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# ARTICLE

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## THE SHADOW OF STATE SECRETS

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## INTRODUCTION

State secrets doctrine catapulted to prominence post-2001, as the executive responded to lawsuits alleging a range of constitutional and human rights violations by refusing to disclose information during discovery and, in some cases, requesting dismissal of suits altogether on national security grounds.<sup>1</sup> More than 120 law review articles followed,<sup>2</sup> and media outlets became outspoken in their criticism of the privilege.<sup>3</sup> In both the Senate and the House, new bills sought to co-

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<sup>1</sup> See, e.g., *ACLU v. Nat'l Sec. Agency*, 493 F.3d 644 (6th Cir. 2007) (applying the state secrets doctrine as a privilege against discovery of evidence that the plaintiffs' communications had been intercepted); *Mohamed v. Jeppesen Dataplan, Inc.*, 539 F. Supp. 2d 1128 (N.D. Cal. 2008) (holding that the state secrets privilege made issues in the case nonjusticiable and deprived the court of subject matter jurisdiction), *rev'd*, 563 F.3d 992 (9th Cir. 2009), *amended and superseded by* 579 F.3d 949 (9th Cir. 2009), *reh'g granted*, 586 F.3d 1108 (9th Cir. 2009), *aff'd*, 614 F.3d 1070 (9th Cir. 2010) (en banc); *Al-Haramain Islamic Found., Inc. v. U.S. Dep't of Treasury*, 585 F. Supp. 2d 1233 (D. Or. 2008) (applying the privilege to prevent access to the government's record); *Hepting v. AT&T Corp.*, 439 F. Supp. 2d 974 (N.D. Cal. 2006) (considering but refusing to apply the state secrets privilege as a disclosure or an absolute bar to action); *El-Masri v. Tenet*, 437 F. Supp. 2d 530 (E.D. Va. 2006), *aff'd*, 479 F.3d 296 (4th Cir. 2007) (applying the privilege to bar discovery and dismiss plaintiff's claims); *Arar v. Ashcroft*, 414 F. Supp. 2d 250 (E.D.N.Y. 2006) (discussing the United States' motion for summary judgment based on state secrets invocation, which later became moot as those claims were dismissed on other grounds), *vacated*, 585 F.2d 559 (2d Cir. 2009) (en banc); *Ctr. for Constitutional Rights v. Bush*, No. 06-00313 (S.D.N.Y. filed Jan. 17, 2006) (arguing that the state secrets privilege interfered with plaintiff's representation); see also SEN. PATRICK LEAHY, STATE SECRETS PROTECTION ACT, S. REP. NO. 110-442, at 3 (2008) ("[W]hat is undebatable . . . is that the [state secrets] privilege is currently being invoked as grounds for dismissal of entire categories of cases challenging the constitutionality of Government action, and that a strong public perception has emerged that sees the privilege as a tool for Executive abuse." (citations omitted)).

<sup>2</sup> A bibliography of secondary sources on state secrets will be posted on the website of Georgetown Law's Center for National Security and the Law after this Article is published.

<sup>3</sup> See, e.g., Robyn Blumner, *Injustice Hides Behind Badge of Security*, ST. PETERSBURG TIMES, Feb. 10, 2008, at 5P (discussing the abuse of the state secrets privilege and attempts by Congress to prevent its misuse); Bruce Fein, *State Secrets Abuse*, WASH. TIMES, Mar. 13, 2007, at A16 (same); Editorial, *Secrets and Rights*, N.Y. TIMES, Feb. 2, 2008, at A18 (same); Editorial, *Secure Lawsuits*, WASH. POST, Mar. 6, 2008, at A20 (same); Editorial, *What's a Secret?*, WASH. POST, Apr. 11, 2008, at A20 (discussing the excessive de-

dify what had previously been a common law doctrine.<sup>4</sup> And in September 2009, the Attorney General introduced new procedures for review and created a State Secrets Review Committee.<sup>5</sup>

Despite the sudden explosion in scholarship and other attention paid to state secrets, very little is known about how the privilege actually works. The research serving as a basis for much of the discussion focuses narrowly on published judicial opinions in which the U.S. government has invoked the privilege and the courts have ruled on it. Myriad concerns follow.

First and foremost, such analyses reveal very little about how the executive branch actually uses the privilege—who invokes it, under what circumstances it is invoked, how frequently it has been threatened, and to what end. Put simply, there is a logical disconnect between looking at how courts rule in their final, published opinions on state secrets and drawing conclusions about the executive branch’s practices.<sup>6</sup>

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ference given to state secrets claims); Editorial, *Whose Privilege?*, N.Y. TIMES, Apr. 18, 2008, at A24 (same); Ben Wizner, *Shielded by Secrecy*, L.A. TIMES, Feb. 14, 2008, at A25 (same); Justin Florence & Matthew Gerke, *State Your Secrets*, SLATE (Nov. 14, 2007, 11:32 AM), <http://www.slate.com/id/2177962> (same); Henry Lanman, *Secret Guarding*, SLATE (May 22, 2006, 3:57 PM), <http://www.slate.com/id/2142155> (same).

<sup>4</sup> In January 2008, Senator Edward Kennedy and twelve cosponsors introduced a bill “to enact a safe, fair, and responsible state secrets privilege Act.” S. REP. NO. 110-442, at 1 (2008). In the 111th Congress, House and Senate versions of bills entitled the “State Secrets Protection Act,” H.R. 984, 111th Cong. (2009), and S. 417, 111th Cong. (2009), which would limit the use of state secrets to situations in which a significant harm to national security was presented, require judicial review of the information to be withheld, and demand that the Attorney General report invocation of the privilege to Congress within thirty days of its assertion.

<sup>5</sup> See Press Release, Dep’t of Justice, Attorney General Establishes New State Secrets Policies and Procedures (Sept. 23, 2009), available at <http://www.justice.gov/opa/pr/2009/September/09-ag-1013.html> (providing for “an internal evaluation of the pending cases in which the privilege has been invoked”).

<sup>6</sup> For a secondary work drawing conclusions about executive assertion of the state secrets privilege based on reported judicial opinions, see, for example, Robert M. Chesney, *State Secrets and the Limits of National Security Litigation*, 75 GEO. WASH. L. REV. 1249, 1249 (2007). See also Lucien J. Dhooge, *The State Secrets Privilege and Corporate Complicity in Extraordinary Rendition*, 37 GA. J. INT’L & COMP. L. 469, 490 (2009) (“[I]nvocations have increasingly sought dismissal of pending litigation rather than limitations upon discovery or other methods by which to shield information from public disclosure.”); Stephanie A. Fichera, *Compromising Liberty for National Security: The Need to Rein in the Executive’s Use of the State Secrets Privilege in Post-September 11 Litigation*, 62 U. MIAMI L. REV. 625, 628-32 (2008) (discussing the rise in invoking the state secrets privilege, particularly in recent cases involving the War on Terror); Amanda Frost, Essay, *The State Secrets Privilege and Separation of Powers*, 75 FORDHAM L. REV. 1931, 1938 (2007) (“For over two decades following *Reynolds*, the executive rarely asserted the state secrets privilege . . . . But starting in 1977, the executive raised the privilege with greater frequency. Between 1953 and 1976, there were only eleven reported cases addressing the privilege; between 1977 and 2001 there were

fifty-nine reported cases.”); Meredith Fuchs, *Judging Secrets: The Role Courts Should Play in Preventing Unnecessary Secrecy*, 58 ADMIN. L. REV. 131, 134-35 (2006) (“In the 23-year span between the Supreme Court case that authorized use of the state secrets privilege in 1953 and 1976, the government litigated cases involving the privilege four times. In the 24 years between 1977 and 2001, courts were called to rule on the government’s invocation of the privilege 51 times.”); Davida H. Isaacs & Robert M. Farley, *Privilege-Wise and Patent (and Trade Secret) Foolish? How the Courts’ Misapplication of the Military and State Secrets Privilege Violates the Constitution and Endangers National Security*, 24 BERKELEY TECH. L.J. 785, 810 (2009) (explaining the competing needs of ensuring national security and encouraging inventors); Carrie Newton Lyons, *The State Secrets Privilege: Expanding Its Scope Through Government Misuse*, 11 LEWIS & CLARK L. REV. 99, 132 (2007) (“[C]ourts have altered the privilege through their jurisprudence, grafting different standards of review, refashioning the balancing test, and relating the privilege to the *prima facie* case.”).

Even authors who recognize that reported cases “represent a fraction of the total cases where the privilege is invoked or implicated” go on to suggest that broad conclusions can be drawn from the smaller sample of cases. ROBERT M. PALLITO & WILLIAM G. WEAVER, *PRESIDENTIAL SECRECY AND THE LAW* 106 (2007). There are many student notes and articles following this pattern. See J. Steven Gardner, Comment, *The State Secret Privilege Invoked in Civil Litigation: A Proposal for Statutory Relief*, 29 WAKE FOREST L. REV. 567, 583-85 (1994) (“During the past twenty years, an alarming phenomenon has developed. The executive has invoked the state secret privilege much more frequently; though the privilege was invoked only approximately five times between 1951 and 1970, it has been relied upon more than fifty times between 1971 and 1994. Furthermore, the privilege has increased in breadth . . . .”); Daniel J. Huyck, Note, *Fade to Black: El-Masri v. United States Validates the Use of the State Secrets Privilege to Dismiss “Extraordinary Rendition” Claims*, 17 MINN. J. INT’L L. 435, 435-36 (2008) (“The state secrets privilege is integral to the Justice Department’s post-9/11 counterterrorism litigation.”); Anthony Rapa, Note, *When Secrecy Threatens Security: Edmonds v. Department of Justice and a Proposal to Reform the State Secrets Privilege*, 37 SETON HALL L. REV. 233, 235 n.14 (2006) (“The state secrets privilege has been invoked just over sixty times since 1953.”); Erin M. Stilp, Note, *The Military and State-Secrets Privilege: The Quietly Expanding Power*, 55 CATH. U. L. REV. 831, 839-41 (2006) (“The use of the state-secrets privilege has expanded in two ways: (1) the absolute number of cases involving invocation of the state-secrets privilege by the government has increased; and (2) within the increased number of state-secrets privilege cases, a larger percentage of those cases involve dismissal of the entire case due to the claimed sensitive nature of the case.” (footnote omitted)); Holly Wells, Note, *The State Secrets Privilege: Overuse Causing Unintended Consequences*, 50 ARIZ. L. REV. 967, 967 (2008) (“Bush’s Administration has shown an increased trend towards secrecy and the denial of public access to information.”); 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, 144 (2007) (“In the area of state secrets cases, courts have become increasingly likely to dismiss litigation before the merits.”); Margaret Ziegler, Note, *Pay No Attention to the Man Behind the Curtain: The Government’s Increased Use of the State Secrets Privilege to Conceal Wrongdoing*, 23 BERKELEY TECH. L.J. 691, 715 (2008) (“In recent years, the use of the state secrets privilege has been expanding, both in frequency of use and in the types of protection it provides.”).

