Note

In Furtherance of Transparency and Litigants' Rights: Reforming the State Secrets Privilege

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Introduction

The treatment of individuals detained by the United States government in the course of the War on Terror has long been a hotly debated issue,[1] and the cases of Khaled El-Masri and Maher Arar present what has been referred to as a "nightmare scenario."[2] In unrelated civil suits against U.S. government officials, these two plaintiffs alleged that they were seized in broad daylight, illegally detained, and harshly interrogated by American authorities under suspicion of involvement with terrorist activity.[3] The plaintiffs claimed that they were subsequently rendered to foreign countries, where they were subject to interrogation and brutal treatment amounting to torture for

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1 *See, e.g.*, Kate Zernike & Sheryl Gay Stolberg, *Differences Settled in Deal over Detainee Treatment*, N.Y. TIMES, Sept. 23, 2006, at A9; Tim Golden & Eric Schmitt, *Detainee Policy Sharply Divides Bush Officials*, N.Y. TIMES, Nov. 2, 2005, at A1; James Risen, David Johnston & Neil A. Lewis, *The Struggle for Iraq: Detainees; Harsh C.I.A. Methods Cited in Top Qaeda Interrogations*, N.Y. TIMES, May 13, 2004, at A1.

2 *See* Jared Perkins, Note and Comment, *The State Secrets Privilege and the Abdication of Oversight*, 21 BYU J. PUB. L. 235, 258–59 (2007).

3 El-Masri v. Tenet, 437 F. Supp. 2d 530, 532–34 (E.D. Va. 2006), *aff'd sub nom.* El-Masri v. United States, 479 F.3d 296 (4th Cir. 2007), *cert. denied*, 128 S. Ct. 373 (2007); Arar v. Ashcroft, 414 F. Supp. 2d 250, 252–55 (E.D.N.Y. 2006), *aff'd*, 532 F.3d 157 (2d Cir. 2008).

many months, before their release, without justification or apology.[4] More troubling still, El-Masri and Arar alleged these injuries were perpetrated upon them as part of an official ongoing practice of the U.S. government, commonly referred to as "extraordinary rendition," to which numerous unknown individuals continue to be subject.[5]

The allegations of these two cases are shocking beyond their facts, as they imply that the government violated and continues to facilitate the violation of its own stated foreign policy, federal law, international legal obligations, and the most basic of human rights—including the right to be free from torture, arbitrary detention, and deprivation of liberty without process. In both cases, the government, as defendant, moved for dismissal of the case, contending that the plaintiffs' claims were based upon matters which, if disclosed, would constitute a threat to national security—state secrets.[6] In both cases, the courts agreed with this contention, foreclosing El-Masri's and Arar's opportunities for redress through the legal process as well as concealing the underlying bases of their injuries from the public eye.[7]

These disturbing cases illustrate the operation of the doctrine of state secrets as it is currently applied. The state secrets privilege is a common law, evidentiary doctrine recognized in federal courts that permits the executive branch to withhold evidence from discovery if its disclosure would pose a risk to national security.[8] When successfully invoked, the privilege prevents litigants from obtaining complete discovery by denying access to the protected information, and as a consequence may cause the plaintiff's claim or the action as a whole to be dismissed.[9]

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4 El-Masri v. Tenet, 437 F. Supp. 2d at 533–34; *Arar*, 414 F. Supp. 2d at 254–55.

5 El-Masri v. Tenet, 437 F. Supp. 2d at 534; *Arar*, 414 F. Supp. 2d at 256.

6 El-Masri v. Tenet, 437 F. Supp. 2d at 535; *Arar*, 414 F. Supp. 2d at 287.

7 *See* El-Masri v. United States, 479 F.3d 296, 308–09 (4th Cir. 2007), *aff'g* El-Masri v. Tenet, 437 F. Supp. 2d at 536, 538, *cert. denied*, 128 S. Ct. 373 (2007); *Arar*, 414 F. Supp. 2d at 281–83, 287.

8 *See* United States v. Reynolds, 345 U.S. 1, 7–8, 10 (1953) (acknowledging existence of state secrets privilege and establishing certain parameters for its successful application); Amanda Frost, Essay, *The State Secrets Privilege and Separation of Powers*, 75 FORDHAM L. REV. 1931, 1935–36 (2007); James Zagel, *The State Secrets Privilege*, 50 MINN. L. REV. 875, 875 (1966); Note, *The Military and State Secrets Privilege: Protection for the National Security or Immunity for the Executive?*, 91 YALE L.J. 570, 571 (1982) [hereinafter *Military and State Secrets Privilege*]; Perkins, *supra* note 2, at 236; Erin M. Stilp, Comment, *The Military and State-Secrets Privilege: The Quietly Expanding Power*, 55 CATH. U. L. REV. 831, 831 (2006).

9 *See* Frost, *supra* note 8, at 1937; J. Steven Gardner, Comment, *The State Secret Privilege Invoked in Civil Litigation: A Proposal for Statutory Relief*, 29 WAKE FOREST L. REV. 567, 567 (1994); Stilp, *supra* note 8, at 836–37.

Since the establishment of the modern state secrets privilege in *United States v. Reynolds*,[10] the scope of a court's role in determining the validity of a claim of privilege has been unclear. As a consequence, in applying the doctrine, U.S. courts have allowed the executive branch to expand the scope of the privilege beyond its doctrinal underpinnings.[11] Instead of scrutinizing the government's invocation of the privilege to determine whether there is a "reasonable danger" that disclosure of evidence will pose a risk to national security, as dictated by *Reynolds*, courts have been largely deferential to executive claims of the state secrets privilege. This expansion of the scope of the privilege allows the executive branch to throw a cloak of secrecy over many controversial government programs and activities that are matters of great public concern. This approach not only forecloses judicial remedies for individuals who allege grave violations of their rights by actions of the United States, but also implicates the need for transparency in a democratically accountable system of government.

To alleviate these concerns for individual rights as well as transparency and democratic accountability, this Note advocates the need to clarify the review process and application of the state secrets privilege. In furtherance of this objective, this Note proposes that Congress should enact a statute that would require *in camera* judicial review of assertions of privilege, limit the privilege to the duration necessary for secrecy, and toll the statute of limitations on plaintiffs' claims where such invocation succeeds. This statutory scheme would act to reduce the detriment suffered by individual litigants under the current judicial application of the privilege and enhance the accountability afforded by effective oversight of government actions.

In Part I, this Note describes the historical origins and development of the state secrets privilege in American jurisprudence and its modern formulation by the Supreme Court in *United States v. Reynolds*.[12] In Part II, this Note discusses contemporary application of the doctrine, including the excessive deference afforded by courts to the executive branch's assertion that disclosure of information will in fact jeopardize national security, as well as misapplication of the doctrine to dismiss cases on the merits. Part III addresses the implications of this expansion of the privilege on two different levels: (1) the denial of an opportunity for redress to individual litigants, and (2) the detriment to transparency of government actions and policies, and its sig-

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

11 *See* discussion *infra* Part II.A–B.

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

nificance for democratic accountability. This Note also explores the particular consequences of expansion of the privilege in the context of challenges to extraordinary rendition, discussing in particular the cases of El-Masri and Arar. Finally, Part IV provides a proposed statutory solution to the problem and discusses potential criticisms of such an approach and alternative proposals.

I. Origins and Development of the State Secrets Privilege in U.S. Jurisprudence

A. The Origins of the Privilege

The state secrets privilege is a common law creation.[13] Its precursor is the English common law "crown privilege," which grants authority to the monarch's ministers to withhold communications regarding state secrets.[14] The roots of the privilege in American courts may be traced back to 1807 and the trial of Aaron Burr for treason.[15] Burr sought production of a letter from General Wilkinson to President Jefferson, which he alleged was critical to his defense.[16] The government objected to the request on the ground that the letter may contain state secrets, "which could not be divulged without endangering the national safety."[17] Although the court ultimately ordered production of the letter on other grounds, it stated that if the letter had contained information that it would have been imprudent to disclose and the executive sought its suppression, it could indeed be kept out.[18] The rationale for the privilege expressed in *Burr*—to the extent it may be applicable—appears to be the interest of protecting the public safety. In declining to pass upon the issue of suppression,

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13 Carrie Newton Lyons, *The State Secrets Privilege: Expanding Its Scope Through Government Misuse*, 11 LEWIS & CLARK L. REV. 99, 101–02 (2007); *Military and State Secrets Privilege*, *supra* note 8, at 571–72; Stilp, *supra* note 8, at 833.

