path dependent. First, path dependent policies display increasing returns, meaning that the more a choice is made the greater the benefit that is accrued.575 The more state secrets are invoked and accepted, the greater the benefits of concealment. Second, policies demonstrate self-reinforcement, which refers to the way decisions promote the persistence of the policy.576 State secrets cases by nature span many years and multiple presidential administrations. But as the use of the privilege has expanded over time, one aspect has been consistent. Once the president invokes the state secrets privilege, subsequent administrations maintain that claim. This is true regardless of political party.

Positive feedback is when a choice creates greater benefits when also made by others.577 It is similar to increasing returns, in that the more accepted invocations of the privilege the greater the benefits of broad concealment. Finally, lock-in refers to the way that one choice becomes more desirable because it has been made a sufficient number of times.

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575 Id.
576 Id.
577 Id.
times.\textsuperscript{578} The more an invocation of the privilege is considered standard operating procedure, the more likely it is to be invoked.

``The dirty little secret here,'' a former associate counsel in the Bush White House, Brad Berenson, explained, ``is that the United States government has enduring institutional interests that carry over from administration to administration and almost always dictate the position the government takes.''	extsuperscript{579} This is particularly true for the national security network and has led to ``persistence in the interests and outlook of the national security leadership.''	extsuperscript{580} In the case of the early Obama administration, the continuity in policy mirrored the continuity in the leadership of the national security network. For a significant period of time the head of the CIA, the Director of National Intelligence, the Secretary of Defense and the head of the White House Counterterrorism office were all alumni of the Bush administration.\textsuperscript{581} President Obama’s initial choices were thus constrained by the national security network’s ability to frame the set of options from which he could choose as ``the option they wanted, bracketed by two unreasonable alternatives that could garner no support.''	extsuperscript{582}

Obama’s campaign rhetoric and even personal preferences collided with the reality of the executive branch in the 21st century. Glennon considers the national security network to be so powerful that he describes it as a ``double government.''	extsuperscript{583} No matter the ideology or intentions of incoming policy makers, the only options available once governing are framed by the national security network. The policy preferences of the

\textsuperscript{578} Id.
\textsuperscript{579} Glennon (2015) p.25
\textsuperscript{580} Goldsmith (2012) p.27
\textsuperscript{581} Glennon (2015) p.61
\textsuperscript{582} Id. p.64
\textsuperscript{583} Glennon (2015)
network are driven by their need to maintain power through continuity and secrecy. The use of the state secrets privilege under President Bush may have been philosophically repugnant to President Obama, but the national security network has a clear and decided interest in preserving the broadest possible interpretation of legitimate secrecy. And so, despite President Obama’s hope for change, the use of the state secrets privilege has continued to expand, bestowing upon the national security network “the keys to their own immunity.”

Quantitative Analysis

This quantitative inquiry begins where the last chapter left off, in 2009. As has been noted previously, state secrets cases often last longer than the presidential administration in which they are initiated. That first two years of the Obama administration’s invocations of the privilege is reflective of that trend. President Obama upheld his predecessors’ example of maintaining all previous claims. But it is worth noting again, that he was under no legal obligation to do so. The expansion of the state secrets privilege under President Bush might have been halted under President Obama. Instead, his first two years exceeded the 17-case high of the Bush administration. The national security network remained successful in maintaining the integrity of the shield of secrecy provided by the privilege.

Some of the trends that became apparent in the initial years following 9/11 have stayed consistent through the Obama administration. First, the major increase in the use of the state secrets privilege since 9/11 has not diminished, although when the government is a party, the courts have upheld the privilege at a slightly lower rate than during the Bush administration. Second, when the government is not a party to the

\[584\] Ambinder and Grady (2013) Loc: 4919
litigation, the courts usually do not rule upon the privilege. And third, in criminal cases invocations of the privilege have yet to be denied.\textsuperscript{585}

Figure 6: State Secrets Privilege Cases by Year 2009-2014\textsuperscript{586}

In the 65 years between \textit{Reynolds} and 9/11, the state secrets privilege was invoked a total of 148 times. Under the Bush administration it was asserted 72 times. And in the five years of the Obama administration accounted for in this dataset the privilege has already been invoked 72 times (see Figure 6). Under President Bush, the average number of state secrets cases was 10 per year, but President Obama has increased that average to 11.5 per year. The year 2014 does represent a decline in the number of state secrets cases, although the dataset does not distinguish between the substantive significance in the cases in which the privilege is invoked. The most recent assertions may have been fewer than in past years, but the cases in which the privilege has been claimed, such as \textit{Jewel}, have far-reaching implications.

One distinction between the Bush and Obama eras is the number of state secrets cases to which the government was not a party, but intervened. Before 9/11, intervention

\textsuperscript{585} Cassman (2015) p.3
\textsuperscript{586} See author’s dataset in Appendix B
into a private suit happened about once every two years.\footnote{Cassman (2015) p.18} Under President Bush this average increased to 4.7 cases per year, making it the group of cases most responsible for over half of the total expansion in invocations of the privilege.\footnote{see Chapter 3, Figure 2} Under the Obama administration, this number decreased to an average of three cases per year and only 25% of the total invocations between 2009-2014. (See Figure 7)

![Figure 7: Distribution of State Secrets Privilege Cases by Government Role 2009-2014\footnote{See author’s dataset in Appendix B}](image)

Under President Bush, 27% of state secrets privilege invocations were upheld in cases to which the government was not a party. Under President Obama, this number dropped to zero. This demonstrates that the courts have become at least somewhat skeptical of assertions of the state secrets privilege by private parties. However, the percentage of cases in which the privilege was denied also decreased from 12% to 5%. The number of private lawsuits in which the privilege was not ruled upon represents the largest category under both Bush and Obama, increasing from 60% to 83%.

Consistent with expectation, in cases where the government was a party to the litigation the courts continue to be much more likely to rule, and to rule favorably for the government. In these cases the courts upheld the privilege 61% of the time, representing a
6% increase from the Bush administration. The number of cases that were upheld in part decreased by two to 17% under President Obama. The percentage of cases in which the privilege was not ruled upon increased by one point to 20%. And only a single case to which the government was a party had an assertion of the state secrets privilege denied.\(^{590}\) Even in that case, *Vance v. Rumsfeld*, the initial denial of the privilege was overturned on appeal and the case was dismissed. The court again seemed to rule on conjecture, rather than facts. “When the state-secrets privilege did not block the claim, a court would find it challenging to prevent the disclosure of secret information. Anyone, whether or not a bona fide victim of military misconduct, could sue and then use graymail (the threat of disclosing secrets) to extract an undeserved settlement.”\(^{591}\)

Cassman found, when examining the entire pre/post 9/11 period that “before September 11, courts ruled on the privilege question about 96% of the time and upheld it 71% of the time when the government was not a party. After September 11, courts have reached the privilege issue only 31% of the time when the government is not a party, and they have upheld it in 53% of cases in which a ruling was made.”\(^{592}\) These findings suggest that the state secrets privilege is not a very successful legal strategy for private litigants, as it was not upheld a single time during the Obama administration when the government was not a party. Courts remain most likely to not rule upon the privilege in these cases, rather than deny the privilege directly. But this has not dissuaded parties from using the privilege as part of a go-to defense.