Erroneous correlation between published judicial opinions and executive action also appears in legal briefs. See, e.g., Motion for Leave to File Brief *Amicus Curiae* of the Reporters Committee for Freedom of the Press at 2-3, *United States v. Franklin*, No. 05-0225 (E.D. Va. Oct. 12, 2005), 2005 WL 5912060 (“[T]he federal government used

Second, the narrow focus on the outcome of published cases sheds little light on how the doctrine operates—how it influences the course of litigation, the range of cases in which it is used, or how parties respond, such as by dropping suits early in the process in the face of the threatened or actual invocation of the privilege.

Third, current scholarship provides a truncated view of how the courts deal with assertion of the privilege. Omitted are the many cases in which the court sidesteps the question altogether or dispenses of the state secrets questions at an early stage in the litigation.<sup>7</sup> Absent, too, are unreported and unpublished opinions (which constitute around eighty percent of the appellate courts' caseload),<sup>8</sup> as well as sealed memoranda and opinions. The resultant lack of baseline anal-

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the state secrets privilege to withhold information only four times between 1953 and 1976, but more than 23 times since 2001.”).

This mistaken interpretation has also worked its way into Congressional documents. See, e.g., S. REP. NO. 110-442, at 3 (“In recent years, the executive branch has asserted the privilege more frequently and broadly than before, typically to seek dismissal of lawsuits at the pleadings stage.”).

<sup>7</sup> See, e.g., *In re “Agent Orange” Prod. Liab. Litig.*, 101 F.R.D. 97, 98 (E.D.N.Y. 1984) (holding that assertion of the privilege was proper); see also *Jabara v. Kelley*, 75 F.R.D. 475, 479-80 (E.D. Mich. 1977) (disposing of state secrets claim as one of many privileges asserted in discovery dispute). Early in the *In re “Agent Orange”* case, the government invoked the state secrets privilege; on February 11, 1983, a Special Master issued recommended guidelines to handle the state secrets claim, which Judge George C. Pratt subsequently adopted in full. See *In re “Agent Orange” Prod. Liab. Litig.*, 97 F.R.D. 427, 433 (E.D.N.Y. 1983) (pretrial order adopting in full the procedures outlined in the special master's report). This case, however, does not treat the state secrets claim in the final, published opinion and so it is not included in compendia of state secrets cases. See, e.g., Chesney, *supra* note 6, app. at 1315-32 (listing state secrets cases, but notably leaving out *In re “Agent Orange”*).

<sup>8</sup> To some extent “unpublished” and “unreported” are synonymous, as both refer to nonprecedential opinions. The former historically referred to opinions not included in the main reporters. Gradually, both Westlaw and LexisNexis began including unpublished opinions in their databases. Then in 2001, West Publishing introduced a Federal Appendix in which the full text, along with headnotes, topics, and key numbers of all unpublished opinions appeared. See Joseph L. Gerken, *A Librarian's Guide to Unpublished Judicial Opinions*, 96 LAW LIBR. J. 475, 475 (2004) (“For many years, these opinions constituted a ‘hidden’ literature.”).

The exact status of nonprecedential opinions is of some doubt, particularly in light of the Eighth Circuit's holding that a judicial rule purporting to free the court from the constraints of precedent is unconstitutional, exceeding the courts' authority under Article III in *Anastasoff v. United States*, 235 F.3d 1054, 1056 (8th Cir. 2000) (en banc), *vacating as moot on other grounds*, 223 F.3d 898 (8th Cir. 2000). See also Michael Hannon, *A Closer Look at Unpublished Opinions in the United States Courts of Appeals*, 3 J. APP. PRAC. & PROCESS 199, 200 (2001) (“[T]he opinions of the United States courts of appeals are a fundamentally important source of law.”). But see *Hart v. Massanari*, 266 F.3d 1155, 1180 (9th Cir. 2001) (holding as constitutional the Ninth Circuit's rule according precedential status to only selected decisions).

ysis makes it difficult to conclude how the judiciary treats the privilege, as well as what variation occurs between the circuits.

In addition to the narrow adherence to published judicial opinions, state secrets research is marked by a lack of detailed historical analysis. Modern state secrets doctrine is thus said to begin with *United States v. Reynolds*,<sup>9</sup> a 1953 case in which the U.S. Supreme Court formally recognized the doctrine following the crash of a B-29 bomber. The Air Force successfully blocked the widows' efforts to obtain the accident report, on the ground that its release would threaten national security.<sup>10</sup> Without the report, the survivors could not establish a prima facie case of negligence. Chief Justice Vinson wrote that recourse to state secrets was not to be "lightly invoked," but where formally asserted by the head of a department with control over the matter, and where a "reasonable danger" to national security existed, information could be withheld.<sup>11</sup> It would be up to the court to ascertain whether to inspect the information in question.<sup>12</sup>

Very few of some thirty pieces written prior to 1953 discuss the history of state secrets in depth, and outside of a handful of important exceptions, since *Reynolds* was decided there has been little historical exposition of the privilege prior to 1953.<sup>13</sup> This gap in scholarship has

<sup>9</sup> 345 U.S. 1 (1953). This case created historical precedent in recognizing the state secrets doctrine. *Id.* at 6-10. For a thoughtful and detailed exposition of this case, see LOUIS FISHER, IN THE NAME OF NATIONAL SECURITY 258 (2006). See also Chesney, *supra* note 6, at 1284-86 (describing the ways in which the *Reynolds* court rejected British precedent regarding state secrets); Fuchs, *supra* note 6, at 168 ("Had the Supreme Court [in *Reynolds*] permitted the lower court to require an *in camera* review of the accident investigation report, it would have enabled the court to ask the military to explain its rationale."); James Zagel, *The State Secrets Privilege*, 50 MINN. L. REV. 875, 882 (1966) ("Almost all cases follow the leading case, *United States v. Reynolds*, and use conclusory phrases such as 'military secrets,' 'strategic information,' or 'intelligence value' to describe privileged matter." (footnotes omitted)).

<sup>10</sup> *Reynolds v. United States*, 192 F.2d 987, 990 (3d Cir. 1951), *rev'd*, 345 U.S. 1 (1953).

<sup>11</sup> See *Reynolds*, 345 U.S. at 7-10 (setting forth the reasonableness standard).

<sup>12</sup> *Id.* at 8.

<sup>13</sup> For important contributions to our understanding of the privilege prior to 1953, see FISHER, *supra* note 9, at 6-22, which describes the development of statutory procedures to handle disputes against the government as they relate to state secrets). See also MORTON H. HALPERIN & DANIEL HOFFMAN, FREEDOM VS. NATIONAL SECURITY 156-236 (1977) (discussing various secrecy provisions relating to matters of national security); Chesney, *supra* note 6, at 1271-80 (explaining how the state secrets privilege derived from "public interest" privileges in the Anglo-American common law); Zagel, *supra* note 9, at 892 (discussing the executive privilege theory, deriving from English law and constitutional principles); Jared Perkins, Note, *The State Secrets Privilege and the Abdication of Oversight*, 21 BYU J. PUB. L. 235, 239 (2007) (explaining that "principles justifying the state secrets doctrine" may have first been articulated in *Marbury v. Madi-*

resulted in the proliferation of an Athena-like theory of state secrets: in 1953 it sprung from Zeus's forehead, with little or no previous articulation. Thus, even the authors of some of the most important work on the privilege, Professors Robert Pallitto and William Weaver, conclude that "[i]n the United States, before *Reynolds*, there is virtually no history with the state secrets privilege."<sup>14</sup> This claim is wrong. Yet it reverberates in the copious articles written on state secrets, where authors frequently repeat the incantation: Marbury—Burr—Totten—Reynolds, before focusing on the "modern era."<sup>15</sup> This distorted view of state secrets has crept its way into congressional reports and judicial opinions.<sup>16</sup> The lack of detailed research risks more than just inaccuracy—it stunts our broader analysis, such as our ability to weigh Article II versus common law assertions, our understanding of the courts' historical treatment of separation of powers, or the role of state secrets as a justiciability doctrine versus an evidentiary rule.<sup>17</sup> And it is emblematic of how little we really understand this doctrine.

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*son*, 5 U.S. (1 Cranch) 137 (1803)); Ken Taymor, Note, *The Military and State Secrets Privilege*, 91 YALE L.J. 570, 571 (1982) ("[The] heritage in American jurisprudence [of the state secrets privilege] can be traced to Aaron Burr's trial for treason . . .").

<sup>14</sup> Brief of Amici Curiae William G. Weaver and Robert M. Pallitto in Support of Affirmance at 4, *Hepting v. AT&T Corp.*, 539 F.3d 1157 (9th Cir. 2008) (Nos. 06-17132, 06-17137) (citing William G. Weaver & Robert M. Pallitto, *State Secrets and Executive Power*, 120 POL. SCI. Q. 85, 92-97 (2005)). The same authors, in their book's discussion of "The Origins of the State Secrets Privilege" in the United States, briefly discussed only a few of the early state secrets cases. See *Totten v. United States*, 92 U.S. 105 (1875); *King v. United States*, 112 F. 988 (5th Cir. 1902); *District of Columbia v. Bakersmith*, 18 App. D.C. 574 (D.C. Cir. 1901); *United States v. Burr*, 25 F. Cas. 30 (C.C.D. Va. 1807); see also PALLITTO & WEAVER, *supra* note 6, at 93-105 (discussing "The Origin of the State Secrets Privilege," including early state secrets cases).