14 Anthony Rapa, Comment, *When Secrecy Threatens Security:* Edmonds v. Department of Justice *and a Proposal to Reform the State Secrets Privilege*, 37 SETON HALL L. REV. 233, 238 (2006); *see also Reynolds*, 345 U.S. at 7 (citing Duncan v. Cammell, Laird & Co., [1942] App. Cas. 624 (H.L.), an English case addressing the crown privilege); Lyons, *supra* note 13, at 101–02; Kirk D. Jensen, Note, *The Reasonable Government Official Test: A Proposal for the Treatment of Factual Information Under the Federal Deliberative Process Privilege*, 49 DUKE L.J. 561, 564–65 & nn.22 & 25 (1999) (citing *Duncan* as one of the origins of crown privilege and noting that the privilege articulated in *Duncan* is most closely analogous to the American state secrets privilege).

15 *In re* United States, 872 F.2d 472, 474–75 (D.C. Cir. 1989); Lyons, *supra* note 13, at 102 & n.13; Stilp, *supra* note 8, at 833.

16 United States v. Burr, 25 F. Cas. 30, 31 (D. Va. 1807) (No. 14692D); Lyons, *supra* note 13, at 102; Stilp, *supra* note 8, at 833.

17 *Burr*, 25 F. Cas. at 31.

18 *Id.* at 37.

the court referred to the lack of evidence of matters "the disclosure of which would endanger the public safety."[19]

The next significant development in the evolution of the state secrets privilege took place during the Civil War era. *Totten v. United States*[20] is considered to be the main precursor and closely related to the state secrets doctrine in American jurisprudence.[21] In *Totten*, the plaintiff sued the government to recover unpaid wages owed to a deceased wartime spy under a contract to conduct espionage on the Confederate states during the Civil War.[22] Upholding the dismissal of the case, the Supreme Court held that no action could be maintained on a contract with the government for "secret services," as the very subject matter of the case—the existence of a secret espionage contract—was a fact that could not be disclosed.[23] As a public policy matter, the Court reasoned, a case could not be allowed to proceed where the trial "would inevitably lead to the disclosure of matters which the law itself regards as confidential."[24] Thus, the *Totten* doctrine was established, requiring complete dismissal of a complaint where the claims are based on matters that the law regards as confidential, such as secret espionage contracts between an individual and the government.[25] *Totten* paved the way for the elucidation of the state secrets doctrine in *Reynolds*.

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19 *Id.*; *see also* Barry A. Stulberg, Comment, *State Secrets Privilege: The Executive Caprice Runs Rampant*, 9 LOY. L.A. INT'L & COMP. L. REV. 445, 449 (1987) (arguing the court's rationale in the *Burr* case was rooted in the public policy of protection of national safety).

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

21 *See* Christopher D. Yamaoka, Note, *The State Secrets Privilege: What's Wrong with It, How It Got That Way, and How the Courts Can Fix It*, 35 HASTINGS CONST. L.Q. 139, 142 (2007); *see also* Perkins, *supra* note 2, at 240 (asserting importance of *Totten* precedent to the modern state secrets privilege); Rapa, *supra* note 14, at 241 (same); Matthew Silverman, Comment, *National Security and the First Amendment: A Judicial Role in Maximizing Public Access to Information*, 78 IND. L.J. 1101, 1104 (2003) (same).

22 *Totten*, 92 U.S. at 105–06.

23 *Id.* at 107.

24 *Id.*

25 Lyons, *supra* note 13, at 121; Yamaoka, *supra* note 21, at 142 (quoting Tenet v. Doe, 544 U.S. 1, 8 (2005)). The doctrine set out in *Totten* was recently affirmed by the Supreme Court in *Tenet v. Doe*, 544 U.S. 1, 8 (2005). In *Tenet*, the Court distinguished the broader *Totten* rule, which provides absolute protection for sensitive materials by barring a suit from proceeding, from the narrower state secrets privilege, which does not require dismissal. *Id.* at 9–10; *see also* discussion *infra* Part II.B.

B. The Modern Formulation of the State Secrets Doctrine: United States v. Reynolds

1. The Reynolds *Rule and Rationale*

The first explicit mention of the state secrets privilege—and the modern formulation of the doctrine—occurred in *United States v. Reynolds*, where the Supreme Court directly addressed whether the U.S. government could invoke a privilege against the production of evidence by claiming disclosure would be harmful to national security.[26] *Reynolds* was a Federal Tort Claims Act[27] suit arising from the crash of a U.S. Air Force B-29 bomber during a mission to test secret electronic equipment.[28] The widows of three civilian observers who were killed in the crash brought suit against the government for the wrongful deaths of their husbands.[29]

To prove the issue of negligence, the plaintiffs sought production of the air force's official accident report and statements of the surviving crew members that were recorded in the course of the investigation.[30] The Secretary of the Air Force filed a formal "Claim of Privilege" with the district court, objecting to production of the report on the grounds that the aircraft and personnel were engaged in a highly secret mission at the time of the crash.[31] In addition, the Judge Advocate General of the U.S. Air Force filed an affidavit claiming that the material could not be provided "without seriously hampering national security, flying safety and the development of highly technical and secret military equipment."[32] The affidavit instead offered to produce the surviving crew members for examination by plaintiffs; the crew members would be allowed to refresh their memories from any statements made in the course of the investigation, though they could not testify as to matters of a classified nature.[33]

In response, the district court ordered the government to produce the documents in question so that it could determine whether they contained privileged information; however, the government refused to

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26 *See* United States v. Reynolds, 345 U.S. 1, 7 (1953); Frost, *supra* note 8, at 1936; Rapa, *supra* note 14, at 243.

27 Federal Tort Claims Act, ch. 753, tit. IV, 60 Stat. 842, 842–47 (1946) (codified as amended in scattered sections of 28 U.S.C.).

28 *Reynolds*, 345 U.S. at 2–3.

29 *Id.* at 3.

30 *Id.*

31 *Id.* at 4.

32 *Id.* at 4–5.

33 *Id.* at 5.

comply with the order.[34] As a result, the court presumed negligence as established for the plaintiffs and entered judgment accordingly after a hearing on damages.[35] The Third Circuit affirmed the judgment of the district court.[36] The appellate court agreed with the district court's conclusion that the government could not be permitted to conclusively determine the validity of its own claim of privilege, likening this to an abdication of the judicial function and infringement upon the judicial function of independent review.[37] Instead, the court deemed *in camera* review to be the appropriate procedure to determine the status of the privilege claim.[38]

The Supreme Court reversed, finding that because the government had asserted a valid claim of privilege, it was not appropriate to impose liability for refusal to produce documents.[39] Noting that the privilege against revealing military secrets was "well established in the law of evidence," the Court set out several requirements for properly invoking the privilege: the government has the claim of privilege and must assert it, the head of the department that has control over the matter must lodge a formal claim of privilege, and the privilege "is not to be lightly invoked."[40]

Rejecting the government's contention that the executive assertion of the state secrets privilege is conclusive, the Court provided for judicial oversight of the privilege, concluding that "[t]he court itself must determine whether the circumstances are appropriate for the claim of privilege, and yet do so without forcing a disclosure of the very thing the privilege is designed to protect."[41] The Court attempted to set out a compromise between the undesirable alternatives of abdicating judicial control over evidence to executive officers and requiring automatic disclosure to the judge before acceptance of a claim of privilege.[42] The resulting rule for successful assertion of the privilege was a balancing test: courts were to weigh the necessity of obtaining the information against the appropriateness of invocation of

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34 *Id.*

35 *Id.*

36 Reynolds v. United States, 192 F.2d 987, 998 (3d Cir. 1951), *rev'd*, 345 U.S. 1 (1953).

37 *Id.* at 997.

38 *Id.*

39 *Reynolds*, 345 U.S. at 6.

40 *Id.* at 6–8.

41 *Id.* at 8.