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\(^{590}\) *Vance v. Rumsfeld* (10-1687, 10-2442) November 7, 2012
\(^{591}\) Id. p.18
\(^{592}\) Cassman (2015) p.24
First, we examine those cases in which the courts did rule on the state secrets privilege. Figure 8 looks first at all state secrets cases, and then separates out the civil and criminal cases. Several trends begin to emerge. In civil cases, the percentage of state secrets invocations that were upheld decreased from the high of 79% under President Bush to only 52% under President Obama. The percentage of civil cases in which the privilege was upheld in part jumped from 2% under President Bush to 29% under Obama. However, once again the percentage of cases in which the privilege was denied dropped from 18% to 10%. This suggests that the courts might be approaching assertions of the state secrets privilege with slightly more skepticism than they did under the Bush administration. However, these denials are less illuminating than one might hope.

The only two suits in which the privilege was actually denied, were in cases in which it was not properly invoked. In Al-Quraishi v. Nakhla, the government was neither a party to the case nor did the government intervene. “In light of the fact that the power to invoke this privilege belongs to the Government alone and the admonition that the state secret doctrine should not in any event be lightly invoked, the Court declines to dismiss the case on the hypothetical possibility that classified information may be

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593 See author’s dataset in Appendix B
594 Al-Quraishi v. Nakhla (PJM 08-1696) July 1, 2010

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pertinent.”595 And in *Roule v. Petraeus*,596 the government was the defendant but did not actually assert the privilege. “The court holds that – on this record – the possibility that the Government “may” involve the state secrets privilege is not sufficient to stay the case or discovery.”597 Ultimately the case was settled.

The use of the state secrets privilege in criminal cases expanded substantially after 9/11. Despite the fact that “criminal cases implicate core individual rights and liberty interests… courts are still very likely to uphold the state secrets privilege in full.”598 In fact, under both the Bush and Obama administrations the privilege was denied only a single time.599 In criminal cases, the courts are still required to examine all evidence *in camera* under the Classified Information Protection Act (CIPA), but the defense is almost always excluded from hearings regarding what is discoverable. Thus, “the state secrets privilege effectively transforms certain evidentiary inquiries in criminal cases from adversarial processes into *ex parte* proceedings between the prosecutors and the judge.”600

Figure 9 examines the full distribution of state secrets cases, including those in which the privilege was not ruled upon. Before 9/11 courts did not rule on the privilege 12% of the time. By the time of the Obama administration, that had tripled to 36%.

595 *Id.* p.34
597 *Id.*
598 Cassman (2015) p.29
599 *U.S. v. Libby* (CRIM.05-394 (RBW))
600 *Id.* at p.38
The privilege has actually been upheld at a slightly lower rate over time, dropping from 58% before 9/11 to 53% under President Bush, and finally to 46% under Obama. Cases in which the privilege is upheld in part have bounced from 13% pre-9/11 down to a low of 8% under the Bush administration, and now back up to 12% under President Obama. As has been previously noted, very few cases since 9/11 have had the state secrets privilege fully denied. It has dropped continuously from a high of 17% before 9/11 to 4% during the Bush administration and now 3% under Obama.

Just as under the Bush administration, the courts continue to address the state secrets privilege with a certain amount of ambivalence. Judges are clearly more hesitant to deny the privilege outright, unless it is obviously improperly invoked, but they are also less eager to uphold it in full. The fact that a full third of state secrets invocations go unruled upon is consistent with the modern history of the privilege. The courts continue to avoid definitively ruling on the nature and scope of the state secrets privilege, and this

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See author’s dataset in Appendix B
ambiguity has allowed the expanse of the privilege to persist.

Finally, we examine the disposition of state secret cases by issue. Under President Bush the privilege was upheld in full or in part at least 50% of the time in all categories except personal injury and torture. This trend diminished somewhat during the Obama administration.

Figure 10: Disposition of State Secrets Privilege Cases By Issue 2009-2014

Under President Obama, judges upheld the privilege at a rate of at least 50% only 25% of the time. For most issues the privilege is more likely to be not ruled upon than upheld,

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602 See author’s dataset in Appendix B
even in part. In constitutional cases touching the First and Fourth Amendments, the result is a mixed bag. First Amendment cases were still upheld at 75% and only denied 25% of the time. But Fourth Amendment cases were denied 54% of the time and only upheld at a rate of 46%. Only in criminal cases has the privilege been upheld 100% of the time, and as such represent the vast majority (67%) of all cases in which the privilege is upheld.

Discussion

These findings suggest that, despite rhetoric to the contrary, very little about state secrets jurisprudence has changed since the Bush administration. The Obama administration is still invoking the privilege at a much higher rate than before 9/11, and in an expansive array of litigation. The courts may not be blindly upholding the privilege every time it is asserted, but neither are they discouraging parties from invoking the privilege through explicit constraints in positive law. The number of cases in which the privilege is not ruled upon reinforces the benefits of invoking this costless privilege regardless of a ruling.

It is very troubling that criminal defendants have been completely unsuccessful at challenging invocations of the privilege since 9/11, and this aspect and should be examined further. While defendants are not being convicted on the basis of secret evidence, the courts have acknowledged that when “the state-secrets privilege applies to criminal cases…it must give way under some circumstances to a criminal defendant’s right to present a meaningful defense.”

While many of the early cases in this dataset could be attributed to President Bush, and were a result of his policies, President Obama did far more than continue to

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603 United States v. Stewart, 590 F.3d 93, 131 (2d Cir. 2009); see also United States v. Aref, 533 F.3d 72, 79-80 (2d Cir. 2008) in Cassman (2015) p.35
invoke the state secrets privilege in the cases of his predecessor. As we shall see in the following section, the Obama administration also invoked the privilege to shield several executive programs of their own from judicial review. These programs implicate some of the most basic human and constitutional rights, including due process, and the right to be free from unwarranted surveillance. But when President Obama “applies his lawyering skills” to state secret cases, it tends “to enable, not constrain” his executive power.  

**Policies Concealed: Unmanned Drones and Targeted Killing**

Early in his administration, President Obama began his attempt to close the prison in Guantánamo Bay, Cuba. He argued that “the US can prosecute the war against terrorism in ‘a manner consistent with our values and our ideals.’” Seven years later, “practical barriers, political machinations and the genuine threat potential of long-held detainees have largely scuppered his commitment to close Guantánamo.” But the experience was instructive. By restricting the most abhorrent aspects of seizure, interrogation, and detention practices, President Obama sought to bring national security policy more in line with his vision of American values and ideals. But these constraints on capture and detention had the unintended consequence of pushing the Obama administration “further into the murky moral maze of drone attacks and targeted killings.” And like the Bush administration before him, the Obama administration has strategically used the state secrets privilege to conceal the enormous expansion of Predator drone program.

607 Id.
Does the President of the United States have the power to identify an American citizen as a terrorist and order his targeted killing by an unmanned drone in a country where the U.S. is not at war, without legal charges, a trial, appeal or any review process outside of the executive branch? The answer appears to depend on when the question is asked. In July 2001, two months before the twin towers fell, the U.S. ambassador to Israel condemned Israel’s targeted killing of Palestinian terrorists. He declared, “The United States government is very clearly on record as against targeted assassinations …They are extrajudicial killings, and we do not support that.” After 9/11, the government took a different stance. Suddenly, the Israeli position seemed much more practical.