<sup>15</sup> See, e.g., Fichera, *supra* note 6, at 628-32 (discussing the historical origins of the privilege and the consequences of its increased use in recent litigation); Emily Simpson, "Nothing Is So Oppressive As a Secret," 80 TEMP. L. REV. 561, 563 (2007) (discussing the privilege's historic origin in *Burr* and *Totten*).

<sup>16</sup> See, e.g., *Ellsberg v. Mitchell*, 709 F.2d 51, 56 (D.C. Cir. 1983) (suggesting that the government had rarely invoked the state secrets privilege prior to World War II); EDWARD C. LIU, CONG. RESEARCH SERV., R40603, THE STATE SECRETS PRIVILEGE AND OTHER LIMITS ON LITIGATION INVOLVING CLASSIFIED INFORMATION 2 (2009) (focusing solely on *Reynolds* as the origin of the state secrets doctrine).

<sup>17</sup> Compare *United States v. Nixon*, 418 U.S. 683, 711 (1974) ("Nowhere in the Constitution[] . . . 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."), *United States v. Marchetti*, 466 F.2d 1309, 1315 (4th Cir. 1972) ("Gathering intelligence information and the other activities of the [CIA] . . . are all within the President's constitutional responsibility for the security of the Nation as the Chief Executive and as Commander in Chief of our Armed forces."), *Rahman v. Chertoff*, 244 F.R.D. 443, 454 (N.D. Ill. 2007) (explaining that the defendants argued that the case is nonjusticiable because it falls under the political question

Legal scholars highlight the difficulty of assembling more accurate data on state secrets. The government has not previously kept any master list detailing the cases in which state secrets have been invoked.<sup>18</sup> Any effort to assemble one would have to rely on a variety of approaches that would likely result in an unreliable data set.<sup>19</sup> Verification of invocation and attribution to particular administrations would require research-intensive docket searches.<sup>20</sup> And, even if a list were to be assembled, quantitative comparisons year-to-year hold little value as such litigation is deeply context-dependent.<sup>21</sup>

These commentators are correct that many of the relevant documents are difficult to obtain.<sup>22</sup> When found, moreover, they are often

doctrine), *rev'd*, 530 F.3d 622 (7th Cir. 2008), *vacated in part*, No. 05-3761, 2010 WL 1335434 (N.D. Ill. Mar. 31, 2010), *El-Masri v. Tenet*, 437 F. Supp. 2d 530, 535 (E.D. Va. 2006) (“The state secrets privilege is an evidentiary privilege derived from the President’s constitutional authority over the conduct of this country’s diplomatic and military affairs and therefore belongs exclusively to the Executive Branch.”), *and* Brief for the United States as Amicus Curiae Supporting Respondent at 29-30, *Mohawk Indus., Inc. v. Carpenter*, 130 S. Ct. 599 (2009) (No. 08-0678), 2009 WL 2028902 (“The state-secrets privilege, whose origins extend to early Anglo-American law, ‘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.’” (citing *El-Masri v. United States*, 479 F.3d 296, 303 (4th Cir. 2007), *cert. denied*, 552 U.S. 947 (2007))), *with Reynolds*, 345 U.S. at 10 (“It may be possible to satisfy the court, from all the circumstances of the case, that there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged.”), *and Kasza v. Browner*, 133 F.3d 1159, 1165 (9th Cir. 1998) (“The state secrets privilege is a common law evidentiary privilege that allows the government to deny discovery of military secrets.”).

<sup>18</sup> See Chesney, *supra* note 6, at 1301 (noting that the government does not keep a “master list” of when the privilege has been invoked); Weaver & Pallitto, *supra* note 14, at 111 (“[T]here appear to be no policy guidelines on the use of the privilege in any major department or agency of the executive branch.”). This omission appears to have been rectified by the Obama Administration. See Press Release, Dep’t of Justice, *supra* note 5 (creating a State Secrets Review Committee and requiring “an internal evaluation of the pending cases in which the privilege has been invoked”).

<sup>19</sup> See Chesney, *supra* note 6, at 1302 (“It makes little sense to compare the rate of assertions of the privilege in such a year to an earlier year in which few or no such occasions arose. . . . [T]here is little point in asking whether the government asserted the privilege at an unusually high rate in any given year.”).

<sup>20</sup> *Id.* at 1301.

<sup>21</sup> *Id.* at 1301-02.

<sup>22</sup> See, e.g., Horn v. Huddle, 699 F. Supp. 2d 236 (D.D.C. 2010) (listing a “Motion to Depose Former State Department IG Investigator by Richard A. Horn” as declassified on the docket, No. 94-1756, but still unavailable on PACER); *Stahl v. Baxter Healthcare Corp.*, No. 06-0865 (E.D. Mo. dismissed Jan. 29, 2009) (state secrets declaration not available on PACER); *Al-Turki v. F.B.I. Document Custodian*, No. 06-01076, 2007 WL 3195129 (D. Colo. Oct. 26, 2007) (unable to access records via PACER); *Boone v. MVM, Inc.*, No. 05-02504, 2007 WL 549833 (D. Colo. Feb. 15, 2007) (docu-

heavily redacted.<sup>23</sup> Docket searches are also research-intensive: 874 state secrets documents currently appear in Westlaw's CourtExpress electronic docket retrieval service, and an additional 100 in LexisNexis's similar Courtlink service—neither of which contain complete docket records from the past thirty years.<sup>24</sup> More broadly, a search of case holdings since 1790 returns some 700 cases in Westlaw and another 670 cases in LexisNexis that refer to state secrets.<sup>25</sup> Specific court records, such as those obtained from the U.S. Court of Federal Claims (in which a significant number of state secrets cases arise), augment these searches.<sup>26</sup> By supplementing the resulting documents with citations in pleadings, motions, briefs, memorandum opinions, judicial decisions, Headnote strings, legislative searches, and secondary source materials, enough material can be assembled to—at a minimum—call into question how well we really understand this privilege, and more positively, to suggest some new hypotheses for how the state secrets privilege operates.

The resulting research reveals that the shadow of state secrets casts longer and broader than previously acknowledged: more than 400

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ments not available via PACER); *In re* Grand Jury Subpoena Dated August 9, 2000, 218 F. Supp. 2d 544, 547, 549 (S.D.N.Y. 2002) (explaining that dates of filing and the state secrets privilege invocation are unavailable via PACER because it was a sealed proceeding); *Int'l Action Ctr. v. United States*, No. 01-0072, 2002 U.S. Dist. LEXIS 16874, at \*7-8 (D.D.C. Aug. 30, 2002) (confirming the state secrets privilege invocation, likely between July and August 2002 when the government replied to plaintiff's motion to compel discovery, but there is no access to documents actually asserting the state secrets privilege via PACER).

<sup>23</sup> See, e.g., *Rahman v. Chertoff*, No. 05-3761, 2008 WL 4534407 (N.D. Ill. Apr. 16, 2008) (showing that the amended memorandum opinion and order were redacted); *Mirage Systems, Inc.'s Memorandum of Points and Authorities in Opposition to St. Clair's Motion to Compel Production of Classified Documents* at 5, 7-8, *Eastman Kodak Co. v. Speasl*, No. 05-039164 (Cal. Super. Ct. Oct. 5, 2007), 2007 WL 5210219 (same); *Complaint* at 4-9, *Doe v. CIA*, No. 05-7939 (S.D.N.Y. Sept. 12, 2005) (exemplifying a heavily redacted document).

<sup>24</sup> Searches conducted by author in course of research.

<sup>25</sup> Searches conducted by author in course of research.

<sup>26</sup> The Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, § 105(a), 96 Stat. 25, 26-28 (codified as amended at 28 U.S.C. § 171 (2006)), established the U.S. Claims Court. This judicial body inherited most of the trial authority covered by the Court of Claims, first created by Congress in 1855 to prevent a run on public money through litigation. The Federal Courts Administration Act of 1992, Pub. L. No. 102-572, § 902, 106 Stat. 4506, 4516 (codified as amended at 28 U.S.C. § 171), changed the name to the U.S. Court of Federal Claims. The court focuses on suits brought against the United States rooted in constitutional or statutory challenges, contractual disputes, or damages related to actions other than torts. Appeals from this court go to the Court of Appeals for the Federal Circuit.

state secrets cases emerged in the aftermath of *Reynolds*.<sup>27</sup> In hundreds of additional cases, moreover, state secrets doctrine played a significant role.

Careful examination of the period from 2001 to 2009 proves particularly illuminating. Hitherto, the intense academic and public debate about the Bush Administration's use of state secrets has centered on some twenty opinions issued as of 2006, with further attention on a handful of highly visible ongoing suits in which the outcome turned on state secrets.<sup>28</sup> The central question has been whether the Administration quantitatively or qualitatively used the privilege differently from its predecessors.

Setting aside for a moment our limited knowledge about what actually did come before, critiques and defenses have been made too hastily, as much of the commentary came prior to the close of the

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<sup>27</sup> These numbers are significantly different from those that currently mark both scholarship and public discourse. See, e.g., ACLU OF MASS., RESTORING THE RULE OF LAW SCORECARD: PRESIDENT OBAMA'S FIRST YEAR IN OFFICE 3 (2010), available at [http://aclum.org/scorecard/archive/obama\\_first\\_year.pdf](http://aclum.org/scorecard/archive/obama_first_year.pdf) ("The Bush Administration invoked 'state secrets privilege' 20 times in its first 6 years. The Obama Administration has used it twice in its first 60 days."); Chesney, *supra* note 6, at 1298 (citing data that estimates there were eighty-nine published opinions in state secrets cases from 1954 to 2006); Weaver & Pallitto, *supra* note 14, at 101, 109 (tallying fifty-five uses of the privilege from between 1953 and 2001 and seven since 2001).