42 *Id.* at 9–10.

the privilege.[43] The strength of the showing of necessity determines how far the court should probe in evaluating the validity of the claim of privilege.[44] If there is a strong showing of necessity, the claim of privilege should not be lightly accepted.[45] Further, where the court finds that military secrets are at stake, the privilege becomes absolute and cannot be overcome by "even the most compelling necessity."[46] Thus, if from all the circumstances of the case, "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," the court should not insist on even an *in camera* examination of the evidence in order to preserve the security that the privilege is meant to protect.[47]

Applying this standard to the facts of the case, the Court reasoned that because the record indicated that the accident involved a military plane testing secret equipment at a time of "vigorous preparation for national defense," there was reasonable danger that the accident report would contain references to the secret electronic equipment that was the focus of the mission.[48] Additionally, the necessity of disclosure was greatly diminished by the availability of an alternative—namely, the testimony of the surviving crew members.[49]

The Court's desire to find a middle ground between sympathetic plaintiffs' need for disclosure and the necessity of protecting state secrets in the Cold War era was understandable; however, in attempting to balance the competing considerations, the Court failed to reconcile the objectives into an approach that could provide sufficient clarity and guidance to lower courts faced with an assertion of privilege. Such problems with application of the *Reynolds* standard would become apparent in subsequent cases dealing with the state secrets doctrine.[50]

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43 *See id.* at 11; *see also* Lyons, *supra* note 13, at 103–04 (describing the standard set out by the *Reynolds* decision as a balancing test).

44 *See Reynolds*, 345 U.S. at 11; *see also* Lyons, *supra* note 13, at 103–04.

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

46 *Id.*

47 *Id.* at 10.

48 *Id.*

49 *See id.* at 11.

50 *See* Rapa, *supra* note 14, at 249–51 (noting that lower courts have struggled "in hammering out the proper procedures *Reynolds* requires").

2. *Postscript to* Reynolds*: Misuse of the State Secrets Privilege*

Several commentators note an ironic twist in the outcome of *Reynolds*: the very case that established the parameters for the state secrets doctrine in American jurisprudence was later revealed to be a wrongful assertion of the privilege.[51] The accident report alleged by the government to contain state secrets in *Reynolds* was recently declassified, only to reveal that the document did not contain information regarding secret electronic equipment.[52] Rather, the report disclosed evidence of the military's negligence as a cause of the engine failure that led to the fatal crash.[53]

Thus, the case that established the standard for invoking the state secrets privilege serves as an illustration of how the doctrine can be misused by the executive in order to block relevant evidence to the detriment of a civil plaintiff. This, together with other problematic consequences of the *Reynolds* articulation of the state secrets privilege, has become apparent in subsequent cases utilizing the doctrine and points to the need for guidance regarding its application.

II. Contemporary Application and Criticisms of the State Secrets Doctrine

The Supreme Court has never reevaluated its holding in *Reynolds*, and the case remains good law and has frequently been cited by lower courts assessing and approving the invocation of the state secrets doctrine.[54] In the course of its application in the lower courts, the holding of *Reynolds*, however, has often been criticized for its lack of clarity and guidance to judges faced with the invocation of the state secrets privilege.[55] Commentators have noted that the scope of a court's function in determining the validity of a claim of privilege remains unclear, resulting in excessive judicial deference to executive assertions of the privilege.[56] Further, the lack of clarity has resulted in

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51 *See* Louis Fisher, In the Name of National Security: Unchecked Presidential Power and the *Reynolds* Case 165–211 (2006); *see also* Rapa, *supra* note 14, at 247–48 (noting declassification of the report and its contents held privileged in *Reynolds*); Stilp, *supra* note 8, at 844–47 (discussing consequences of subsequent declassification of the report in *Reynolds*).

52 Rapa, *supra* note 14, at 247; Stilp, *supra* note 8, at 844.

53 Stilp, *supra* note 8, at 844.

54 *See, e.g.*, Tenenbaum v. Simonini, 372 F.3d 776, 777 (6th Cir. 2004) (affirming district court's grant of summary judgment because of the state secrets doctrine).

55 *See, e.g.*, Zagel, *supra* note 8, at 889–91; Silverman, *supra* note 21, at 1104.

56 *See* Zagel, *supra* note 8, at 888; *Military and State Secrets Privilege*, *supra* note 8, at 573–75; Perkins, *supra* note 2, at 244; Rapa, *supra* note 14, at 249–50; *see also* discussion *infra* Part II.A.

frequent use of the doctrine to dismiss entire cases rather than merely to limit discovery.[57]

A. Reviewing an Assertion of the State Secrets Privilege: Excessive Judicial Deference

Despite establishing the state secrets doctrine, the *Reynolds* rule ultimately provides lower courts with few guidelines regarding the review process.[58] The landmark case instructs judges to utilize the strength of the necessity of disclosure to determine how far to probe in evaluating the validity of the claim of privilege.[59] Simultaneously, *Reynolds* indicates that courts should refrain even from conducting an *in camera* examination of the documents in question if there is a "reasonable danger" that state secrets are at stake.[60] This reasonable danger test indicates that judges do not always have the ability to review the contents of the document in question.[61] In effect, judges are forced to "rule in a vacuum."[62] They must determine the necessity of disclosing a document without looking at the document itself to evaluate its significance to the requesting party's case.[63]

A further complication arises from the judiciary's general tendency to defer to executive decisions regarding foreign affairs, national security, and military matters.[64] In the context of the state secrets doctrine, courts have grounded their deference to executive claims of the privilege in the notion that the judiciary's lack of expertise may lead to disclosure of fragments of seemingly harmless information that in the aggregate could pose a substantial risk to national security.[65] The lack of clarity regarding the role of the court in evalu-

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57 *See* discussion *infra* Part II.B.

58 *See* Zagel, *supra* note 8, at 889; Silverman, *supra* note 21, at 1104; Stulberg, *supra* note 19, at 467; Yamaoka, *supra* note 21, at 151 (observing that the Court in *Reynolds* wrote "a singularly confused opinion").

59 United States v. Reynolds, 345 U.S. 1, 11 (1953).

60 *Id.* at 10.

61 *See id.* at 10–11; Zagel, *supra* note 8, at 891; Yamaoka, *supra* note 21, at 152.

62 Zagel, *supra* note 8, at 891.

63 *Id.*; s*ee also* Silverman, *supra* note 21, at 1104 (noting the implication that judges are supposed to sense whether the privilege is appropriately invoked without access to basic facts on which the claim is based).

64 *See, e.g.*, Halkin v. Helms, 598 F.2d 1, 8–9 (D.C. Cir. 1978); *see also* Christopher Brancart, *Rethinking the State Secrets Privilege*, 9 WHITTIER L. REV. 1, 11–12 (1987) (discussing judicial deference to executive decisions regarding military and diplomatic matters); *Military and State Secrets Privilege*, *supra* note 8, at 578 (noting deference derives from President's constitutional responsibility for foreign policy and view of executive as having superior skills regarding such policy decisions).

65 This theory has been articulated in *Halkin v. Helms*:

ating claims of the state secrets privilege, coupled with judicial hesitation to second-guess executive decisions in this area, leads courts to rely largely on executive determinations of the need for secrecy.[66] The result has been characterized as a broad presumption of privilege that is practically irrebuttable.[67] Instead of conducting a meaningful evaluation of invocation of the privilege, courts rely on executive assertions of the necessity for secrecy without so much as *in camera* examination of the documents in question—a review process that amounts to a rubber stamp of approval.[68]

One author recounts his experience litigating a state secrets claim asserted to block production of a document explaining why the FBI was tracking mail received by the Socialist Workers' Party.[69] The plaintiff, a high school student, had sent a letter to the political organization for a school assignment.[70] When the FBI intercepted the letter and created a file on the student, she sought to expunge the file.[71] As a result of judicial deference to the FBI's assertion of the privilege, it took five years of "strenuous litigation" and appeals before it was finally revealed that the FBI had been tracking the organization's mail merely because of its active involvement in antiwar protests.[72] This case serves as an example of the excessive deference afforded to assertions of the privilege, despite facts indicating a strong need for disclosure and doubtful existence of alleged secrets.

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

598 F.2d at 8–9 (citation omitted). This view of judicial deference in the state secrets arena has been termed the "mosaic" theory. *See generally* David E. Pozen, Note, *The Mosaic Theory, National Security, and the Freedom of Information Act*, 115 YALE L.J. 628 (2005) (discussing the roots of the "mosaic" theory and arguing that mosaic claims require additional judicial scrutiny, not additional judicial deference).

66 *Military and State Secrets Privilege*, *supra* note 8, at 579.

67 *Id.*; *see* Brancart, *supra* note 64, at 12.