As long as terrorism was classified as an act of war rather than a crime, the Bush administration could free itself from the constraints of due process imposed by the Constitution. Further, the Bush administration was confident that even if the program were to come under any sort of scrutiny, the state secrets privilege would likely protect the executive branch from ever having to defend the practice in a court of law. President George W. Bush never had to face the particular conundrum noted above, but his successor would. The Bush administration may have initiated the CIA’s targeted killing program, but President Obama quickly picked up where his predecessor left off. In fact, Obama authorized as many drone attacks in his first 10 months in office as Bush did during the last three years of his presidency.

On September 30, 2011, a U.S. citizen named Anwar Al-Aulaqi was killed in a drone strike in Yemen. His teenage son, Abdulrahman – who was a native born citizen born in Denver, Colorado and had not seen his father in years – was killed by a drone two

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weeks later while eating at an outdoor café in Yemen with his younger cousin. Al-Aulaqi was a radical cleric based in Yemen with a worldwide following because he spoke English. By 2010, the Obama administration had connected him directly to the Christmas Day “Underwear Bomber” plot and determined he was the inspiration for the Fort Hood shootings and the failed Times Square bombing attempt. Still, administration officials were hesitant to add Al-Aulaqi to the CIA hit list because of the legal issues surrounding his citizenship. 609

In January 2010, the Department of Justice’s Office of Legal Counsel (infamous for its “Torture Memos” during the Bush administration) 610 was called upon to create the legal justification for the “extraordinary seriousness of a lethal operation by the United States against a U.S. citizen.” 611 The secret memo articulated the conditions under which the president had the authority to carry out the extrajudicial killing of an American citizen. 612

The administration refused to turn over the memo, even to Congress, and three years later the ACLU sued for its release. In January 2013 the case was dismissed by Judge Colleen McMahon who wrote, “I can find no way around the thicket of laws and precedents that effectively allow the executive branch of our government to proclaim as perfectly lawful certain actions that seem on their face incompatible with our Constitution and laws while keeping the reasons for their conclusion a secret… The Alice-in-

609 Id.
611 DOJ White Paper: Lawfulness of a Lethal Operation Directed Against a US Citizen Who is a Senior Operational Leader of Al-Qa’ida or An Associated Force (undated, leaked Feb 2, 2013)
612 Id.
Wonderland nature of this pronouncement is not lost on me.” She called the legal environment in which she was operating “a veritable Catch-22.”

A month later, in February 2013, a 16-page summary white paper of the memo (which was not classified) was obtained by the NBC News. “Although not an official legal memo, the white paper was represented by administration officials as a policy document that closely mirrors the arguments of classified memos on targeted killings by the Justice Department’s Office of Legal Counsel, which provides authoritative legal advice to the president and all executive branch agencies.”

The memo has been called “chilling… full of twisted definitions, gaping loopholes and hints that the White House still isn’t sharing its full justification for killing citizens without due process.” The memo contends that it is legal to assassinate a US citizen under certain conditions. The first condition is that “an informed, high-level official of the US government has determined that the targeted individual poses an imminent threat of violent attack against the U.S.” This is problematic for two reasons. The term “high-level official” is singular, which means that a lone individual can make this lethal decision. The memo does not specify which high-level officials might qualify, or to whom they might be accountable. The condition also mandates that the threat must be imminent, but the memo defines “a broader concept of imminence” in such a way that a reasonable person might instead call this “not at all imminent.” To the DOJ “imminent is

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616 DOJ White Paper: Lawfulness of a Lethal Operation Directed Against a US Citizen Who is a Senior Operational Leader of Al-Qa’ida or An Associated Force (undated, leaked Feb 2, 2013)
whatever they say it is.” The second condition, that “capture is infeasible,” is equally problematic in terms of language. Throughout pages of legalese, “infeasible” reads more like “inconvenient.” This is another example of Obama’s preference for a kill-not-capture policy.

Perhaps the most troubling aspect of the memo’s justification for the program is the assumption that the target is a “senior, operational leader of al Qaeda or an associated force.” There are presumably a finite number of people who fall into this category. However, the ambiguity of “an associated force” seems to give the government the freedom to target individuals who are quite separate from Al Qaeda. Critics within and outside the government have long objected that the criteria used by the CIA to identify these terrorists are simply too imprecise. One such critic noted, “When the CIA sees three guys doing jumping jacks they think they have a terrorist training camp… Men loading a truck with fertilizer could be bomb-makers… or farmers.” Similar to the early stages of the war in Afghanistan, much of the human intelligence is gathered from tribal and religious groups that have been enemies for generations. Turning someone in to the CIA as a “terrorist” is still an expedient way to get rid of a local enemy and make more reward money than most people in the region can earn in a year.

It is easy to see the appeal of using unmanned drone attacks to fight terrorists halfway across the planet. From the government’s perspective, the endeavor is clean, low-risk and relatively cheap. No American lives are lost in a drone strike. And dubious

617 Downie (2013)
618 McCrisken (2011) p.794
619 DOJ White Paper: Lawfulness of a Lethal Operation Directed Against a US Citizen Who is a Senior Operational Leader of Al-Qa’ida or An Associated Force (undated, leaked Feb 2, 2013)
accounting has allowed the CIA to label any males over the age of 13 killed in an attack as terrorists, which helps keep the official number of civilian casualties very low. In 2010, the New America Foundation published a report that found that “the true civilian fatality rate since 2004 according to our analysis is approximately 32 percent.”\textsuperscript{621} The truth is that there is no proper accounting of the human costs (or any other aspect) of the unmanned killing because the entire drone program is a state secret.

Following the assassination of Al-Aulaqi, administration officials (including the attorney general) suggested that President Obama release the Justice Department’s memo to justify the killing. After all, Obama made the decision two years earlier to release the DOJ legal opinions on Bush’s enhanced interrogation techniques. Still, as is so often the case, the president decided that his secrets must be kept. “Once it’s your pop stand, you look at things a little differently,” said Mr. Rizzo, the former general counsel CIA.\textsuperscript{622} When drone strikes leave such a tangle of innocent victims that grieving families are given body parts from unidentified corpses, so they have something to bury, the U.S. government takes no responsibility. In keeping with official policy, it refuses to confirm or deny the very program.\textsuperscript{623}

In 2012, the ACLU and Nasser Al-Aulaqi, the grandfather of Abdulrahman, filed suit against the U.S. government claiming, among other things, that the extrajudicial targeted killing of an American citizen is a violation of the Fifth Amendment guarantee to due process. Arguing in a July 2013 hearing, the attorneys for the ACLU said the case


\textsuperscript{623} McKelvey (2011)
“brings into stark relief the consequences of the government’s position as to whether it may be brought into court when it violates the rights of its citizens. The government’s argument boils down to ‘trust us’ when national security is involved.” Although the track record for suing the U.S. government in these cases is not good, the questioning in the hearing was encouraging. U.S. District Judge Rosemary M. Collyer asked a government lawyer, “How far does your argument take you? Where is the limit to this? Where does that stop?” She then answered her own question and declared, “the courthouse door.” Despite Judge Collyer’s apparent disinclination to take the government’s claims at face value, the case was dismissed in April 2014.