<sup>28</sup> See, e.g., Chesney, *supra* note 6, at 1301 ("The available data do suggest that the privilege has continued to play an important role during the Bush administration, but it does not support the conclusion that the Bush administration chooses to resort to the privilege with greater frequency than prior administrations or in unprecedented substantive contexts."). Chesney goes on to list twenty published opinions from 2001 to 2006. *Id.* app. at 1329-32; see also FISHER, *supra* note 9, at 245 ("The political climate after 9/11 has emboldened the government to assert state secrets in an increasing number of cases."); Frost, *supra* note 6, at 1935 (discussing "how the Bush Administration's assertion of the privilege differs from past practice"); Weaver & Pallitto, *supra* note 14, at 108 ("President George W. Bush's administration seems even more committed to secrecy and maintenance of executive power than previous administrations . . .").

For prominent ongoing cases centered on rendition, see *Mohamed v. Jeppesen Dataplan, Inc.*, 563 F.3d 992 (9th Cir. 2009), *rev'd*, 563 F.3d 992 (9th Cir. 2009), *amended and superseded by* 579 F.3d 949 (9th Cir. 2009), *reh'g granted*, 586 F.3d 1108 (9th Cir. 2009), *aff'd*, 614 F.3d 1070 (9th Cir. 2010) (en banc); *El-Masri v. United States*, 479 F.3d 296 (4th Cir. 2007); and *Arar v. Ashcroft*, 414 F. Supp. 2d 250 (E.D.N.Y. 2006), *vacated and superseded by* 585 F.3d 559 (2d Cir. 2009) (en banc). For those cases associated with the National Security Agency's (NSA) warrantless wiretapping program, see *Hepting v. AT&T Corp.*, 539 F.3d 1157 (9th Cir. 2008); *ACLU v. Nat'l Sec. Agency*, 493 F.3d 644 (6th Cir. 2007); *Al-Haramain Islamic Found. v. U.S. Dep't of Treasury*, 585 F. Supp. 2d 1233 (D. Or. 2008); and *Ctr. for Constitutional Rights v. Bush*, No. 06-0313 (S.D.N.Y. filed Jan. 17, 2006).

Administration.<sup>29</sup> These analyses ignored the time it takes for such cases to work their way through the courts, attributing cases that arose under previous administrations to the current government and ignoring ongoing cases that had yet to be decided.<sup>30</sup> They omitted many unpublished, unreported, and sealed cases, as well as suits voluntarily dismissed. Missing too were cases in which either the government or private actors threatened state secrets, but the executive refrained from invoking it, or where the executive did invoke it, but the issue did not work its way into the final judicial opinion.

In contrast, docket searches demonstrate that, from January 2001 to January 2009, the privilege played a significant role in the executive branch's national security litigation strategy. In one case, the Administration asserted the state secrets privilege some 245 times.<sup>31</sup> More to the point, the government has invoked the state secrets privilege in more than 100 cases, which is more than five times the number of cases previously considered. And it is not just the executive branch that benefitted from the privilege: in scores of additional cases, private industry claimed that the state secrets doctrine applied, with the expectation that the federal government would later intervene to prevent certain documents from being subject to discovery or to stop the suit from moving forward. Beyond these, there are hundreds of cases on which the shadow of the privilege fell.

This Article thus focuses on cases working their way through the courts between 2001 and 2009. It begins with disputes related to government contractors, where the threatened and actual invocation of the privilege appears in a broad range of grievances. Breach of contract, patent disputes, trade secrets, fraud, and employment termination cases prove remarkable in their frequency, length, and range of technologies involved. Wrongful death, personal injury, and negli-

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<sup>29</sup> For similar critiques of the Obama Administration, see Steven D. Schwinn, *The State Secrets Privilege in the Post-9/11 Era*, 30 PACE L. REV. 778 (2010). “[T]he Government’s new position [of expanding the state secrets privilege], first under President Bush and now under President Obama, marks an important and disturbing change in how it considers and treats the privilege.” *Id.* at 779.

<sup>30</sup> Professor Chesney recognizes this problem and the consequent difficulty in narrowing the scope for attribution. He explains that even if a list of state secrets cases could be assembled, “difficult questions of political attribution arise. Particularly with respect to cases identified by virtue of . . . circuit court opinions published in the first or second year of a presidential administration, it may well be the case that the original invocation of the privilege occurred under the prior administration.” Chesney, *supra* note 6, at 1301.

<sup>31</sup> *Int’l Action Ctr. v. United States*, No. 01-0072, 2002 U.S. Dist. LEXIS 16874, at \*7 (D.D.C. Aug. 30, 2002).

gence cases extend beyond product liability to include infrastructure and services, as well as an emerging area perhaps best understood as the conduct of war.

These corporate cases are distinguished by the tendency of companies to claim that state secrets are at stake early in the dispute and the subsequent role of the United States, if it chooses to become involved and to invoke the privilege, as an intervenor. Close inspection suggests a conservative executive branch that is more likely to step forward when breach of contract, trade secrets, or patent disputes present themselves, and unlikely—once it invokes the privilege—to back down. Where the executive initially decides not to intervene and invoke the privilege, the rapid expansion of the use of contractors appears to be giving birth to a new form of “graymail”: should the government initially refuse to support the corporation’s state secrets claim, companies deeply embedded in the state may threaten to air legally or politically damaging information.<sup>32</sup> Even when no overt threat is made, the government may worry that certain information will emerge during the course of the trial that would politically compromise the agency or individuals involved. In other cases, the government may be dependent upon a corporation for a key aspect of national defense, thus creating an incentive for the state to protect the company from financial penalties associated with bad behavior.<sup>33</sup>

The Article next turns to the telecommunications cases that arose from the warrantless wiretapping program of the National Security Agency (NSA). More than fifty such suits emerged between 2006 and 2009, with the government acting variously as plaintiff, intervenor, and defendant. Although many of these cases ultimately turned on amendments to the Foreign Intelligence Surveillance Act (FISA),<sup>34</sup> state secrets assertions grounded on a closely held executive branch jurisprudence played a key role throughout. These cases shed light

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<sup>32</sup> I use the term “graymail” differently here from the manner in which it was used prior to the Classified Information Procedures Act (CIPA), 18 U.S.C. app. §§ 1–16 (2006). *See infra* text accompanying notes 682–85.

<sup>33</sup> To distinguish between claims by corporations in which state secrets will be implicated (generally in the form of an affirmative defense) and the government’s actual invocation of the privilege, I use the verb “claim” for the former and “invoke” for the latter. Later in the Article, for cases where the government asserts the state secrets privilege but does not formally invoke it, I similarly use the word “claim.” These terms, of course, are to be distinguished from courts actually upholding the privilege itself.

<sup>34</sup> Foreign Intelligence Surveillance Act of 1978 Amendments Act of 2008, Pub. L. No. 110-261, 122 Stat. 2436 (codified as amended in scattered sections of 18 and 50 U.S.C.).

on the parallel effect of state secrets, with similar treatment for suits in which the privilege is never formally invoked. They also bring to the fore the constitutional questions that accompany the privilege.

Following this discussion, the Article looks at disputes in which the government defended the suit and invoked state secrets. These cases stem from allegations of Fourth and Fifth Amendment violations, torture, environmental degradation, breach of espionage contracts, and defamation.<sup>35</sup> Here, it appears that state secrets serve not just to protect national security interests, but also to mask officials' unlawful behavior. As in the corporate cases and the telecommunications suits, the executive does not change its course once it invokes the privilege. Significant advantages, quite apart from the suppression of particular documents or the dismissal of a suit altogether, accompany the assertion of the privilege and affect motions, attorney-client communications, and control over discovery. The privilege may also give the government access to opposing counsel's files, if and when the attorney tries to withdraw from the case.

Despite Judge Learned Hand's admonition in *United States v. Andolschek* that the government must choose either to prosecute or to drop criminal charges,<sup>36</sup> the state secrets privilege has also played a role in the criminal context and provides the basis for Part IV. Remarkably, in two cases—quite apart from Chief Justice Vinson's requirement in *Reynolds* that the state secrets privilege be formally invoked—the executive did not even need to formally invoke the privilege.<sup>37</sup> Instead, the court simply read into the case that the privilege had been invoked and, therefore, applied.

Collectively, these cases underscore the importance of looking more carefully at how the state secrets doctrine works in practice.<sup>38</sup>

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<sup>35</sup> Immigration disputes are not included in this discussion. As there are precedents for state secrets arising in this context, further research specifically focused on the use of the privilege in immigration proceedings may be warranted. *See, e.g.,* *Yang v. Reno*, 157 F.R.D. 625, 632 (M.D. Pa. 1994) (explaining that the government moved for a protective order limiting discovery based in part on state secrets); *United States v. Koreh*, 144 F.R.D. 218, 222-24 (D.N.J. 1992) (holding that disclosure of documents relating to the Soviet bloc's alleged disinformation campaign against an Eastern European emigrant would threaten U.S. national security).

<sup>36</sup> *United States v. Andolschek*, 142 F.2d 503, 506 (2d Cir. 1944).

<sup>37</sup> *See* *United States v. Stewart*, 590 F.3d 93, 98 (2d Cir. 2009); *United States v. Aref*, 533 F.3d 72, 76 (2d Cir. 2008).