68 Silverman, *supra* note 21, at 1104; Stulberg, *supra* note 19, at 469–70.

69 *See* Frank Askin, *Secret Justice and the Adversary System*, 18 HASTINGS CONST. L.Q. 745, 762 (1991).

70 *See* Paton v. La Prade, 469 F. Supp. 773, 775 (D.N.J. 1978).

71 *See id.* at 776.

72 Askin, *supra* note 69, at 762.

B. Effect of a Successful Claim of Privilege: Dismissal of a Case on the Pleadings

A further criticism of contemporary application of the *Reynolds* standard to the invocation of the state secrets doctrine arises from the effect courts have given to successful assertions of the privilege. Frequently, a successful claim of privilege has led to wholesale dismissal of the plaintiff's action against the government, rather than limitation of discovery.[73] This consequence has been attributed to judicial conflation of the *Reynolds* holding with the *Totten* rule of dismissal, as well as to excessive deference to the government's blanket assertions of the state secrets privilege.[74]

Although the state secrets doctrine has been used to dismiss a plaintiff's entire case before the merits on many occasions, commentators have argued that the privilege under *Reynolds* is typically not the proper basis for dismissing a case on the pleadings.[75] The lack of clarity of the *Reynolds* holding and its confusion with the predecessor *Totten* doctrine have been cited as explanations for dismissal.[76] In *Totten*, the Court concluded that public policy prohibits any trial "which would inevitably lead to the disclosure of matters which the law itself regards as confidential . . . ."[77] Thus, the *Totten* rule operates as an absolute bar to litigation that involves such confidential matters.[78]

Totten's inflexible approach has been distinguished from the balancing test required by the state secrets privilege under *Reynolds*. In *Tenet v. Doe*,[79] the Supreme Court affirmed the *Totten* holding regard-

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73 *See, e.g.*, Black v. United States, 62 F.3d 1115, 1119 (8th Cir. 1995) (affirming dismissal of case at pleadings stage in suit alleging harassment); Zuckerbraun v. Gen. Dynamics Corp., 935 F.2d 544, 547 (2d Cir. 1991) (dismissing case at pleadings stage in suit against manufacturers of missile defense system); Edmonds v. U.S. Dep't of Justice, 323 F. Supp. 2d 65, 79 (D.D.C. 2004), *aff'd*, 161 F. App'x 6 (D.C. Cir. 2005) (dismissing case at pleadings stage in suit by former-FBI whistleblower alleging violation of the Privacy Act); *see also* Stilp, *supra* note 8, at 839–40 & nn.74–75 (providing numerous examples of cases dismissed at the pleadings stage from 1988 to the present, and contrasting this with cases from *Reynolds* through 1984, which applied the state secrets doctrine narrowly to block discovery of certain documents while allowing the suit to proceed).

74 *See* Frost, *supra* note 8, at 1939–40 (noting a qualitative change in executive assertions of the privilege); Stilp, *supra* note 8, at 841–42 (arguing courts are misinterpreting the privilege in dismissing cases at the pleadings stage); Yamaoka, *supra* note 21, at 146–50 (attributing the dismissal of cases before the merits to a misinterpretation of *Reynolds*).

75 *See* Lyons, *supra* note 13, at 109–10, 122; Yamaoka, *supra* note 21, at 146.

76 *See* Lyons, *supra* note 13, at 109–10, 122; Yamaoka, *supra* note 21, at 146; *see also* discussion of the *Totten* doctrine, *supra* Part I.A.

77 Totten v. United States, 92 U.S. 105, 107 (1875).

78 Lyons, *supra* note 13, at 121.

79 Tenet v. Doe, 544 U.S. 1 (2005).

ing actions that are in themselves based upon a state secret.[80] The Court, however, expressly distinguished the state secrets doctrine and its consequences: "[t]he state secrets privilege and the more frequent use of *in camera* judicial proceedings simply cannot provide the absolute protection we found necessary in enunciating the *Totten* rule."[81] *Tenet* described the *Totten* holding as "broader" and "more sweeping" than the holding in *Reynolds*, and contrasted the categorical prohibition of continued litigation under the *Totten* rule with the balancing approach of *Reynolds*, indicating that the state secrets privilege does not require dismissal.[82] This distinction indicates that the *Totten* rule should be applied to bar a suit from proceeding where the subject matter of the litigation is itself a state secret, while the state secrets privilege should be utilized more narrowly to block disclosure of privileged material without dismissing the case.[83]

Nevertheless, courts have interpreted *Reynolds* to require dismissal of the plaintiff's action based on the state secrets privilege.[84] Commentators have pointed out that such cases mistakenly place emphasis on a footnote in *Reynolds* that refers to *Totten*, which merely provides an example of an extreme case where the state secrets privilege would overcome any necessity of disclosure, as support for the proposition that dismissal is required where the plaintiff's action involves a confidential matter.[85] It is possible for situations to arise where a plaintiff's case is based upon something that is a state secret—as was the case in *Totten*—and dismissal on the pleadings is the proper course of action. Such cases, however, should not be dismissed on the grounds of the state secrets doctrine, but rather based on the distinct *Totten* rule.[86] Further, such situations should be infrequent, as the dismissal of a case on the pleadings is a "'draconian'" and "'drastic'" remedy.[87] In

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80 *Id.* at 8–11 (noting the Court's "adherence" to *Totten*).

81 *Id.* at 11.

82 *Id.* at 9–10; *see also* Lyons, *supra* note 13, at 122 (noting that the state secrets privilege was not intended to be a "complete bar" on constitutional claims); Stilp, *supra* note 8, at 841–42 (distinguishing the state secrets privilege from the absolute protection of the *Totten* rule).

83 *See* Stilp, *supra* note 8, at 842.

84 *See, e.g.*, Kasza v. Browner, 133 F.3d 1159, 1170 (9th Cir. 1998) (ruling plaintiff is unable to proceed because "the very subject matter" of her action was asserted to be a state secret); Farnsworth Cannon, Inc. v. Grimes, 635 F.2d 268, 281 (4th Cir. 1980) (en banc) (holding that dismissal on the pleadings was appropriate); Edmonds v. U.S. Dep't of Justice, 323 F. Supp. 2d 65, 81 (D.D.C. 2004) (dismissing case before discovery); *see also* Lyons, *supra* note 13, at 109–10; Yamaoka, *supra* note 21, at 146.

85 Lyons, *supra* note 13, at 109–10; Yamaoka, *supra* note 21, at 146–49.

86 Stilp, *supra* note 8, at 842.

87 *See* Lyons, *supra* note 13, at 110 & n.75 (quoting *In re* United States, 872 F.2d 472, 477 (D.C. Cir. 1989) and Fitzgerald v. Penthouse Int'l, Ltd., 776 F.2d 1236, 1242 (4th Cir. 1985)).

practice, courts have conflated the state secrets doctrine and the *Totten* per se rule, resulting in a misapplication of the *Reynolds* privilege and all too frequent dismissal of cases on the pleadings instead of a limitation on discovery.

III. Implications of Misconstruction of the State Secrets Privilege

A. Detriment to Rights of Individual Litigants

Like any evidentiary privilege, the state secrets privilege is in conflict with the rights of individual plaintiffs. Much like the spousal and attorney-client privileges, the state secrets doctrine, where successfully invoked, operates to bar production of documents that plaintiffs seek in litigating their cases.[88] All such privileges subordinate the need for effective fact-finding and discovery of truth to another societal interest.[89] The harsh application, however, of the state secrets doctrine is more extensive. As a defendant in a civil suit, the government is permitted to assert the need for secrecy to deny plaintiffs the evidence they need to establish grave violations of constitutional rights and then to seek dismissal of the action based on that very denial of information.[90] As one commentator points out, in any action that involves a claim of privilege there are winners and losers; the problem with contemporary application of the state secrets doctrine, however, is that the loser is always the plaintiff who brings suit against the government, and the defendant is always permitted to shield itself from responsibility for alleged constitutional violations.[91]

Reynolds attempted to strike a compromise between the rights of individual litigants and the risk of prejudicing national security interests.[92] Courts have misapplied this approach, foregoing the balancing test articulated in *Reynolds* in favor of a highly deferential process of review. This, combined with great willingness to dismiss cases on the pleadings, has tipped the scale in favor of government interests to the detriment of individual rights.[93] Increasingly, litigants are left without a remedy for alleged violations of individual rights, and without the

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88 *See* United States v. Reynolds, 345 U.S. 1, 11 (1953); *see also* Brancart, *supra* note 64, at 6 (discussing operation of privileges in general); Rapa, *supra* note 14, at 236–37 (noting the tension with litigants' rights inherent in the state secrets privilege).