*Al-Aulaqi v. Panetta* highlights the difficulties in taking a quantitative approach to the study of the state secrets privilege. Although the government made reference to the state secrets privilege throughout the case, their brief ultimately suggested that the court need not rule on the privilege directly because the case could be dismissed on other grounds such as lack of standing. In this case, as in many others, the suit was not decided on the state secrets privilege. Rather, the government held the privilege as a trump card, notifying the judge that even if she were to find that the case could proceed on other grounds, the states secret privilege would prove to be a non-justiciable threshold. Ultimately, the court again declined to comment on the issue of the state secrets privilege.625

Ambinder and Grady report that President Obama “spent hours reviewing the case, even though there was almost no question that the government would assert the [state secrets] privilege. According to one source, Obama asked his White House

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625 McKelvey (2011) p.1362
counsels whether there was a way to litigate at least some of the case without using the privilege peremptorily. In the Al-Aulaqi case, the Justice Department offered the court four reasons the case wouldn’t stand; the state secrets privilege was their firewall option. 626 In fact, the Obama administration made broader claims than those pressed during the Bush administration, arguing that the President’s wartime targeting decisions are not judicially reviewable at all. 627

For obvious reasons, the state secrets privilege has been called the “death knell of the drone cases.” Even if a complaint survives “the jurisdictional, justiciability, immunity, and other hurdles to lawsuits challenging U.S. drone policy” 628 the state secrets privilege will likely prove an insurmountable barrier to litigation. However, the unique circumstances of this case, involving the killing of an American child not personally connected to terrorism, should have forced the court to address the legality of the drone program. Or, a successful invocation of the privilege, followed by an appeal, might have compelled the Supreme Court to rule directly on the state secrets privilege. Instead, the secrecy of the drone program has left a vacuum in place of any real debate on this radically new and geographically unconstrained use of state-sanctioned lethal force.

If the basic legality of the unmanned drone programs is not addressed soon, that opportunity will be gone. In April 2013, Georgetown Law Professor Rosa Brooks testified before the Senate Judiciary Committee. She advised, “Every individual detained, targeted, and killed by the U.S. government may well deserve his fate. But when a

626 Ambinder and Grady (2013) Location : 4873
government claims for itself the unreviewable power to kill anyone on earth, at any time, based on secret criteria and secret information discussed in a secret process by largely unnamed individuals, it undermines the rule of law. One can argue, as the Obama administration does, that current US drone policy is entirely lawful, and perhaps this is so, if we’re willing to take virtually everything about the strikes on faith, and don’t mind jamming square pegs into round holes. But ‘legality’ is not the same as morality or common sense. Current US drone policy offers no safeguards against abuse or error, and sets a dangerous precedent that other states are sure to exploit.”

This is the future of national security. Polls show that Americans are wearier than ever of committing U.S. troops to foreign wars. Meanwhile, the public is fairly tolerant of non-American collateral damage. The political nightmare surrounding the attempted closure of Guantánamo Bay has proven that it is often more palatable to kill than detain. However, this sanitized version of warfare has come at a great cost. “Drones have replaced Guantánamo as the recruiting tool of choice for militants; in his 2010 guilty plea, Faisal Shahzad, who had tried to set off a car bomb in Times Square, justified targeting civilians by telling the judge, “When the drones hit, they don’t see children.”

The president believes the drone program is not reviewable by the courts. The administration continues to insist that, regardless of what evidence might be available in the public domain, the government has the ability to deflect all responsibility by acting as if that information is secret. So far they have been correct. And yet, as former CIA Director for George W. Bush, Michael Hayden cautioned, “I have lived the life of


someone taking action on the basis of secret O.L.C. memos, and it ain’t a good life. Democracies do not make war on the basis of legal memos locked in a D.O.J. safe.”

Policies Concealed: Warrantless Surveillance – They’re (Still) Listening

Warrantless wiretapping first entered the public consciousness during the Watergate scandal. President Nixon is famously quoted as saying, “When the president does it, that means it isn’t illegal,” and he was almost right. *U.S. v. Nixon* represents one of the only times the courts denied the state secrets privilege, clarifying that the privilege only applies to cases of national defense and cannot be invoked to cover criminal behavior. The Supreme Court refused to accept the argument that the privilege could be used to “justify a broad doctrine of executive immunity from judicial oversight.” But less than a decade later, during Ronald Reagan’s first term, the court made an unexpected finding.

*Halkin v. Helms* arose from the domestic surveillance of Vietnam War protestors whose phones had been tapped. In the opinion, the Court declared that any evidence of wiretapping was a secret of state and was “absolutely privileged from disclosure in the courts ... Once the court is satisfied that the information poses a reasonable danger to secrets of state, even the most compelling necessity cannot overcome the claim of privilege.” By invoking the state secrets privilege, the president could have any case against him dismissed, simply by denying the plaintiff the very

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632 Richard Nixon “Watergate Interview Frost/Nixon” 1977 https://www.youtube.com/watch?v=HiHN3IJ_j8A
634 Id.
635 Halkin v. Helms, 690 F.2d 997 (D.C.Cir 1982)
636 Id.
evidence necessary to make a *prima facie* case. This set a dangerous and long lasting precedence for wiretapping cases in the United States.

When the Bush era wiretapping case, *Hepting*, was dismissed due to Congress’ grant of “retroactive immunity” to the telecom companies, the plaintiffs regrouped and filed another lawsuit. *Jewel v. NSA*[^637] was first brought against President Bush and later against President Obama, as well as their respective national security teams. The suit is still based in part on the testimony of a phone company employee who inadvertently became aware of the NSA collection center in his office in San Francisco. This case maintains that the centerpiece of the government’s domestic surveillance program is a nationwide network of sophisticated communications devices attached to key facilities of telecom companies, which are used to intercept, acquire and store the phone calls, emails, instant messages, text messages, web communications and other communications of practically every American who uses the phone system or Internet. The Obama Administration spent the last seven years successfully keeping *Jewel* out of court by maintaining that, even if the plaintiffs have independent evidence of such a program, that information is a state secret and cannot be adjudicated.

On June 6, 2013 NSA contractor, Edward Snowden, began leaking classified documents involving a wide range of national security policies to the media. The leaks had two primary impacts on the state secrets privilege. One of the most immediate effects was on *Jewel*. Dozens of the classified documents leaked by Snowden were directly related to the scope and authorization of the specific surveillance programs named in the

[^637]: *Jewel et al. v. NSA et al.* (4:08-cv-4373-JSW)
suit. Within hours, the White House directed the Director of National Intelligence to declassify those documents, along with additional ones related to the programs.638

On June 7, 2013, the Obama administration went back to court to request that, in light of recent revelations, the judge in Jewel grant a complete stay in the case (and all motions pending, including the invocation of the state secrets privilege) to give the administration a chance to “reassess.”639 The plaintiffs objected to the government’s attempt to “plunge the entire lawsuit into a state of suspended animation simply because their motion lies in tatters” and reminded the court that the case had already progressed at “less than a snail’s pace.” They also pointedly noted that the recent revelations (not exactly revelations for the government, which had the information all along) reaffirmed the plaintiffs’ case as well as the basic legal issues at stake, specifically the right of American citizens “to be free from untargeted, unwarranted and unlawful government surveillance.”640 On July 8, 2013 the court took the bold step of refusing Obama’s invocation of the state secrets privilege and sent the case back to the trial court to begin the discovery process.641 Specifically, Judge Jeffrey White noted that “Congress intended for FISA to displace the common law rules such as the state secrets privilege with regard to matter within FISA's purview.”642

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642 *Id.*
In November 2014, the government reverted to form and filed another demand that the central Fourth Amendment claims of the case be dismissed.\(^643\) In the brief, they reiterated their theory that the plaintiffs first, have no standing to bring the claim and second, cannot prove the merits of their case. Finally, the government noted that even if the judge were to find that the plaintiffs did have standing, and could prove the merits of their case, “it cannot be litigated” because of the protection of the state secrets privilege.\(^644\)

By the time Judge White ruled, in February 2015, he apparently changed his mind regarding the scope of the state secrets privilege. “Having reviewed the Government Defendants’ classified submissions, the Court finds that the Claim must be dismissed because even if Plaintiffs could establish standing, a potential Fourth Amendment Claim would have to be dismissed on the basis that any possible defenses would require impermissible disclosure of state secret information.”\(^645\) Judge White found the Snowden leaks to be insufficient in the face of evidence over which the government claimed the privilege. “Notwithstanding the unauthorized public disclosures made in the recent past and the Government’s subsequent releases of previously classified information about certain NSA intelligence gathering activities since 2013, the Court notes that substantial details about the challenged program remain classified.”