<sup>38</sup> This Article focuses on instances in which the U.S. state secrets doctrine has been invoked. In the course of my research, I found dozens of further cases in which corporations asserted foreign countries' state secrets. *See, e.g.,* *City of Emeryville & Emeryville Redevelopment Agency's Opposition to Sherwin Williams' Motion to En-*

They challenge the dominant paradigm, which tends to cabin state secrets as an evidentiary rule within executive privilege.<sup>39</sup> They suggest

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force November 25, 2008 Court Order and for Judgment of Civil Contempt at 20, *City of Emeryville v. Elementis Pigments, Inc.*, No. 39-03719 (N.D. Cal. Mar. 19, 2009), 2009 WL 1248140 (distinguishing, on a motion opposing sanctions for bad faith, a case in which a corporate arm of the Chinese government was sanctioned for failing to comply with discovery and for asserting the state secrets privilege in an untimely fashion) (citing *Richmark Corp. v. Timber Falling Consultants*, 959 F.2d 1468, 1471-79 (9th Cir. 1992); Verified Shareholder Derivative Complaint at 18, *Knopf v. Semel*, No. 08-04538 (N.D. Cal. July 30, 2008), 2008 WL 4066973 (arising out of Yahoo's agreement with China to enable China to monitor Internet activity, leading to the arrest of two democracy advocates by China for allegedly divulging state secrets); *Amec Inc.'s Reply Brief in Support of Its Motion to Dismiss Applied's First Amended Complaint* at 11-12, *Applied Materials, Inc. v. Advanced Micro-Fabrication Equip., Inc. China*, 630 F. Supp. 2d 1084 (N.D. Cal. 2008) (No. 07-05248), 2008 WL 1912916 (mentioning the Chinese state secrets laws governing exports in arguing for a Chinese forum for the litigation); Defendant Yahoo!, Inc.'s Opposition to Plaintiffs' Motion to Initiate Initial and Jurisdictional Discovery at 5 n.2, *Xiaoning v. Yahoo!, Inc.*, No. 07-02151 (N.D. Cal. Oct. 11, 2007), 2007 WL 4357951 (noting that pursuing discovery recommended by plaintiffs would expose defendants to legal sanction for disclosing what the China considers to be state secrets); Memorandum of Law of J.V. Trading (Glendale) Inc. and Jeffrey Liu in Support of Motion (1) to Dispense with Jurisdictional Hearing, as Jianlibao Group Has Waived the Defense of Lack of Personal Jurisdiction Except for Alleged Improper Service of Process, and (2) in the Alternative, to Compel Discovery on Jurisdictional Issues at 15-16, *JLB Holdings (HK) Co. v. Qishu*, No. 03-600705 (N.Y. Sup. Ct. Aug. 31, 2004), 2004 WL 3320503 (referring to the "Chinese State Secret Law" objection plaintiffs asserted twenty-eight times in their "General Objections" and separate objections); Response of Trans Chemical Limited to CMC's Objections and Emergency Motion for Protective Order and Expedited Hearing, *In re Arbitration Between Trans Chemical Ltd. & China Nat'l Mach. Imp. & Exp. Corp.*, 978 F. Supp. 266 (S.D. Tex. 1997) (No. 95-4114), 1997 WL 33832255 (discussing Chinese state secrets laws as used by the respondent to argue that the discovery sought by the petitioner was illegal). In addition to China (to which the previous examples refer), my docket searches have uncovered that state secrets have been asserted with regard to the Gambia, Georgia, Iran, Indonesia, Mexico, Nigeria, Peru, the Philippines, Russia, Switzerland, and Venezuela.

<sup>39</sup> See, e.g., Mauro Cappelletti & C.J. Golden, Jr., *Crown Privilege and Executive Privilege: A British Response to an American Controversy*, 25 STAN. L. REV. 836, 841 (1973) (detailing the role of English courts in balancing the executive interest in withholding sensitive information against the interests of the litigants in the case); Paul A. Freund, *Foreword: On Presidential Privilege*, 88 HARV. L. REV. 13, 20 (1974) ("A . . . possible meaning of executive privilege is . . . an exemption from a duty to produce testimony or documents and a legal capacity to control the production of certain kinds of evidence by others."); Paul Hardin, III, *Executive Privilege in the Federal Courts*, 71 YALE L.J. 879, 879 (1962) ("In the eyes of the executive departments . . . of the United States Government . . . [t]he executive branch has uncontrolled discretion to withhold from the courts anything whose disclosure would be inimical to the public interest or even, it seems, to the best interest of the executive." (footnote omitted)); Neil Kinkopf, *Executive Privilege: The Clinton Administration in the Courts*, 8 WM. & MARY BILL RTS. J. 631, 634 (2000) ("When the President asserts the privilege in a judicial proceeding, the courts understand the battle line to be drawn between the President's constitutional powers and those of the Judiciary. This assumption, however, is a misunderstanding."); Heidi Kitrosser, *Secrecy and Separated Powers: Executive Privilege Revisited*, 92 IOWA L. REV. 489,

in contrast that the doctrine has evolved to become a powerful litigation tool, wielded by both private and public 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. Ascertaining how the doctrine actually works is not, in itself, a normative enterprise. It thus falls to future articles to consider structural and procedural devices to ensure that the manner in which the state secrets privilege operates mirrors the purpose for which it was created.

### I. GOVERNMENT CONTRACTORS AND STATE SECRETS

The increasingly intricate relationship between national defense, private industry, and technology provides the framework for scores of

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493 (2007) (concluding that the executive privilege is not constitutionally based and the courts should order compliance with statutorily proper demands for information from the executive); William W. Lentz, *Executive Privilege to Withhold Information from Congress: Constitutional or Political Doctrine?*, 42 UMKC L. REV. 374, 375 (1974) (“Limited judicial participation in the development of the doctrine of executive privilege has resulted in a doctrine molded by political expediency and by the distribution of power between the President and Congress as much as by constitutional theory.”); Nathaniel L. Nathanson, Commentary, *From Watergate to Marbury v. Madison: Some Reflections on Presidential Privilege in Current Historical Perspectives*, 16 ARIZ. L. REV. 59, 73-77 (1974) (explaining the immediate effect of the presidential privilege on the Watergate scandal, as well as the long-term effect of the privilege on the presidency and the separation of powers); Mark J. Rozell, *Executive Privilege Revived?: Secrecy and Conflict During the Bush Presidency*, 52 DUKE L.J. 403, 419-20 (2002) (arguing that the use of executive power during President George W. Bush’s presidency deviated from its traditional use, ultimately weakening it); Mark J. Rozell, *Restoring Balance to the Debate over Executive Privilege: A Response to Berger*, 8 WM. & MARY BILL RTS. J. 541, 550-55 (2000) (arguing that executive privilege is a legitimate power under the Constitution); Jonathan Turley, *Paradise Lost: The Clinton Administration and the Erosion of Executive Privilege*, 60 MD. L. REV. 205, 211 (2001) (emphasizing that executive privilege must be reformed to repair the “damage to the presidency itself” in the wake of the Clinton scandal); John F. Dodge, Jr., Recent Decision, 53 MICH. L. REV. 1178, 1188 (1955) (“[S]ome courts have given such great weight to the executive request for secrecy as to almost nullify the effectiveness of the judicial determination.”); Timothy V. Ramis, Comment, *Executive Privileges: What Are the Limits?*, 54 OR. L. REV. 81, 90-96 (1975) (delineating the scope of executive privilege and the various legal issues that arise when the privilege is claimed); Taymor, *supra* note 13, at 583-89 (suggesting alternative means for the executive to protect state secrets while minimizing the imposition on individual rights). But see JAMES E. BAKER, IN THE COMMON DEFENSE 48-49 (2007) (arguing that state secrets is more than an evidentiary rule within executive privilege and is an absolute privilege that can be used in what might otherwise be a justiciable case).

lawsuits that have arisen during the War on Terror. Somewhat surprisingly, very little attention has been paid to this litigation. Yet such suits are hardly new. In the early twentieth century, the judiciary confronted issues arising from government contractors' construction of weapons and military vessels. Thus, in addition to the more traditional area of libel,<sup>40</sup> cases like *In re Grove*, *Pollen v. United States*, and *Pollen v. Ford Instrument Co.* alleged patent infringements and resulted in the invocation of the state secrets privilege.<sup>41</sup>

As technology advanced and the threat of the Cold War loomed, the government sought new and more varied relationships with private companies, driving national security deeper into the public domain. In 1950, National Security Council Report 68 became the blueprint for U.S. strategy, calling for "a rapid and sustained build-up of the political, economic, and military strength of the free world."<sup>42</sup> The United States would need to draw on its industrial strength for success. In his famous farewell address in January 1961, President Dwight D. Eisenhower explained:

A vital element in keeping the peace is our military establishment . . . . This conjunction of an immense military establishment and a large arms industry is new in the American experience. The total influence—economic, political, even spiritual—is felt in every city, every statehouse, every office of the federal government. We recognize the imperative need for this development. Yet we must not fail to comprehend its grave implications. Our toil, resources, and livelihood are all involved; so is the very structure of our society . . . . Only an alert and knowledgeable citizenry can compel the proper meshing of the huge industrial and mili-

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<sup>40</sup> See, e.g., *Pac.-Atl. S.S. Co. v. United States*, 175 F.2d 632 (4th Cir. 1949) (libel in admiralty); *Republic of China v. Nat'l Union Fire Ins. Co.*, 142 F. Supp. 551 (D. Md. 1956) (same); *Cresmer v. United States*, 9 F.R.D. 203 (E.D.N.Y. 1949) (libel against the Navy under the Federal Tort Claims Act); *Wunderly v. United States*, 8 F.R.D. 356 (E.D. Pa. 1948) (libel against the Armed Forces under the Federal Tort Claims Act); *Anglo-Saxon Petroleum Co. v. United States*, 78 F. Supp. 62 (Mass. Dist. Ct. 1948) (libel in admiralty); *State ex rel. Kent v. United States*, 1947 A.M.C. 1336 (D. Md. 1947) (libel against the Navy under the Public Vessels Act and Federal Tort Claims Act); *The Wright*, 2 F. Supp. 43 (E.D.N.Y. 1932) (libel against the Navy in admiralty).