89 Brancart, *supra* note 64, at 6.

90 Perkins, *supra* note 2, at 252–53.

91 Lyons, *supra* note 13, at 123.

92 *See Reynolds*, 345 U.S. at 9–10.

93 *See* discussion of increasing use of state secrets privilege to dismiss cases on the pleadings, *supra* Part II.B.

mere opportunity to resolve their case on the merits.[94] The denial of a forum effects a violation of plaintiffs' constitutional and statutory rights to adjudicate their claims.[95]

Furthermore, forcing plaintiffs to defend against dismissal of their suits without providing access to the requisite documents distorts the adversarial nature of dispute resolution in our legal system.[96] By denying plaintiffs the opportunity to litigate their claims, the judicial proceedings fail to impart a sense of fairness and justice to the legal process.[97] Although the protection of information for preservation of national security is a highly compelling societal interest, the unfairness of withholding evidence from a plaintiff invoking the judicial process to enforce a constitutional right—the right to a remedy having been termed "the very essence of civil liberty"[98]—argues for a reevaluation of the ways in which the state secrets privilege is applied.[99]

B. Secrecy at the Expense of Government Accountability

Beyond the detriment to the individual rights of litigants, the doctrine's basis in the need for secrecy places it at odds with the necessity for government accountability in a democratic society. As a general matter, the efficacy of a democracy rests on the ability of its citizenry to evaluate the actions of its government and to hold elected officials accountable through the democratic process.[100] Accountability requires a measure of transparency in government operations—a basis of knowledge on which the electorate can conduct oversight.[101] Such oversight not only enhances the efficacy of the government, but acts as a deterrent to potential abuse of power.[102]

In the area of national security, however, the need for transparency poses a problem.[103] As one commentator notes, "[t]he national security of a constitutional democracy operates around a dilemma: security requires secrecy of certain military and intelligence

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94 *See* Askin, *supra* note 69, at 750.

95 Lyons, *supra* note 13, at 123.

96 Askin, *supra* note 69, at 749.

97 *See id.* at 757 (citations omitted) (asserting that the adversarial system serves to legitimize the legal process by assuring the losing party of the fairness of its procedures).

98 Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803).

99 Askin, *supra* note 69, at 768–69.

100 *See* Seth F. Kreimer, *Rays of Sunlight in a Shadow "War": FOIA, the Abuses of Anti-Terrorism, and the Strategy of Transparency*, 11 Lewis & Clark L. Rev. 1141, 1144 (2007).

101 *See id.* ("It is common currency that transparency is a tonic to democratic legitimacy and to lawful government.").

102 *See id.* at 1144–47.

103 *See* Brancart, *supra* note 64, at 3.

activities and democracy requires scrutiny of those activities."[104] The state secrets privilege, as an evidentiary mechanism for protecting national security interests, works to the detriment of the transparency that enables government accountability.[105] Each situation in which the government successfully invokes the privilege to prevent harm to national security results in a correspondent loss of opportunity for citizens to exercise effective oversight over their government in furtherance of accountability.[106] The expansion of the state secrets doctrine through excessive judicial deference to executive claims regarding secrecy and wholesale dismissal of cases amounts to an incursion on public rights by impairing citizens' ability to serve as a check on the power of their government.[107] Beyond the denial of public rights of oversight, expansion of the doctrine and the attendant loss of transparency remove a deterrent against governmental abuse of power.[108]

The preservation of national security is an interest of exceeding importance, and a measure of secrecy is admittedly necessary to the effective workings of the government in intelligence gathering and military matters.[109] The contemporary threats to national security posed by hostile regimes and globally networked organizations of nonstate actors have become all too apparent in the wake of attacks on the United States at home and abroad. The significant danger posed by such threats counsels for permitting the executive branch broad discretion in identifying and fighting any perceived sources of harm to national security. Recognition of the significance of this interest contributes to the judiciary's tendency to defer to executive assertions of the state secrets privilege.[110] In the face of considerations as crucial as national security, judges hesitate to second guess the need for secrecy in a field where the executive possesses constitutional powers and the judiciary may lack expertise.[111]

Despite the recognized importance of secrecy in matters pertaining to the security of our nation, the value of such secrecy is nevertheless limited.[112] As previously discussed, secrecy limits the public's

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104 *Id.*

105 *See* Lyons, *supra* note 13, at 126; Zagel, *supra* note 8, at 878.

106 *See* Lyons, *supra* note 13, at 126; Zagel, *supra* note 8, at 878–79; Gardner, *supra* note 9, at 590.

107 *See* Lyons, *supra* note 13, at 126.

108 *See* Gardner, *supra* note 9, at 590.

109 Brancart, *supra* note 64, at 3; Zagel, *supra* note 8, at 878.

110 *See* Brancart, *supra* note 64, at 11–12.

111 *Id.*; *see also supra* notes 64–65 and accompanying text.

112 *See* Perkins, *supra* note 2, at 260–61.

ability to exercise effective oversight in furtherance of government accountability. Accordingly, by permitting expansion of the state secrets doctrine, courts contribute to the damage secrecy causes to democratic accountability.[113]

Many commentators argue that the effect of this damage can be readily perceived in the form of executive branch abuse of the state secrets privilege.[114] They have pointed to the executive's tendency to opt for secrecy,[115] resulting in "unnecessary classifications on *billions* of items"[116] as well as a significant increase in the amount of documents considered classified since September 11, 2001.[117] Judicial deference to assertions of the state secrets privilege serves to indulge, rather than check, this executive bias in favor of secrecy.[118] As greater secrecy decreases transparency and the deterrent effect of public oversight is weakened, the government has fewer restraints against concealment of wrongdoing.[119]

Various instances have been cited where the potential for abuse has arguably been realized, and "exaggerated" claims of privilege have been utilized to avoid embarrassment or disclosure of misconduct.[120] The prosecution of a former CIA official involved in the Iran-Contra affair provides one such example.[121] In that case, the Department of Justice utilized the state secrets privilege to block disclosure of a document containing information on CIA facilities in Central America which had already been disclosed, though not yet confirmed by the government.[122] Consequently, the case was dismissed, despite the Independent Counsel's contention that there were no actual state secrets at stake.[123] Such situations provide a compelling argument for

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113 *Id.* at 261.

114 *See, e.g.*, Askin, *supra* note 69, at 760–63 (contending the privilege has been invoked to conceal government wrongdoing and citing examples); Gardner, *supra* note 9, at 585–87 (discussing "overprotection and overclassification" of information); Stilp, *supra* note 8, at 842–44 (noting the potential for improper classification of documents for purposes of concealment).

115 Askin, *supra* note 69, at 760 & n.101.

116 Zagel, *supra* note 8, at 899.

117 Stilp, *supra* note 8, at 842–43 & n.90.

118 Stulberg, *supra* note 19, at 465.

119 *See id.* at 465–66.

120 *See* Askin, *supra* note 69, at 761–63 (citing the Watergate scandal, the aborted prosecution of a former CIA official in the Iran-Contra affair, and FBI surveillance of antiwar protesters during Vietnam as examples).

121 *Id.* at 762.

122 *Id.*

123 *Id.*

reexamining the application of the doctrine and invite the conclusion that more rigorous judicial testing of secrecy claims is needed.[124]

In *Reynolds*, the Supreme Court attempted to create a middle ground between the competing concerns of accountability and national security by establishing a balancing test to be administered by courts.[125] Unfortunately, the balancing approach lacked clarity and guidance, leading judges to forego rigorous review of executive claims of the privilege and defer to the asserted need for secrecy—consequently diminishing the transparency necessary for effective public oversight of government conduct.