The Judge wanted to make it clear that he had examined the secret evidence \textit{in camera} and had not taken the government’s claims at face value. However, he expressed exasperation at his inability to articulate the reasoning behind his decision, even to the plaintiffs in the case. “The Court is frustrated by the prospect of deciding the current motions without full public disclosure of the Court’s analysis and reasoning. However, it


\(^{644}\) \textit{Id.}

is a necessary by-product of the types of concerns raised by this case. Although partially not accessible to the Plaintiffs or the public, the record contains the full materials reviewed by the Court. The Court is persuaded that its decision is correct both legally and factually and furthermore is required by the interests of national security.\footnote{Id. p.9}

The decision did not result in a total dismissal because the ruling did not pertain to the “portion of the case that covers the NSA’s capture of telephone records on a massive scale.”\footnote{Statement of EFF Executive Director Cindy Cohn. (February 2015) \url{https://www.eff.org/deeplinks/2015/02/jewel-v-nsa-making-sense-disappointing-decision-over-mass-surveillance}} But the plaintiffs appealed the summary judgment in August 2015, where the case now stands. In their appellant brief, the plaintiffs noted the about-face in Judge White’s decision regarding FISA superseding the state secrets privilege.

“Unaccountably, without addressing plaintiffs’ contentions or the impact of its prior section 1806(f) order, the district court held that the state secrets privilege applied to plaintiffs’ Fourth Amendment claim and provided an alternative ground for dismissing plaintiffs’ claim.”\footnote{Jewel v. NSA (08-CV-04373- JSW), August 4, 2015. “Appellants’ Opening Brief.” p.54}

The legislative history and statutory purpose of FISA (of which section 1806(f) is a part) is instructive. Following the surveillance scandals of the 1970’s the Senate initiated an investigation that became known as the “Church Committee.” Their inquiry revealed that “for many decades the Executive, without any warrants or other lawful authority, had been conducting massive, secret dragnet surveillance invading the privacy and violating the Fourth Amendment rights of thousands of ordinary Americans.”\footnote{Id. p.50} The Foreign Intelligence Surveillance Act (FISA) was the response to the Church Committee’s recommendation to impose comprehensive limits on Executive surveillance,
and, more importantly for our purposes, to create civil remedies for cases of unlawful surveillance. Toward that end, Congress included section 1806(f) that requires courts to “use national security evidence to determine the legality of surveillance, instead of excluding that evidence under the state secrets privilege.”650 The plaintiffs, echoing the argument made in Judge White’s prior ruling, reiterated in their brief that “In cases involving electronic surveillance, section 1806(f) displaces and supersedes the common-law state secrets privilege. Congress expressly provided that section 1806(f) applies “notwithstanding any other law,” thus confirming its intent to displace the state secrets privilege in cases challenging the lawfulness of electronic surveillance.651

The plaintiffs also brought to the courts attention a recent ruling by the Supreme Court. In Riley v. California652 the Supreme Court affirmed that the search and seizure of digital information has Fourth Amendment implications and does trigger the warrant requirement. “The fact that technology now allows an individual to carry such information in his hand does not make the information any less worthy of the protection for which the Founders fought.”653 The plaintiffs believe that the privacy rights to digital information announced in Riley are analogous to the digital information that the government is searching and seizing through warrantless surveillance.654 As Cindy Cohn, the executive director of the Electronic Frontier Foundation (a plaintiff) said, “While this program of mass surveillance may have once been a secret, the government has now fully admitted that it copies communications wholesale from the Internet backbone and

650 Id. p.51
651 Id. p.49
652 Riley v. California, 134 S.Ct. 2015
653 Id. at 2495
654 Jewel v. NSA (08-CV-04373- JSW), August 4, 2015. “Appellants’ Opening Brief.” p.34
searches the full content of them. It’s more than time for a court to rule that this violates
the Fourth Amendment.”

**Snowden: Open-Source Secrets**

Presidents have long believed that their activities must remain secret because an
informed public, judiciary or legislature would effectively constrain their power. To put it
another way, would the expansions of executive power previously discussed have been
possible without the shield of presidential secrecy encompassed by the state secrets
privilege? The Snowden disclosures suggests otherwise.

The executive branch likes to claim that “secrecy is a one way street; once
information is published [or disclosed], it cannot be made secret again.” The
government regularly uses this argument to dissuade lower court judges from ordering
the disclosure of evidence, claiming “an order of disclosure is ‘effectively unreviewable
on appeal.’” However, lawyers for the president often try to drive both ways down this
particular street by pretending that information made available publically must still be
considered a state secret.

After a decade in which two presidential administrations aggressively used the
state secrets privilege to conceal the very existence of the phone and data surveillance
programs, the leaks forced the president to formally address the existence and scope of
the NSA program. In those speeches, President Obama announced that several reforms
would be made to the surveillance policies and to the procedures of the Foreign

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657 *Id.*
Intelligence Surveillance Court (FISC). Thus, another observable effect of the Snowden leaks were new constraints on the president’s power to surveille.

The disclosures by Snowden also illuminated the fact that the executive branch actively misleads the Congressional committees tasked with oversight of the national security network. In March 2013 the Director of National Intelligence (DNI) for President Obama, James Clapper, testified before the Senate Intelligence Committee. Senator Ron Wyden (D-OR) asked directly about the NSA surveillance. ““[D]oes the NSA collect any type of data at all on millions or hundreds of millions of Americans?” Clapper responded, “No, sir.” When Wyden followed up, asking again, “It does not?” Clapper replied, “Not wittingly. There are cases where they could inadvertently perhaps collect, but not wittingly.” Only three months later, following the Snowden leaks, Clapper admitted that his testimony was false. He appeared on NBC where he justified his false testimony by calling it “the least untruthful” response he could give.

Not only did the Obama administration mislead the Senate Intelligence Committee, they also deceived the Foreign Intelligence Surveillance Court (FISC). In a declassified 2011 opinion by the FISC’s chief judge, U.S. District Court Judge John Bates, the court said that it was “troubled that the government’s revelations...mark the third instance in less than three years in which the government has disclosed a substantial

misrepresentation regarding the scope of a major collection program.”\footnote{Shane, Scott. “Court Upbraided NSA on Its Use of Call-Log Data,” \textit{The New York Times}. September 10, 2013, in Glennon (2015) p.71} It appears as though this method of prevarication is less an aberration and more standard operating procedure.