<sup>41</sup> See *In re Grove*, 180 F. 62 (3d Cir. 1910) (patent infringement for torpedo boats); *Pollen v. United States*, 85 Ct. Cl. 673 (1937) (patent infringement for gun sightings components); *Pollen v. Ford Instrument Co.*, 26 F. Supp. 583 (E.D.N.Y. 1939) (same); see also *United States v. Haugen*, 58 F. Supp. 436, 438 (E.D. Wash. 1944) ("The right of the Army to refuse to disclose confidential information, the secrecy of which it deems necessary to national defense, is indisputable.").

<sup>42</sup> NAT'L SEC. COUNCIL, NSC-68: A REPORT TO THE NATIONAL SECURITY COUNCIL BY THE EXECUTIVE SECRETARY ON UNITED STATES OBJECTIVES AND PROGRAMS FOR NATIONAL SECURITY 64 (1950), available at [http://www.trumanlibrary.org/whistlestop/study\\_collections/coldwar/documents/pdf/10-1.pdf](http://www.trumanlibrary.org/whistlestop/study_collections/coldwar/documents/pdf/10-1.pdf).

tary machinery of defense with our peaceful methods and goals, so that security and liberty may prosper together.<sup>43</sup>

Many trends mark the evolution of the relationship between government and private corporations. Two are of particular importance to state secrets considerations. First is the increasing formalization of secrecy protections to control information.<sup>44</sup> Thus, in 1954, the Commerce Department established the Office of Strategic Information to work with companies to limit the dissemination of information.<sup>45</sup> Simultaneously, the Department of Defense (DoD) issued a regulation advising defense contractors to avoid publishing information of “possible use” to enemy states.<sup>46</sup> By 1960, these arrangements had become formalized in a new system of classification specifically targeted at industry.<sup>47</sup> Executive Order 10,865 provided for the classification of bidding on, negotiating, awarding, performing, or terminating contracts with federal agencies, as well as for allowing private actors to have access to classified information.<sup>48</sup> Subsequent orders extended and defined the relationship between the executive and private companies.<sup>49</sup> The end of the Cold War neither weakened public-private relations nor diminished efforts to protect national security in-

<sup>43</sup> President Dwight D. Eisenhower, Farewell Address to the Nation (Jan. 17, 1961).

<sup>44</sup> The following discussion omits efforts to restrict media access to and coverage of government activities.

<sup>45</sup> JAMES RUSSELL WIGGINS, FREEDOM OR SECRECY 102-03 (1964).

<sup>46</sup> *Id.* at 110.

<sup>47</sup> The broader twentieth-century development of the classification system falls beyond the scope of this Article. Its development can be traced through past executive orders. See Exec. Order No. 10,290, 3 C.F.R. 789 (1949–1953) (extending military classification to civilian departments and agencies for the first time and establishing four classification categories); Exec. Order No. 10,501, 3 C.F.R. 979 (1949–1953), *reprinted as amended in* 50 U.S.C. § 401 (1970) (revoking Exec. Order No. 10,290 and establishing the Confidential, Secret, and Top Secret classifications in order to safeguard official information); Exec. Order No. 11,652, 3 C.F.R. 678 (1971–1975), *reprinted as amended in* 50 U.S.C. § 401 (Supp. III 1973) (creating new procedures for classification and declassification of national security information and revoking Exec. Order No. 10,501); see also *Developments in the Law—The National Security Interest and Civil Liberties*, 85 HARV. L. REV. 1130, 1189-90 (1972) (discussing the classification of government documents for national security purposes).

<sup>48</sup> Exec. Order No. 10,865, 3 C.F.R. 398 (1959–1963), *reprinted as amended in* 50 U.S.C. § 435 (2006).

<sup>49</sup> See, e.g., Exec. Order No. 10,909, 26 Fed. Reg. 508 (Jan. 17, 1961) (defining and amending Exec. Order 10,865); Exec. Order No. 11,382, 32 Fed. Reg. 16247 (Nov. 28, 1967) (changing all mentions of the Federal Aviation Agency to referencing the Department of Transportation with regard to classified information); Exec. Order No. 12,038, 43 Fed. Reg. 4957 (Feb. 3, 1978) (transferring the functions of the Atomic Energy Commission to the Department of Energy and the Nuclear Regulatory Commission).

formation held by third parties. To the contrary, in 1993, the executive formally established a robust National Industry Security Program to safeguard classified information released to contractors, licensees, and grantees of the federal government.<sup>50</sup>

While these devices centered on public-private contractual relations, new legislation extended the executive's ability to control non-contractual entities to private actors that held information central to national security. Following World War II, the Invention Secrecy Act became the first peacetime measure to restrict private actors' inventions in the name of national security.<sup>51</sup> Between 1963 and 1979, the annual number of secrecy orders placed on inventions derived from government contracts hovered between 4100 and 5100.<sup>52</sup> During the following decade, the total number of secrecy orders increased significantly.<sup>53</sup> Since that time, the number of annual secrecy orders has hovered around 5000 per year.<sup>54</sup>

Beyond secrecy orders, the Atomic Energy Act tethered nuclear technologies to the national interest, classifying such discoveries from birth.<sup>55</sup> Both benign and nefarious explanations for the increase in secrets and secrecy orders abound. The numbers could be equally tied to the growth of the bureaucratic state and the government's growing dependence on technology rather than attributing the increase to information control. But, in the context of this Article, such

<sup>50</sup> See Exec. Order No. 12,829, 58 Fed. Reg. 3479 (Jan. 6, 1993), *as amended* by Exec. Order No. 12,885, 58 Fed. Reg. 65863 (Dec. 14, 1993).

<sup>51</sup> Invention Secrecy Act of 1951, Pub. L. No. 82-256, 66 Stat. 3 (codified as amended at 35 U.S.C. §§ 181-188).

<sup>52</sup> See H.R. REP. NO. 96-1540, at 62 (1980) ("According to Patent Office records, the number of secrecy orders climbed to 6,149 by December 31, 1958, dropped to 4,503 at the end of 1963, and rose to 5,092 at the end of 1967. On January 1, 1971, there were 5,006 secrecy orders in force. The number declined to 4,887 at the beginning of 1973, to 4,145 at the beginning of 1976, and to 4,109 at the outset of 1978.").

<sup>53</sup> See Gary L. Hausken, *The Value of a Secret: Compensation for Imposition of Secrecy Orders Under the Invention Secrecy Act*, 119 MIL. L. REV. 201, 202 n.10 (1988) (showing 3513 orders in effect in 1979); Letter from Robert Fawcett, Program Analyst, U.S. Patent & Trademark Office, to Steven Aftergood, Fed'n of Am. Scientists (Oct. 22, 2004), available at <http://www.fas.org/sgp/othergov/invention/stats.pdf> (showing a total of 5556 orders in 1989).

<sup>54</sup> See LAURA K. DONOHUE, THE COST OF COUNTERTERRORISM 299 (2008) (tracking the number of secrecy orders since 1950); Letter from Robert Fawcett to Steven Aftergood, *supra* note 53; Steven Aftergood, *Invention Secrecy Activity, as Reported by the Patent and Trademark Office*, FED'N OF AM. SCIENTISTS, <http://www.fas.org/sgp/othergov/invention/stats.html> (last visited Sept. 15, 2010).

<sup>55</sup> Atomic Energy Act of 1946, Pub. L. No. 79-585, § 10, 60 Stat. 755, 766-68 (codified as amended at 42 U.S.C. §§ 2161-2166 (2000)) (restricting the dispersal of data relating to atomic energy use or technology).

arguments are less important than the fact of the expansion, as these and other executive orders and statutory devices became intimately linked to state secrets assertions: when such devices are implicated in suits, the state secrets privilege often attends.<sup>56</sup> The privilege has thus become part of a broader framework through which the government tries to limit its vulnerability.

A second trend deserving of notice is the increasingly complex relationship between private industry and the national security establishment. In the context of state secrets, this relationship plays out in a few important ways. For one, our understanding of national interest and homeland security has expanded, involving a broader spectrum of companies implicating national security concerns. Thus corporations owning any part of the critical information infrastructure, such as biotech firms with insight into biologically engineered diseases, high-technology companies with access to double-key encryption codes, firms that log flight plans, and mobile telephone service providers become central to national defense. Proliferating points of contact have created the potential for an increasing number of disputes.<sup>57</sup>

The increasing complexity also plays out in a deeper role for private industry within the military domain: it is not just the companies which manufacture weapons or build battleships that contribute to U.S. national security, but also corporations that fight, train forces, collect intelligence, and carry out special operations under contract. Such private military companies (PMCs) maintain a corporate struc-

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<sup>56</sup> See, e.g., *Clift v. United States*, 597 F.2d 826 (2d Cir. 1979) (affirming that documents in a lawsuit under the Invention Secrecy Act were not discoverable on state secrets grounds); *Halpern v. United States*, 258 F.2d 36, 38 (2d Cir. 1958) (alleging a lawsuit under the Invention Secrecy Act involved state secrets); *Foster v. United States*, 12 Cl. Ct. 492, 493 (1987) (same); *AT&T Co. v. United States*, 4 Cl. Ct. 157, 158 (1983) (upholding state secrets privilege in lawsuit under the Invention Secrecy Act).