C. Implications of an Expanded State Secrets Privilege in the Context of the War on Terror

In the context of new threats to national security following the attacks of September 11, 2001, and the War on Terror, the need for secrecy—especially with regard to sensitive information concerning the government's intelligence and military operations—is of particular importance. This context, however, also raises crucial concerns of individual rights and executive accountability with regard to actions taken by the government in response to such national security threats. As the need for secrecy remains in tension with individual rights and the goal of governmental accountability, the consequences of misapplication of the state secrets doctrine in the context of the War on Terror are thus qualitatively different. This Section explores the conflict in a particular setting: the assertion of the state secrets privilege in civil suits challenging the government's practice of "extraordinary rendition," wherein U.S. officials allegedly transfer individuals suspected of terrorist activity to foreign countries known to practice methods of interrogation not permitted in the United States.[126] The two leading cases in this area have particular consequences for the judicial misapplication of the state secrets privilege in such situations.

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124 *See id.* at 763.

125 *See* United States v. Reynolds, 345 U.S. 1, 9 (1953).

126 In the post-September 11th environment, the problems of the state secrets privilege have arisen in several contexts in addition to extraordinary rendition, including wiretapping surveillance and whistleblower suits. *See, e.g.*, Hepting v. AT&T Corp., 439 F. Supp. 2d 974 (N.D. Cal. 2006) (wiretapping); Edmonds v. U.S. Dep't of Justice, 323 F. Supp. 2d 65 (D.D.C. 2004) (whistleblower suit).

1. *Two Challenges to Extraordinary Rendition:* El-Masri v. Tenet *and* Arar v. Ashcroft

El-Masri v. Tenet[127] and *Arar v. Ashcroft*[128] both involve challenges to the program of extraordinary rendition allegedly carried out by U.S. government officials.[129] In his civil suit against the U.S. government under the Alien Tort Statute, German citizen Khaled El-Masri alleged that he was an innocent victim of the practice of extraordinary rendition, as carried out pursuant to U.S. policy.[130] El-Masri claimed he was seized by Macedonian authorities at the border between Macedonia and Serbia on New Year's Eve in 2003.[131] Upon being captured, El-Masri alleged he was imprisoned for twenty-three days in a hotel room in Skopje, during which time he was not permitted to contact an attorney, consular officials, or his family, while being continuously interrogated about involvement with Al Qaeda, which he denied.[132] He was then taken to an airstrip near Skopje, where he claims he was beaten, stripped, and sexually assaulted.[133] His captors, whom El-Masri contended were CIA officials, sedated him and flew him to a CIA-run facility in Kabul, where he remained for four months.[134]

While imprisoned in Kabul, El-Masri was interrogated about his alleged association with terrorist groups, subjected to abusive treatment, and denied any opportunity to contact German officials.[135] In March of 2004, he was brought before two American officials, who admitted that his detention was a mistake, but claimed they were not authorized to release him.[136] On May 28, 2004, he was flown to Albania, where he was left on an abandoned road.[137] After making contact with Albanian officials, El-Masri eventually returned to Germany, only to discover that his family had left the country during his five-month absence.[138]

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127 El-Masri v. Tenet, 437 F. Supp. 2d 530 (E.D. Va. 2006), *aff'd sub nom.* El-Masri v. United States, 479 F.3d 296 (4th Cir. 2007), *cert. denied*, 128 S. Ct. 373 (2007).

128 Arar v. Ashcroft, 414 F. Supp. 2d 250 (E.D.N.Y. 2006), *aff'd*, 532 F.3d 157 (2d Cir. 2008).

129 *See* El-Masri v. Tenet, 437 F. Supp. 2d at 532–35; *Arar*, 414 F. Supp. 2d 250.

130 El-Masri v. Tenet, 437 F. Supp. 2d at 532–35.

131 *Id.* at 532.

132 *Id.* at 532–33.

133 *Id.* at 533.

134 *Id.* at 533–34.

135 *Id.* at 533.

136 *Id.*

137 *Id.* at 534.

138 *Id.*

El-Masri filed suit against the former director of the CIA, CIA employees, and private corporations that allegedly participated in his abduction.[139] He alleged violations of his Fifth Amendment right to due process, as well as violations of international legal norms prohibiting prolonged arbitrary detention and cruel, inhuman, or degrading treatment, pursuant to the Alien Tort Statute.[140] The United States moved to dismiss the complaint, claiming the state secrets privilege precluded litigation of the case.[141] The government argued that the suit would place at issue "alleged clandestine foreign intelligence activity that may neither be confirmed nor denied in the broader national interest," and claimed any further elaboration on this justification for secrecy would itself be contrary to the national interest.[142] Further, the government contended that nothing short of dismissal would suffice to protect the state secrets at issue.[143]

El-Masri contended that, because the existence of the program was publicly acknowledged by government officials and the facts of his case were widely publicized, there was no legitimately sensitive information to protect from disclosure.[144] The district court granted the motion to dismiss, noting the executive branch's authority and greater expertise in national security matters, and concluding that the sensitive information was central to the litigation.[145] The Fourth Circuit affirmed the decision of the district court, agreeing that the information at issue met the *Reynolds* "reasonable danger" standard, and the state secrets privilege therefore barred its disclosure.[146] Further, the court concluded that dismissal on the pleadings was proper because any attempt to proceed would threaten disclosure of the privileged information, as it was central to the case.[147] Recently, the Supreme Court declined to hear El-Masri's appeal of the dismissal.[148]

The case of *Arar v. Ashcroft* presented similar issues. Maher Arar, a Syrian-born Canadian citizen, brought suit against U.S. offi-

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139 *Id.*

140 *Id.* at 534–35.

141 *Id.* at 535.

142 Memorandum of Points and Authorities in Support of the Motion by Intervenor United States to Dismiss or, in the Alternative, for Summary Judgment at 11–12, El-Masri v. Tenet, 437 F. Supp. 2d 530 (No. 01417), *available at* http://www.aclu.org/pdfs/safefree/govt_mot_dismiss.pdf.

143 *Id.* at 12.

144 *See* El-Masri v. United States, 479 F.3d 296, 301 (4th Cir. 2007), *cert. denied*, 128 S. Ct. 373 (2007).

145 El-Masri v. Tenet, 437 F. Supp. 2d at 536, 538–39.

146 El-Masri v. United States, 479 F.3d at 307–09.

147 *Id*. at 311.

148 El-Masri v. United States, 128 S. Ct. 373 (2007).

cials alleging illegal detention in America and extraordinary rendition to Syria, where he was subjected to interrogation and torture.[149] Arar claimed that on September 26, 2002, he was stopped by immigration officials at John F. Kennedy Airport in New York and interrogated for eight hours on suspicion of links to terrorist groups, which he denied.[150] He was then seized, shackled, and put in solitary confinement until the following day, when he was interrogated further.[151] Arar was offered the opportunity to return to Syria, which he refused for fear of being tortured there.[152] Subsequently, he was sent to a detention center in Brooklyn and placed in solitary confinement, where his requests to contact a lawyer or his family were continually refused.[153]

After several days, immigration officials told Arar that he would have to be removed from the United States because of alleged membership in Al Qaeda; he was permitted to meet with a Canadian official who provided assurances that he would not be removed to Syria.[154] After several more days of interrogations, however, Arar was informed that he would indeed be sent to Syria.[155] In response to his protests, immigration officials allegedly told Arar that their agency was not governed by the "Geneva Conventions."[156] Arar contends he was flown to Jordan and handed over to Syrian authorities, who ultimately transported him to Syria.[157] Arar was detained in Syria for ten months, during which time he alleges he was kept in a grave-size cell, interrogated for eighteen hours per day, physically and psychologically tortured, and forced to sign confessions to being a participant in terrorist activities.[158] Arar was eventually released to the custody of Canadian officials more than a year after his initial detention in New York.[159]

Arar's civil suit alleged that the defendants directed the interrogations by Syrian officials and consequently facilitated his arbitrary detention, interrogation, and torture.[160] At a minimum, Arar argued,

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149 Arar v. Ashcroft, 414 F. Supp. 2d 250, 252 (E.D.N.Y. 2006), *aff'd*, 532 F.3d 157 (2d Cir. 2008).

150 *Id.* at 253.

151 *Id.*

152 *Id.*

153 *Id.*

154 *Id.*

155 *Id.* at 254.

156 *Id.*

157 *Id.*

158 *Id.* at 254–55.

159 *Id.* at 255.

160 *Id.* at 257.