Recently, the Obama White House has publically taken a conciliatory tone toward those seeking more transparency from the government. Administration members freely admit that public support can only be born from public trust. As one highly placed member of the national security network noted, “Greater disclosure to the public is necessary to restore the American people’s trust that intelligence activities are not only lawful and important to protecting our national security, but that they are appropriate and proportional in light of the privacy interests at stake.”\footnote{http://www.fas.org/sgp/eprint/litt.pdf} But close observers of these policies are dubious of the administration’s sudden conviction in the value of transparency.\footnote{http://blogs.fas.org/secrecy/2014/03/litt-transparency/}

Both the statements of the government and the timing of classification policy reforms make it apparent that the action was not initiated by the “diligent exercise of congressional oversight or by judicial review” or by “any other objective norm. Rather it was explicitly inspired by the leaks.”\footnote{U.S. v. Reynolds, 345 U.S. 1, 7 1953} The Obama administration continues to call the leaks criminal, while some in Congress consider them to be treason. Although the secrecy which protects the national security network, embedded within the executive branch, appears to be impregnable to the forces of traditional checks and balances, the Snowden leaks emerged as a “uniquely powerful tool”\footnote{Id.} in shaping secrecy reforms.

\footnote{http://www.fas.org/sgp/eprint/litt.pdf}
\footnote{http://blogs.fas.org/secrecy/2014/03/litt-transparency/}
\footnote{U.S. v. Reynolds, 345 U.S. 1, 7 1953}
\footnote{Id.}
Chapter 5: Conclusion – Checks UnBalanced

Interwoven throughout the legal history of the state secrets privilege are warnings of executive abuse and overreach. By the mid-19th century, even courts of the British Empire were beginning to show skepticism at the level of deference given to executive claims of secrecy, and to rebuff suggestions of such legal authority. “If that doctrine be law, or rather, were law, it would be appalling. It would be such that no one would feel himself secure. I cannot, I must not assent to it. It is not law. It is unconstitutional. It is tyrannical. It is monstrous.”

In the United States, such warnings were made explicit in the 20th century “Treatise On The Anglo-American System of Evidence in Trials at Common Law,” and were prescient. In 1923, John Henry Wigmore admonished that the existence of a state secrets privilege must be constrained by an active judiciary. The privilege “has been so often improperly invoked and so loosely misapplied that a strict definition of its legitimate limits must be made.” Wigmore went on to conclude that, “the truth cannot be escaped that a Court which abdicates its inherent function of determining the facts upon which the admissibility of evidence depends will furnish to bureaucratic officials too ample opportunities for abusing the privilege. The lawful limits of the privilege are extensible beyond any control, if its applicability is left to the determination of the very

668 Id. at §2212a
official whose interest it is to shield his wrongdoing under the privilege…Both principle and policy demand that the determination of the privilege shall be for the Court.”

In 1951, the lower courts ruled in the landmark Reynolds case that to recognize a “sweeping privilege” protecting sensitive information is “contrary to sound public policy” because it “is a small step to assert a privilege against any disclosure of records merely because they might prove embarrassing to government officers.” The judge reiterated this longstanding warning, but over the last 60 years (ironically, beginning with the Supreme Court in Reynolds) it has been soundly ignored by American courts. Rather than adhering to its prescribed constitutional role as a check on executive power, the judiciary has allowed the state secrets privilege to expand from a common law privilege, designed to protect discrete pieces of evidence within a trial, to a get-out-of-jail-free card for the executive branch and private corporations alike.

At the opening of George W. Bush’s first term, he and Vice President Dick Cheney told aids that “past presidents had ‘eroded’ presidential power, and that they wanted ‘to restore’ it so that they could ‘hand off a much more powerful presidency’ to their Successors.” The terrorist attacks of 9/11 provided the administration with the perfect environment in which to put these ideas into practice. Administration lawyers used a combination of the unitary executive theory and the newly broad state secrets privilege to create a zone of exclusive authority and total secrecy over a range of foreign and even domestic policies.

The Bush administration declared that any attempt to constrain the president’s “constitutional authority to withhold information … which could impair foreign relations,

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669 Id. at §2379
670 Reynolds v. U.S., 192 F.2d 987 (3dCir. 1951)
671 Goldsmith (2007) p.89
the national security, the deliberative processes of the Executive, or the performance of the Executive’s constitutional duties. It is an illegal encroachment upon executive power and would be rejected. Such an interpretation of executive power essentially gave the president the authority to act in a range of secret programs, refuse to disclose such secret activities to Congress and defeat judicial review through the invocation of the state secrets privilege. Any independent check on the executive could now be circumvented. The privilege had been converted “from a functional, practical litigation rule into part of a comprehensive strategy to reduce public exposure of executive branch activities.”

Although the quantitative narrative is not incredibly nuanced, the empirical evidence is straightforward. Three trends emerged under the Bush administration. First, the number of invocations of the state secrets privilege has increased appreciably since 9/11. While much of this increase is a result of a rise in state secrets claims from private litigants, the number of claims initiated by the government has also increased in a significant way. Second, these cases do not represent a major increase in state secrets assertions that are being upheld, but rather an increase in the number of cases in which the courts are not ruling upon the privilege at all. The third trend is particularly troubling and represents criminal cases, in which defendants have been completely unsuccessful in challenging the use of the state secrets privilege, despite the most basic violations of fundamental civil liberties that this implies. The warning against this use of the privilege goes back as far as the Burr case. “If you determine that we be deprived of the

673 Statement of Dr. William Weaver, before the Committee on the Judiciary, U.S. Senate, February 13, 2008 at p.208
674 All of these conclusions concur with Cassman’s assessment of the full post 9/11 period, 2002-2014. Cassman (2015) p.29
benefit of important written or oral evidence by the introduction of this State secrecy, you
lay, without intending it, the foundation for a system of oppression.”

Following 9/11, the Bush administration reorganized the national security
infrastructure and established the threat of terrorism as the center of American public
policy. As the preeminence of the national security network emerged within the
executive branch, certain policies became institutionalized that insulated the network
against restraint. Although it evolved in response to structural incentives rather than
invidious intent, the network exercises predominant power with respect to national
security matters.

The benefits derived by the executive branch from the national security network
are undeniable and include “enhanced technical expertise, institutional memory and
experience, quick-footedness, opaqueness in confronting adversaries, policy stability, and
insulation from popular political oscillation and decisional idiosyncrasy.” But such
benefits are costly, and predicated on secrecy. Without the comprehensive protection of
the state secrets privilege from scrutiny, it seems unlikely that the national security
network would have been able to emerge with such preeminence.

The level of embeddedness of this national security network did not become fully
apparent until the transition to the Obama administration was complete. As was
evidenced by President Obama’s surprise that his lawyers invoked the state secrets
privilege in the Jeppesen case, “even the President now exercises little substantive control

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675 Weaver & Escontrias (2008) p.40, Quoting Mr. Botts to Chief Justice John Marshall in the trial of Aaron
Burr
676 Jackson, Richard, “Culture, Identity and Hegemony: Continuity and (the Lack of) Change in US
390–411
677 Glennon (2015) p.113
678 Id. p.116
over the overall direction of U.S. national security policy.” Barack Obama may have come to the Oval Office with designs on changing the way the executive branch utilized the state secrets privilege, but that presupposed that the president is capable of instituting “a complete about-face… [in] a top-down policymaking model. After all, the [national security network] works for the president.” But the continuity of state secret policy has been complete. No matter how objectionable the new Obama administration found a policy, they did not hesitate to invoke the privilege and demand dismissal. The national security network has “resisted transparency” very successfully, “with unsurprising results.”