<sup>57</sup> See, e.g., *United States v. Haugen*, 58 F. Supp. 436, 431-38 (E.D. Wash. 1944) (arising in the course of the Manhattan Project), *aff'd*, 153 F.2d 850 (9th Cir. 1946); *Weinberger v. Catholic Action of Haw./Peace Educ. Project*, 454 U.S. 139, 146-47 (1981) (concerning the storage of nuclear weapons). For discussion of the growing relationship between government and industry in the twentieth century, see SEYMOUR MELMAN, *PENTAGON CAPITALISM* 71-96 (1970), which explains the Pentagon's involvement with private means of production. See also CHALMERS JOHNSON, *THE SORROWS OF EMPIRE* 131-49 (2004) (tracking the United States military's use of private contractors); C. WRIGHT MILLS, *THE POWER ELITE* 169 (1956) ("[T]he distinction between the political and the economic man has been diminishing . . . . [M]ore and more of the corporate executives have entered government directly; and the result has been a virtually new political economy . . . ."); *THE WAR ECONOMY OF THE UNITED STATES* 1-8 (Seymour Melman ed., 1971) (discussing the effect of the military-industrial firm on industrial capitalism).

ture, distinguishing them from traditional mercenary models.<sup>58</sup> Sandline International, once one of the largest PMCs, explained that its “business was established in the early 1990s to fill a vacuum in the post cold war era.”<sup>59</sup> The company specialized in strategic advice, threat analysis, basic and advanced military and special forces training, intelligence operations, humanitarian operations, strategic communications, counternarcotics, counterterrorism, operations to counter organized crime, protection of key installations, and other operational support (e.g., command, control, communication and intelligence teams, special forces units, pilots, and engineers).<sup>60</sup>

Sandline is just one of many contractors that have become involved in U.S. military operations. According to the Congressional Research Service, as of September 2009, the U.S. Department of Defense had more contractors in Iraq and Afghanistan (218,000) than uniformed personnel (195,000).<sup>61</sup> These numbers did not include the significant number of contractors hired on behalf of other U.S. entities, such as the Department of State or USAID. Perhaps the starkest measure of the degree to which contractors have become integrated into the war effort is morbidity: by July 2007, according to Reuters, more than 1000 government contractors had died in Iraq and Afghanistan since the wars began, and more than 13,000 had been severely wounded or injured.<sup>62</sup> These numbers represented approximately one civilian contractor killed for every four members of the U.S.

<sup>58</sup> P. W. SINGER, *CORPORATE WARRIORS* 45 (Robert J. Art et al. eds., 2003). Singer explains that the newest wave of companies are, first and foremost, commercial enterprises. *See id.* (“[PMCs] are hierarchically organized into registered businesses that trade and compete openly (for the most part) and are vertically integrated into the wider global marketplace. They target market niches by offering packaged services covering a wide variety of military skill sets.”).

<sup>59</sup> *Corporate Overview*, SANDLINE INT’L, <http://www.sandline.com/company/index.html> (last visited Sept. 15, 2010).

<sup>60</sup> Incorporated in the Bahamas, with offices in London and Washington, D.C., the company guaranteed “strict rules of confidentiality.” *Id.* In 2004, the company closed operations. In 2002, Sandline’s director, former British Army Lieutenant Colonel Tim Spicer, founded Aegis Defense Services, a private military company that contracts with the U.S. Department of Defense. *See Tim Spicer*, AEGIS, <http://www.aegisworld.com/index.php/tim-spicer> (last visited Sept. 15, 2010).

<sup>61</sup> MOSHE SCHWARTZ, CONG. RESEARCH SERV., R40764, *DEPARTMENT OF DEFENSE CONTRACTORS IN IRAQ AND AFGHANISTAN: BACKGROUND AND ANALYSIS* 5 (2009); *see also* GARY MOTSEK, ASSISTANT DEPUTY UNDER SEC’Y OF DEF., *CONTRACTOR SUPPORT OF U.S. OPERATIONS IN THE USCENCOM AREA OF RESPONSIBILITY, IRAQ, AND AFGHANISTAN* 1 (2010) (reporting a total of 207,553 contractors in Iraq and Afghanistan in the second quarter of fiscal year 2010).

<sup>62</sup> Bernd Debusmann, *In Outsourced U.S. Wars, Contractor Deaths Top 1,000*, REUTERS, July 3, 2007, available at <http://www.reuters.com/article/idUSN0318650320070703>.

Armed Forces, with upwards of 3919 U.S. soldiers having died in Iraq and Afghanistan as of July 2007.<sup>63</sup>

The government has expended considerable resources to hire these firms. The Congressional Budget Office estimates that from 2003 to 2007, the Department of Defense committed some \$76 billion to contractors in the Iraq theater.<sup>64</sup> In fiscal year 2007 and the first half of fiscal year 2008, the DoD spent an additional \$22 billion on its contracts and obligations in Iraq.<sup>65</sup> Nevertheless, very little is known about the private companies working for the United States overseas. It was not until the second half of 2007 that the DoD began to collect information on contractors—and even this data has been brought into question.<sup>66</sup>

What is remarkable about these contractors is that, quite apart from *Reynolds's* requirement that only the government invoke the state secrets privilege, PMCs such as Halliburton, DynCorp, and L-3 Communications, as well as more traditional contractors, such as Boeing Company, Northrop Grumman, Raytheon, and Honeywell International, consistently assert state secrets as an affirmative defense.<sup>67</sup> Yet there is virtually *no* scholarship on how and when these companies have claimed the privilege, how successful they have been in claiming that it applies, the role of the privilege as a tactical device, or the conditions under which the executive branch formally supports such claims by intervening and invoking the privilege.

The pattern over the past eight years is that these corporations respond to complaints by claiming state secrets as an affirmative defense. They then approach the executive to intervene and prevent the suit from moving forward.<sup>68</sup> The federal government subsequently (a) does nothing, (b) files a motion of interest and requests time to consider the national security implications, (c) files a motion to intervene and requests time to consider the national security implications, (d)

<sup>63</sup> *Id.* At a minimum, these numbers highlight significant corporate interests in the wars.

<sup>64</sup> CONG. BUDGET OFFICE, 3053, CONTRACTORS' SUPPORT OF U.S. OPERATIONS IN IRAQ 3 (2008). The Iraq theater includes Iraq, Bahrain, Jordan, Kuwait, Oman, Qatar, Saudi Arabia, Turkey, and the United Arab Emirates. *Id.*

<sup>65</sup> U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-19, CONTINGENCY CONTRACTING: DOD, STATE, AND USAID CONTRACTS AND CONTRACTOR PERSONNEL IN IRAQ AND AFGHANISTAN 21 (2008).

<sup>66</sup> SCHWARTZ, *supra* note 61, at 4.

<sup>67</sup> *See infra* Section I.B.

<sup>68</sup> On occasion, intelligence agencies may also alert the executive to suits as they arise, as Department of Justice personnel indicated to the author during a discussion at American University School of Law on November 18, 2009.

files a motion to suppress certain evidence, or (e) files a motion to dismiss or a motion for summary judgment on state secrets grounds. A number of observations that have previously escaped notice can be drawn—precisely because of the narrow focus on published opinions adjudicating the state secrets question.

First, the executive appears to adopt a conservative approach: it only intervenes in commercial disputes once other formalities have been met and the suit is, indeed, moving forward. Even at this point, it does not always become involved. For instance, although there are exceptions, the executive appears more likely to intervene in contract, patent, and trade secrets cases than in class action torts (although many of these suits are still in their infancy and the government's approach may change). Similarly, the executive appears more willing to intervene in tort suits involving military equipment and technology than in cases regarding contractors' services—even where the contractors are engaged in a more traditional armed-forces capacity. Additionally, there appears to be a one-way ratchet: such suits often span multiple administrations, but once the executive has invoked the state secrets privilege, subsequent administrations hold the line.

Second, many government contractors—including most of the top ten in terms of volume of business—benefit from use of the state secrets doctrine in suits that allege a range of illegal activity including torture, disappearances, chemical warfare, assault, battery, racial discrimination, toxic dumping, fraud, breach of contract, patent infringement, trade secrets, and libel.

Two further observations are of note. First, and perhaps most importantly, the operation of the privilege gives rise to the potential for a new form of "graymail." Many of these companies have access to information that would make the state politically and legally vulnerable to exposure. Once a company is confronted with a suit, it can approach the government and threaten that, in the course of litigation, information that the state does not want in the public domain may emerge. If the government refuses to intervene, the company may not just make the information it currently holds public, but it can begin subpoenaing internal government documents and reports allegedly necessary to its defense, thus spurring the government to act. In other cases, there may be no wrongdoing involved; that is, companies may not deliberately be seeking to provoke the government to respond by threatening to air politically or legally damaging information. Nevertheless, the natural evolution of the lawsuit may result in a similar outcome: the government, aware that the agency or individu-

als involved may be compromised if the lawsuit is to continue and if the company is to be provided with the opportunity to defend itself, may step in to prevent a case from proceeding. Second, quite apart from these risks, the corporation may be so embedded in the country's national defense that the state cannot afford for it to be subject to significant financial penalties—or bankruptcy. In each of these situations, the state secrets privilege gives rise to a form of private indemnity.

Even where the government never becomes involved in the suit, the threat of the state secrets privilege gives companies a tactical advantage. It shapes litigation in important and prejudicial ways, often dropping out of the picture by the time the court issues its opinion resolving the case. Once it becomes an affirmative defense, for instance, the privilege provides a hook for companies to remove the case to federal court. Its use draws out litigation, giving companies, which tend to have significantly more resources than plaintiffs, more time to mount a defense. The privilege may scare off litigants who may be unwilling or unable to sustain a multiyear, even multidecade, court battle, particularly if the case is ultimately unlikely to come to trial. Whether or not the government will eventually intervene is unknown; corporations claiming that state secrets are at stake are privy to classified materials, and precedent for the state intervening in every type of suit exists.

#### A. *Breach of Contract, Patent Disputes, and Trade Secrets*

The most common contractor actions implicating state secrets involve breach of contract, patent disputes, and trade secrets. Indeed, one of the first state secrets cases to arise in the Bush Administration came from a suit involving Virtual Defense and Development International, Inc., a corporation claiming to be entitled to a sales commission on MiG-29 fighter jets.<sup>69</sup> The contractor, who brought suit on January 22, 1998, sought production of an unredacted classified cable from the U.S. Ambassador to Moldova to the State Department, which reported on a meeting in which a potential arms deal was discussed.<sup>70</sup> The Secretary of State invoked the state secrets privilege.<sup>71</sup> After reviewing the cable in camera, Judge Ricardo M. Urbina ordered the State Department

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<sup>69</sup> *Virtual Def. & Dev. Int'l, Inc. v. Republic of Moldova*, 133 F. Supp. 2d 9, 11, 23 (D.D.C. 2001).

<sup>70</sup> *Id.* at 23.