U.S. officials knew or should have known of the substantial likelihood that he would be tortured upon being handed over to Syria.[161] Based on these allegations, Arar asserted claims for relief under the Torture Victims Protection Act[162] and the Fifth Amendment.[163] The government invoked the state secrets privilege with regard to Arar's claims of removal to Syria, interrogation, and torture.[164]

Much like in *El-Masri*, the government articulated its assertion of the privilege in very broad terms, contending that disclosure of information supporting the claims would interfere with foreign relations, compromise intelligence operations, and prejudice national security.[165] Asserting Arar's claims could not be litigated without such disclosure, the government sought dismissal.[166] The district court ultimately declined to address the state secrets privilege and dismissed on other grounds,[167] but despite finding the state secrets issue moot, the court addressed the importance of national security concerns.[168] Specifically, the court noted the need for secrecy with regard to efforts to halt international terrorism, and emphasized that such considerations are left most appropriately to the executive branch and legislature.[169] Such language is strongly reminiscent of state secrets rhetoric and may indicate that despite the court's avoidance of the issue, the government's secrecy claims played a significant role in the disposition of the case.

2. *Misapplication of the Secrecy Privilege in Challenges to Extraordinary Rendition*

The cases of El-Masri and Arar place the consequences of judicial misapplication of the state secrets doctrine—denial of individual liti-

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161 *Id.*

162 Torture Victim Protection Act of 1991, 28 U.S.C. § 1350 (2006).

163 *Arar*, 414 F. Supp. 2d at 257–58.

164 *See* Memorandum in Support of the United States' Assertion of State Secrets Privilege at 2–3, *Arar*, 414 F. Supp. 2d 250 (No. 04-CV-249-DGT-VVP), 2005 WL 2547997. The government did not assert the state secrets privilege with regard to Arar's other claim of mistreatment while in the United States. *See id.*

165 *Id.*

166 *Id.* at 3.

167 *See Arar*, 414 F. Supp. 2d at 287 ("Now that those Counts have been dismissed on other grounds, the issue involving state secrets is moot.").

168 *Id.* at 279–80. In dismissing, the court concluded that: (1) Arar lacked standing to bring a claim for declaratory relief against the plaintiffs in their official capacities; (2) he did not have a cause of action under the Torture Victim Protection Act against defendants in their personal capacities; and (3) he could not bring a cause of action under *Bivens* due to the "national-security and foreign policy considerations at stake." *Id.* at 287.

169 *Id.* at 281.

gants' rights and loss of public oversight of governmental action—in a qualitatively different light. Where an evidentiary privilege has broken free of its doctrinal underpinnings and courts apply it expansively to block claims of egregious violations of human rights and an ongoing program of government-facilitated illegal activity, the need for a remedy becomes shockingly apparent.

The allegations of El-Masri and Arar are very grave, indeed, with regard to violations of individual rights. Both claim to have been secretly and illegally seized, interrogated, and denied due process by officials of the U.S. government. Further, they allege that they were subjected to prolonged and arbitrary detention, torture, and cruel, inhuman, or degrading treatment that was known to and facilitated by government officials. Where wrongdoing of such magnitude is alleged, the injustice caused by denying litigants the opportunity to obtain redress or even to adjudicate their case on the merits is particularly appalling. In addition, the generalized justification for secrecy advanced by the government in such litigation implies that any future victim of the ongoing practice of extraordinary rendition will be denied a forum to litigate on identical grounds.

Although the unredressed deprivation of such basic human rights poses a serious problem of injustice at the individual level, the detriment to the public's right of oversight is also significant. The allegations of El-Masri and Arar amount to serious abuses of power by U.S. government officials and the executive branch, including violations of international legal obligations, implementing federal legislation, and customary norms of human rights.[170] Further, the allegations are not claimed to be isolated instances of abuse but rather part of an ongoing practice by government officials.[171] An ongoing government program of extraordinary rendition such as the one described by El-Masri and Arar is an issue of great public concern, and the case for oversight in furtherance of government accountability in this area is particularly

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170 Though the constitutional implications of these cases are beyond the scope of this Note, it is worth mentioning that separation of powers concerns have also been raised. *See* Perkins, *supra* note 2, at 253–57. It has been noted that the state secrets privilege poses a problem to the judicial oversight of executive action. *See id.* at 253. Executive programs and actions that are alleged to be illegal must be subject to judicial oversight under the principle of separation of powers; this principle is violated by allowing the executive branch to determine what is admitted into evidence in a trial adjudicating the questioned program or activity. *See id.* at 257. Further, dismissal of suits pursuant to the privilege has an effect on the legislative power to assign jurisdiction and delegate executive oversight to the federal courts. *See* Frost, *supra* note 8, at 1934.

171 *See* El-Masri v. United States, 479 F.3d 296, 300 (4th Cir. 2007), *cert. denied*, 128 S. Ct. 373 (2007); *Arar*, 414 F. Supp. 2d at 256.

strong.[172] Direct and effective congressional action challenging such executive activities is politically improbable;[173] judicial tipping of the scales in favor of secrecy thus amounts to insulation from accountability. In a Vietnam-era state secrets case, Justice Stewart summarized the particular need for transparency in this area of governmental affairs:

> In the absence of the governmental checks and balances present in other areas 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.[174]

Whereas misapplication of the state secrets doctrine in extraordinary rendition cases cloaks with secrecy an area in which transparency and public oversight are essential, it is exceedingly important to provide for meaningful review and proper application of the doctrine.

IV. Proposal to Prevent Misapplication of the State Secrets Privilege

A. Proposed Statutory Requirement of In Camera *Review and Equitable Tolling*

Alleviating the harm to rights of individual litigants and to mechanisms of accountability caused by expansion of the state secrets doctrine requires clarification regarding review and application of the privilege, as well as a process for addressing the needs of litigants whose claims are weakened or dismissed due to legitimate invocation of the doctrine. In furtherance of this objective, Congress should enact a statute requiring *in camera* judicial review in evaluating invocation of the privilege, as well as providing for conditional application of the privilege and tolling of the statute of limitations on plaintiffs' claims, where such invocation is successful.

Exhibiting extreme deference to executive assertions of the privilege, courts have been reluctant to probe deeply into the government's stated justification of the need for secrecy. In so doing, judges have tended to forego *in camera* review of the information at issue, relying on the assertion in *Reynolds* that "reasonable danger" of dis-

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172 For a discussion of the importance of the competing concern of preservation of national security, see *supra* Part III.B.

173 *See* Perkins, *supra* note 2, at 259 (pointing out the improbability of direct congressional action in aid of individuals such as El-Masri and Arar due to political considerations).

174 N.Y. Times Co. v. United States, 403 U.S. 713, 728 (1971) (Stewart, J., concurring).

closure of state secrets counsels against insisting upon an *in camera* examination of the evidence.[175] In order to avoid the misapplication of the privilege caused by the unclear *Reynolds* standard combined with the judicial inclination towards deference, Congress should clarify the scope of the judicial function in evaluating privilege claims by imposing a requirement of *in camera* review of the evidence. Furthermore, where the review process is complete and the invocation of the privilege has been found legitimate, statutory language should provide for conditional application of the privilege, such that the evidence is barred only as long as the necessity for secrecy endures. Along with a provision for tolling of the statute of limitations on plaintiffs' claims, this approach would permit litigation of the action once the danger of prejudice to national security has passed.

Such provisions would address the dual problems of litigants' rights and government accountability. The provision for *in camera* review of the evidence would benefit individual litigants by requiring judges to subject the executive assertion of the privilege to rigorous and meaningful review, thus weeding out illegitimate invocations of secrecy and permitting plaintiffs to proceed. Compelling judges to review the documents at stake counteracts the tendency towards great deference exhibited by the judiciary. When a court's careful evaluation reveals valid reasons for nondisclosure, the process at a minimum forces the government to make a strong case for secrecy and guarantees plaintiffs that their interests have not simply been prejudiced by "the caprice of executive officers."[176] Requiring *in camera* review would also advance the goal of governmental accountability, as it would deter wrongful invocation of the state secrets privilege by ensuring such claims would be subject to thorough testing.[177] The expectation of meaningful review would provide a disincentive for the government to assert the privilege where it is not warranted, thereby lifting the veil of secrecy and permitting greater public oversight of government action. Even where a legitimate claim of privilege acts to block the disclosure of evidence, compelling the government to make a thorough case for secrecy instead of relying on generalized claims of privilege serves the cause of transparency.

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175 United States v. Reynolds, 345 U.S. 1, 10 (1953).

176 *Id.* at 9–10; *see* Brancart, *supra* note 64, at 16 (pointing out the benefit of compelling the government to provide a justification for the privilege in the context of protective orders as a proposed solution).