Theoretically, the executive branch should be held accountable for national security related activities, in practice, however “all available evidence indicates that the law has carved out a no enforcement zone when it comes to executive branch secrecy.” This trend has not diminished under President Obama. “Despite some rhetorical changes, he has recommitted the US to an interpretation” of national security “that reasserts the imperatives of an unending conflict against terrorism.”

Many of the causes of the Obama state secrets privilege policy are path dependent, driven by the national security network’s need to maintain power through continuity and secrecy. The quantitative trends that emerged during the Bush administration have maintained their relevance. Although the absolute number of invocations has declined somewhat in recent years, the significance of the invocations has not diminished.

President Obama may have condemned the use of the privilege under President Bush, but

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680 Id. p. 58
681 Id. p. 92
682 Weaver & Escontrias (2008) p. 89
683 McCrisken (2011) p. 801
the national security network has a clear imperative to protect the broadest possible interpretation of the state secrets privilege. “Nothing in the Obama [state secrets] policy or subsequent actions suggests that the Administration will hold itself accountable.”\textsuperscript{684} Without an external mechanism to impose a cost on the utilization of the privilege, it is “destined to be both abused and used in increasing frequency as the costless nature of the use becomes more widely recognized and internalized”\textsuperscript{685} by the institution. The current application of the state secrets privilege provides no incentive for any presidential administration to constrain its use.\textsuperscript{686}

Some argue that the reformation of the state secrets privilege “should come from the judiciary itself.”\textsuperscript{687} But when a Supreme Court Justice argues that “courts should simply defer to presidential determinations that the benefits of wartime action outweigh the costs to liberty, and thus not engage in purported ‘second guessing’ of controversial political policies that deal with national security-related issues,”\textsuperscript{688} it is unclear what manner of judicial reform is possible. Frost argues that if one branch of government is “unable or unwilling” to take on the task of curbing executive power, the other must “do so in the court’s stead.”\textsuperscript{689}

Throughout the legal history of the state secrets privilege, the Supreme Court has declined the opportunity to resolve several lingering issues, including the degree of deference shown to executive claims of secrecy in court, the obligation of judges to independently evaluate such claims, the specific conditions under which valid claims of

\textsuperscript{684} Wells (2010) p.648  
\textsuperscript{685} Weaver & Escontrias (2008) p.90  
\textsuperscript{686} Setty (2012) p.1653  
\textsuperscript{687} Chehab (2011) p. 343; Pallitto & Weaver (2007)  
\textsuperscript{688} Chehab (2011) Quoting Justice Clarence Thomas p. 345  
the privilege must result in outright dismissals, and what remedies might be offered to injured parties under such circumstances. With the failure of the Court to articulate detailed guidance in the use of the privilege, “lower courts developed an almost unstoppable momentum of jurisprudence that relies on judicial capitulation to executive claims of national security.” 690 Setty concludes that the judiciary has “disregarded the concepts of checks and balances and abdicated its responsibility.” 691 Even in the cases where a judge has dared to challenge the executive’s invocation of the state secrets privilege, “multiple federal appellate courts have been quick to reverse those decisions on appeal.” 692

Judges report that they often feel as though their hands are tied. Judge Ellis, who presided in the El-Masri case wrote, “After full briefing and argument (in El-Masri), I concluded that the state secrets privilege had been properly invoked and that dismissal was necessary to prevent public disclosure of state secrets. But I was not at all pleased with this result, although I felt it was compelled by well-established law.” 693 While the authority of such well-established law is debatable, the result is a presidentially created, and judicially accepted state secrets privilege “that rivals the power of crown privilege at its height.” 694

Chehab suggests the current “conception of the state secrets privilege encroaches upon congressional powers to confer jurisdiction on the courts because it operates to basically preclude federal courts from adjudicating cases or controversies that would

690 Weaver & Escontrias (2008) p.68
691 Setty (2012) p.1638
692 Chehab (2011) p. 363
694 Weaver & Escontrias (2008) p.68
otherwise be within their judicial authority.”\textsuperscript{695} The framers of the Constitution always presumed the legislative branch would be the strongest branch of government and therefore Article III confers upon Congress the power to regulate the jurisdiction and power of federal courts, even in the area of national security.\textsuperscript{696} Congress has actually done so on several occasions. The creation of the Foreign Intelligence Surveillance Court (FISC), for example, gives major national security responsibilities to federal judges. It is therefore the responsibility of Congress to enact federal legislation that addresses the dangerous gaps in the procedures and standards that regulate the modern use of the state secrets privilege.\textsuperscript{697}

Legislation should re-affirm the co-equal role of the judiciary by compelling it to make decisions, informed by independent scrutiny of evidence, about what is subject to the state secrets privilege. The public trusts judges to secure the rights of individuals and to safeguard constitutional principles. It is their duty to exercise independent review of the credibility and necessity of the executive branch’s state secrets claims. It is critical that an independent judiciary be empowered to weigh competing interests and preserve the adversarial process in court.\textsuperscript{698} The epilogue to the Reynolds case raises serious questions about the capacity and willingness of the executive and judiciary branches to function as separate, trusted branches of government. More often, they appear to form a common front against the public in national security cases. Throughout the history of the state secrets privilege, the executive branch has asserted it over information that is often
unreliable and, at times, completely false. And the judiciary has accepted such assertions at face value, without even the pretense of review.

For the White House, today’s state secret is often tomorrow’s leak to the media. Even mundane information is classified for erroneous reasons. A judge told the story of a classified document, which the government refused to turn over in a trial, that turned out state “the fact that milk carried in cartons in the helicopters curdled.” The executive branch seems to believe that simply raising the privilege should be enough to have it accepted. The Obama administration’s argument is that the state secrets privilege is “particularly important when, as now, our Nation is engaged in a conflict with a terrorist enemy in which intelligence is absolutely vital to protecting the homeland.” But evoking the ethereal fear of a threat to the nation should not be enough to support such a powerful claim of privilege. The executive branch declares, “Trust us!” No external review is required because accountability is preserved by a number of “procedural and substantive requirements that must be satisfied,” and these protections alone “ensure that the privilege is asserted only in the most appropriate cases.” Of course, no matter how carefully these procedures are followed, it is ultimately by a self-interested party.

When the government invokes the state secrets privilege, “there is more than adequate reason to fear that it is doing so to avoid accountability, as in Reynolds, rather than to protect a legitimate security interest.” Despite such a track record, lawyers for the president believe the judiciary should judge executive claims of secrecy with the

700 Statement of Carl J. Nichols, Deputy Assistant Attorney General, U.S. Department of Justice, Civil Division, Washington DC, before the Committee on the Judiciary, U.S. Senate, February 13, 2008 at p.178
701 Id.
702 Statement of Louis Fisher before the Committee on the Judiciary, U.S. Senate, February 13, 2008 at p.160
703 Ellington (2013) p. 143
“utmost deference.” But treating such claims with a unique degree of deference immediately places plaintiffs at a disadvantage and undermines any opportunity for private individuals to pursue their claims. This approach demotes the judiciary to an inferior position to the executive branch, invites executive abuse and ultimately fails to restore crucial checks and balances.