177 *See* Zagel, *supra* note 8, at 900.

Providing for temporal limits on the duration of the successfully invoked privilege, together with equitable tolling, would permit plaintiffs to pursue a remedy once the necessity for secrecy has passed. This approach would ameliorate the injustice done to plaintiffs deprived of any opportunity to seek redress for their injuries—particularly in the context of the tremendous harm alleged to have been suffered by individuals such as El-Masri and Arar. The victims of extraordinary rendition would no longer be precluded from relief based solely on the nature of their case. The equitable tolling provision also deters misuse of the privilege and furthers governmental accountability, as the government can eventually expect, if the plaintiffs later bring suit, to be held responsible for any concealment of wrongdoing.

The proposed statutory solution thus serves to alleviate the problems caused by contemporary misapplication of the state secrets privilege. Simultaneously, this approach does not abandon the interest in national security. Instead, it requires a secure method for evaluating invocations of the privilege and maintains the protection afforded by the privilege as long as a legitimate need for secrecy endures.

In the cases of El-Masri and Arar, mandating judicial review would have resulted in a less cursory evaluation of their claims. At best, the courts, upon reviewing the relevant information *in camera*, would have determined that all or some of the documents do not pose a sufficient danger to national security, such that the litigation could proceed. At a minimum, the plaintiffs would have been assured that their claims were given the extensive consideration merited by the gravity of the injuries they alleged and provided an opportunity for redress when the need for secrecy regarding the extraordinary rendition program became less apparent.

B. Potential Criticisms

One criticism to any approach that calls for more stringent judicial testing of assertions of the state secrets privilege is that federal judges lack the competence and trustworthiness needed to evaluate sensitive matters in the area of national security.[178] Commentators, however, note that federal judges regularly deal with complicated and sensitive information in various areas of litigation—such as patent, antitrust, and securities cases—and there are few situations where the need for protecting evidence is too subtle to rely on a judge to make a

178 *See* Stulberg, *supra* note 19, at 462–65.

reasoned determination.[179] Further, experience has shown that judges are not likely to act recklessly in finding evidence unprivileged; rather, judges tend to exhibit deference when it comes to executive classification of information.[180] The notion that *in camera* review poses a problem of judicial trustworthiness has similarly been refuted.[181] Commentators point out that judges, no more than executive officers who routinely handle sensitive information, do not present a threat to national security.[182]

Another criticism of the proposed approach is that relief for the individual litigant may come too late.[183] One scholar writing forty years ago considered a procedure for postponing litigation until secrecy is no longer needed, and contended that "under proper standards most sensitive information requires secrecy for short periods of time, at most three or four years."[184] In the contemporary context of an ongoing "War on Terror" conducted against covert and globally dispersed terrorist organizations, the duration of the need for secrecy cannot be dismissed so lightly. Although it is difficult to set a limit on the duration of secrecy in this context and such conflicts are admittedly long-lived, the proposed solution attempts to best accommodate the nature of modern threats to national security. The threat of terrorism in its current form presents novel issues, and no solution can preserve perfectly the rights of individual litigants. Considerations of national security must still be factored into the balance. This proposal, however, seeks to relieve the imposition on litigants' rights by providing for a future opportunity to seek redress. It serves as an improvement over the current application of the state secrets doctrine, wherein the successfully invoked privilege is unlimited in duration.

A further issue regarding the proposed statutory scheme concerns the role of judicial deference. The tendency of judges to defer to the executive branch's claims of secrecy, as well as to decisions regarding foreign affairs and military matters more generally, has been widely recognized.[185] Although it is likely that this tendency towards deference will persist to some degree, despite the imposition of requirements for more rigorous testing of executive claims, the pro-

179 Zagel, *supra* note 8, at 900; *see also* Stulberg, *supra* note 19, at 463.

180 *See* Zagel, *supra* note 8, at 899–900; Stulberg, *supra* note 19, at 463–64.

181 *See* Stulberg, *supra* note 19, at 464–65.

182 *Id.* at 465; Gardner, *supra* note 9, at 589.

183 *See* Rapa, *supra* note 14, at 274.

184 Zagel, *supra* note 8, at 909.

185 *See* discussion *supra* Part II.A.

posed provision for *in camera* review is a step forward in clarifying the judiciary's proper role in scrutinizing assertions of the privilege. Though it is not possible to control the thought processes of individual judges, the provision of rules to delineate their responsibility in evaluating secrecy claims can only serve to further the stated goals of transparency and litigants' rights.

A final reservation to this proposal questions whether the potential disclosure of evidence at an indeterminate time when the need for secrecy has passed would effectively deter misuse of the state secrets privilege, such that the goals of transparency and oversight are served. The statutory scheme envisioned, though it does not guarantee immediate disclosure—and thus immediate oversight—in every case, is the optimal approach to achieving governmental accountability. The provision for *in camera* review of evidence in every case would prevent the government from concealing wrongdoing with vague and generalized assertions of the need for secrecy which can be used to conceal wrongdoing from the consequences of public knowledge. The effect of forcing a coherent justification for secrecy at the time the privilege is asserted in itself works to further transparency. Additionally, transparency "after the fact" is nevertheless valuable: it serves as a "compass, disclosing where the government is headed and allowing political actors and the electorate to turn the political system back toward appropriate regard for constitutional values."[186] Allowing for disclosure of the government's transgression of constitutional limitations after the fact allows the electorate to appraise such wrongdoing and respond accordingly.

C. Alternative Proposals

Various alternative approaches have been suggested to ameliorate the acknowledged problems with judicial evaluation and application of the state secrets doctrine. Most proposals focus on judicial procedural mechanisms to assist in evaluating claims of privilege, such as special masters appointed by the court to screen state secrets from disclosure,[187] the provision of security-cleared juries in cases where the privilege is invoked,[188] and creation of special tribunals of national security experts to evaluate state secrets privilege questions.[189] Such approaches, however, which require investigating the credentials of a

186 Kreimer, *supra* note 100, at 1147.

187 *See* Brancart, *supra* note 64, at 24.

188 *See* Gardner, *supra* note 9, at 594–95.

189 *See* Zagel, *supra* note 8, at 897–98.

given special master, tribunal, or jury, would be costly and time-consuming to implement, and may increase the risk of disclosure of sensitive information by introducing additional parties.[190] The proposal for a special court modeled after the Foreign Intelligence Surveillance Court created under the Foreign Intelligence Surveillance Act[191] is particularly ill-suited for the objective of furthering transparency and government accountability, as such a court seeks instead to protect secrecy and enable the government to collect information.[192]

The statutory solution proposed here would not alter the judicial process so drastically as to require removal to alternative forums or appointment of additional individuals to conduct the evaluation process. By working within the existing judicial structure and trial processes, judges are permitted to perform the evaluative and balancing functions at which they are adept, and there is no need to disclose the sensitive material to additional individuals who may not be as trustworthy or are not as familiar with the intricacies of the dispute. Accordingly, a revision of the existing evaluation and application of the state secrets privilege should ameliorate the detriment to rights of litigants and mechanisms of oversight, without imposing excessive burdens on the judicial process or further compromising the interest in national security that is the object of every such dispute.

Conclusion

In setting forth a standard for evaluation of executive claims of the state secrets privilege, *Reynolds* attempted to establish a balance between the competing considerations of national security and the necessity of disclosure for individual litigants and public oversight of governmental actions. Despite such efforts, the compromise has not proven to be an effective means of preventing harm to individual and public rights. Excessive judicial deference to the government's invocation of the privilege and contentions that any litigation on the merits would prejudice national security have transformed the *Reynolds* balancing test into a presumption in favor of secrecy—a presumption that judges are not often willing to test by examining the documents alleged to be sensitive. Although national security concerns are of great importance, the current climate of elevated threats must not be used as a pretext to throw a cloak of secrecy over violations of domestic law and international obligations, as is alleged in litigation concerning the

190 *See id.* at 887 (describing special courtroom techniques as "costly and clumsy").

191 Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. §§ 1801–1872 (2006).

192 *See* Silverman, *supra* note 21, at 1125.

government's program of extraordinary rendition. Accordingly, the proposed statutory solution seeks to address situations where individuals are precluded from relief based solely on the nature of their case, and the executive branch has the potential to conceal controversial government policies in areas of great public concern.