As Chehab notes, “Nothing in Reynolds requires that standard and nothing in the Constitution prevents Congress and the courts from adopting a standard that better protects against presidential abuse of the state secrets privilege and more properly safeguards the rights of private litigants.” Further, he finds that “nothing in the Constitution or in the Framers' intent gives the President any plenary authority over national security.” In order to preserve the integrity of our legal system, the state secrets privilege must be treated as “a qualified privilege and not an absolute one,” with each claim of the privilege qualified by independent judicial review.

Legislation should also assure fairness in the courtroom for private individuals in civil litigation by clarifying the right to pursue legal remedies from Congress when a successful invocation of the state secrets privilege makes a trial impossible. It is imperative that Congress re-establish oversight of the state secrets privilege to strengthen the government’s ability to balance national security interests with the rights and liberties

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704 Statement of Carl J. Nichols, Deputy Assistant Attorney General, U.S. Department of Justice, Civil Division, Washington DC, before the Committee on the Judiciary, U.S. Senate, February 13, 2008, p.7, 10, 12
705 Chehab (2011) p. 366
706 Id.
707 Statement of The Constitution Project before the Committee on the Judiciary, U.S. Senate, February 13, 2008
708 Statement of Louis Fisher before the Committee on the Judiciary, U.S. Senate, February 13, 2008 at p.160
709 Statement of The Constitution Project before the Committee on the Judiciary, U.S. Senate, February 13, 2008
of individuals.\textsuperscript{710} But congressional oversight must become much more robust if it is going to guard against abuse and any unintended consequences of reform. As former Representative Norman Mineta, a senior member of the House Intelligence Committee, said about oversight of the national security network, “We are like mushrooms…They keep us in the dark and feed us a lot of manure.”\textsuperscript{711}

Over the past decade, presidents from both political parties have aggressively asserted executive power by using the state secrets privilege as a shield. Dozens of cases have tried to challenge controversial national security programs as documents have come to light through press leaks, inadvertent disclosures or the intentional admissions of administration officials. Yet these cases are never heard. And there is much more at stake than the individual complaints themselves. They serve the greater national interest as they attempt to challenge government conduct that is illegal or unconstitutional.\textsuperscript{712}

The last time the U.S. Senate held hearings on such legislation in 2008, the attorney general testified that the state secrets privilege “serves a vital function by ensuring that private litigants cannot use litigation”\textsuperscript{713} to disclose information that would directly harm national security. In practice, the privilege has mutated into a legal shield that enables people in the executive branch and the private sector to act illegally and then claim immunity because of state secrets. But secrecy in government is antithetical to the very idea of democracy. It shields the executive branch from oversight and invariably

\textsuperscript{710} Statement of The American Bar Association before the Committee on the Judiciary, U.S. Senate, February 13, 2008 p.226
\textsuperscript{711} Glennon (2015) p.51
\textsuperscript{712} Statement of the American Civil Liberties Union, before the Committee on the Judiciary, U.S. Senate, February 13, 2008
\textsuperscript{713} Statement of Carl J. Nichols, Deputy Assistant Attorney General, U.S. Department of Justice, Civil Division, Washington DC, before the Committee on the Judiciary, U.S. Senate, February 13, 2008 at p.7
breeds abuse. At its most basic level, government “by the people” is impossible if the people are not aware of what their government is doing.\textsuperscript{714}

The current interpretation of the state secrets privilege has damaged the executive branch by significantly decreasing the public’s trust in the institution of the presidency. It has also harmed the judiciary by making judges, who should be independent arbiters, practically irrelevant in any case that touches national security, even indirectly.\textsuperscript{715} It is now up to Congress to constrain the use and prevent abuse of the privilege.

In recent years, both houses of Congress have introduced a State Secrets Protection Act. In January 2008, the Senate introduced S.2533,\textsuperscript{716} where it languished through the presidential election. “After the Obama administration appeared to adopt the Bush administration’s stance in favor of a broad and sweeping invocation and application of the privilege,”\textsuperscript{717} H.R.3332\textsuperscript{718} was introduced in the House in February 2009 and again on October 23, 2013, but in neither case was the bill brought to the floor for a vote. Tien suggests that the combination of legislative inertia and high level of deference shown to executive branch decision making in national security has derailed the attempts at genuine legislative oversight and substantive reform.\textsuperscript{719} Congress should re-introduce the state secrets reform legislation “to ensure an external, long-term check on executive branch overreaching.”\textsuperscript{720} As Senator Ted Kennedy noted when he introduced the bill in 2008, “The act will strengthen our national security by requiring judges to protect all state secrets from disclosure, and it will strengthen the rule of law by preventing misuse

\begin{itemize}
\item \textsuperscript{714} Statement of Michael Vatis, Partner in Steptoe & Johnson, before the Committee on the Judiciary, U.S. Senate, February 13, 2008 at p.192
\item \textsuperscript{715} Statement of the Louis Fisher, before the Committee on the Judiciary, U.S. Senate, February 13, 2008
\item \textsuperscript{716} https://www.govtrack.us/congress/bills/110/s2533
\item \textsuperscript{718} https://www.congress.gov/bill/113th-congress/house-bill/3332/
\item \textsuperscript{720} Setty (2012) p.1653
\end{itemize}
of the privilege and enabling more litigants to achieve justice in court… Congress has clear constitutional authority [here] and it is long past time for us to exercise this authority on such an important issue.”

Throughout history, “an unrestrained security apparatus has been one of the principal reasons that free governments have failed.” Weaver and Escontrias caution that the tyranny of the national security network is “is no less dangerous to the rights of the people and our democratic traditions than the monarchy of King Charles was to the subjects of his time.” As is evidenced by the Al-Aulaqi case, the concealment of the state secrets privilege provides the national security network with “the power to kill and arrest and jail, the power to see and hear and read peoples’ every word and action, the power to instill fear and suspicion, the power to quash investigations and quell speech, the power to shape public debate or to curtail it, and the power to hide its deeds and evade its weak-kneed overseers… in short, the power of irreversibility.” Under these circumstances, it is not an exaggeration to say that the state secrets privilege “represents a serious threat to congressional oversight and the ends of justice.”

The privilege is a distasteful necessity in a democratic government, but its exploitation over the last decade has led only to the “unwarranted aggrandizement of executive power.”

As the future of national security moves away from guns and tanks toward bytes of data, the entire national security network (including domestic security) will be hidden behind the shadow of the state secrets privilege. Once that occurs, it will be virtually

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721 Congressional Record: January 23, 2008 (Senate) Page S198-S201 Statement of Senator Ted Kennedy
722 Glennon (2015) p.117
723 Weaver & Escontrias (2008) p.89
724 Glennon (2015) p.117
725 Statement of Dr. William Weaver, before the Committee on the Judiciary, U.S. Senate, February 13, 2008 at p.208
726 Id.
impossible to undo. The checks and balances that are the very foundation of our system of government will unravel permanently. As the daughter of one of the original Reynolds claimants wrote to the Senate in 2008, “correcting the flaws in the state secrets privilege will not bring back the lives lost and ripped asunder, but it can provide a measure of justice to the families who have been affected by these cases and provide security for the future.”

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727 Phyllis Brauner, daughter of original Reynolds plaintiff, before the Committee on the Judiciary, U.S. Senate, February 13, 2008
## Appendix A: All State Secrets Privilege Cases

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