<sup>71</sup> *Id.*

to declassify two of the redacted sentences.<sup>72</sup> On August 15, 2001, the court granted summary judgment in favor of Moldova.<sup>73</sup>

Such cases certainly predate the Bush Administration.<sup>74</sup> Indeed, contract suits, like *Virtual Defense & Development International v. Republic of Moldova*, often span multiple administrations. For instance, McDonnell Douglas and General Dynamics entered into a full-scale engineering and development contract with the Navy in 1988 to develop a stealth aircraft known as the A-12 Avenger.<sup>75</sup> In 1991, the contractors sought \$3.992 billion in a claim for equitable adjustment and conversion of the contract termination for default to one of convenience.<sup>76</sup> Successive rounds of litigation carried the case through 2009.<sup>77</sup> The state secrets claim played a complex role throughout, and the appeals court ultimately sustained it in the third round of litigation.<sup>78</sup> The lengthy timeframe that applies to breach of contract cases also marks patent infringement and trade secrets disputes.<sup>79</sup>

Many of these disputes extend beyond traditional military aircraft or weapons specifications. The technologies range from digital imaging, fiber optics, and radar to data mining and source code.<sup>80</sup> At the

<sup>72</sup> *Id.* at 24 (order granting reconsideration).

<sup>73</sup> *Virtual Def. & Dev. Int'l, Inc. v. Republic of Moldova*, No. 98-0161 (D.D.C. Aug. 15, 2001) (order granting summary judgment for defendant and dismissing the case with prejudice).

<sup>74</sup> *See, e.g., N.S.N. Int'l Indus. v. E.I. Dupont de Nemours & Co.*, 140 F.R.D. 275, 281 (S.D.N.Y. 1991) (upholding a government motion for a protective order barring release of classified documents discussing state secrets).

<sup>75</sup> *McDonnell Douglas Corp. v. United States*, 182 F.3d 1319, 1321-22 (Fed. Cir. 1999).

<sup>76</sup> *McDonnell Douglas Corp. v. United States*, 567 F.3d 1340, 1355-56 (Fed. Cir. 2009).

<sup>77</sup> *See id.* (concluding that the government was justified in terminating the contract because of a default by the plaintiff).

<sup>78</sup> *McDonnell Douglas Corp. v. United States*, 323 F.3d 1006, 1024 (Fed. Cir. 2003).

<sup>79</sup> *See, e.g., Zoltek Corp. v. United States*, 86 Fed. Cl. 738 (2009) (B-2 bomber patent infringement case filed March 25, 1996; in November of the same year the government filed a motion for a protective order based on state secrets—a motion granted by the court ten years later); *D.T.M. Research, L.L.C. v. AT&T Corp.*, 245 F.3d 327 (4th Cir. 2001) (misappropriation of trade secrets case involving state secrets, which endured for nearly eight years); *see also* Motion with Memorandum in Support by USA for Protective Order, and Exhibits A-D, *D.T.M. Research, L.L.C.*, 245 F.3d 327 (No. 96-01852) (entered on September 14, 1998, and modified on April 27, 2000).

<sup>80</sup> *See, e.g., D.T.M. Research, L.L.C.*, 245 F.3d at 329 (arguing that the defendant misappropriated trade secrets regarding data mining); *Crater Corp. v. Lucent Techs., Inc.*, 625 F. Supp. 2d 790, 794 (E.D. Mo. 2007) (alleging misappropriation of trade secrets, patent infringement, and breach of contract in a dispute regarding fiber-optic technology); *Montgomery v. eTrepid Techs.*, No. 06-0056, at 2-10 (D. Nev. May 29,

heart of the *Montgomery v. eTrepid Technologies* litigation, for instance, lies surveillance software claimed to assist intelligence agencies in scanning traffic for Al Qaeda communications. On June 21, 2007, Director of National Intelligence Jonathan Negroponte invoked state secrets.<sup>81</sup> The United States sought a protective order pursuant to Federal Rule of Civil Procedure 26(c) to prevent disclosure of information regarding the

existence . . . of any actual or proposed relationship, agreement, connection, contract, transaction, communication, or meeting of any kind between an intelligence agency . . . and any actual or proposed interest in, application, or use by any intelligence agency, or any current or former official, . . . of any technology, software, or source code owned or claimed by any individuals or entities associated with these lawsuits.<sup>82</sup>

After reviewing the evidence in camera and ex parte, the court granted the order on August 29, 2007.<sup>83</sup>

While private corporations tend to claim the applicability of the state secrets doctrine in the first instance, the executive branch often steps in to formally support such claims.<sup>84</sup> It only tends to do so, however, once it appears that the suit is, indeed, moving forward. For instance, a dispute between Crater Corporation and Lucent Technologies stemmed from a patent filed in 1991 by Philip French and co-

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2008) (order regarding source-code discovery), 2008 WL 2277118, at \*2-6 (discussing allegations involving source code, breach of contract, and patent infringement and ordering the plaintiffs to produce all documents in response to discovery requests); Plaintiff's Memorandum of Law at 7-9, *Sensis Corp. v. Lysack*, No. 07-00543 (N.D.N.Y. May 22, 2007), 2007 WL 4675710 (alleging misappropriation of trade secrets regarding radar technology); *Mirage Sys., Inc.'s Amended Memorandum of Points and Authorities in Opposition to St. Clair's Motion to Compel Production of Classified Documents at 2*, *Eastman Kodak Co. v. Speas*, No. 05-039164 (Cal. Super. Ct. Oct. 12, 2007), 2007 WL 5303264 (claiming the defendant infringed digital imaging technology patents).

<sup>81</sup> *Montgomery*, No. 06-00056, at 2 (D. Nev. Aug. 29, 2007) (protective order).

<sup>82</sup> *Id.* at 1.

<sup>83</sup> *Id.* at 2.

<sup>84</sup> *See, e.g., D.T.M. Research, L.L.C.*, 245 F.3d at 330 (moving to quash defendant's subpoenas served to numerous federal agencies through the United States' invocation of the state secrets privilege); *McDonnell Douglas Corp. v. United States*, 182 F.3d 1319, 1330 (Fed. Cir. 1999) (remanding the state secret issue to the trial court); *Montgomery v. eTrepid Techs., L.L.C.*, No. 06-0056, 2009 WL 910739, at \*8 (D. Nev. Mar. 31, 2009) (involving the state secrets privilege invocation by the United States in a trade secret mis-appropriation case); *Virtual Def. & Dev. Int'l, Inc. v. Republic of Moldova*, 133 F. Supp. 2d 9, 23 (D.D.C. 2001) (discussing state secrets invoked by the State Department to oppose plaintiff's motion to compel disclosure of a classified cable); *McDonnell Douglas Corp. v. United States*, 37 Fed. Cl. 270, 272 (1996) (dismissing multiple claims by a military contractor after the government invoked the state secrets doctrine).

inventors Charles Monty and Steven Van Keuren.<sup>85</sup> Lucent Technologies, a subsidiary of AT&T, was interested in using the inventors' design for an underwater fiber-optic coupler in conjunction with a classified contract it had secured with the U.S. government.<sup>86</sup> The inventors provided Lucent with drawings and consented to a research and development license, with the future design to be negotiated.<sup>87</sup> They alleged that Lucent subsequently denied the inventors access to the CAD drawings and offered some \$100,000 to license the technology.<sup>88</sup> In May 1998, the inventors brought suit for misappropriation of trade secrets, patent infringement, and breach of contract.<sup>89</sup> Three months later Lucent moved for dismissal under 28 U.S.C. § 1498(a).<sup>90</sup> The district court dismissed the suit based on the patent infringement claim.<sup>91</sup> With the trade secrets and breach of contract claims still in play, however, litigation continued, prompting the U.S. military to intervene on March 12, 1999, and to invoke the state secrets privilege to protect some 26,000 documents.<sup>92</sup> The government argued that the

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<sup>85</sup> *Crater Corp.*, 625 F. Supp. 2d at 795-96; see also Chesney, *supra* note 6, at 1303 n.294 (citing *Crater Corp. v. Lucent Techs., Inc.*, 423 F.3d 1260, 1262-63 (Fed. Cir. 2005)) (discussing the *Crater* case, in which a protective order was granted against fact discovery regarding production of radar technology due to the state secrets privilege).

<sup>86</sup> *Crater Corp.*, 624 F. Supp. 2d at 796-97. For detailed discussion of this case, see Isaacs & Farley, *supra* note 6, at 789-99.

<sup>87</sup> Second Amended Complaint at 2-3, *Crater Corp.*, 625 F. Supp. 2d 790 (No. 98-00913), 2006 WL 2699395.

<sup>88</sup> Isaacs & Farley, *supra* note 6, at 790 (citing Kevin Poulsen, *Secrecy Power Sinks Patent Case*, WIRED (Sept. 20, 2005), <http://www.wired.com/science/discoveries/news/2005/09/68894>).

<sup>89</sup> *Crater Corp. v. Lucent Techs., Inc.*, 423 F.3d 1260, 1261-62 (Fed. Cir. 2005).

<sup>90</sup> *Crater Corp. v. Lucent Techs., Inc.*, No. 98-00913, 1999 WL 33973795, at \*1 (E.D. Mo. Aug. 25, 1999), *aff'd in part, vacated in part*, 255 F.3d 1361 (Fed. Cir. 2001). Section 1498(a) provides an affirmative defense for government contractors that shifts liability to the government for patent infringement, where a patented invention is used by or manufactured for the government by a private party. 28 U.S.C. § 1498(a) (2006).

<sup>91</sup> *Crater Corp.*, 1999 WL 33973795, at \*3. A separate administrative claim filed against the United States was still pending as of 2007. *Crater Corp.*, 625 F. Supp. 2d at 799.

<sup>92</sup> See *Crater Corp.*, 423 F.3d at 1264 (Fed. Cir. 2005) (stating the government's position that none of the approximately 26,000 documents could be disclosed); United States' Motion to Intervene and Supporting Memorandum at 1, *Crater Corp.*, 625 F. Supp. 2d 790 (No. 98-00913), 1999 WL 34870263 (asserting grounds for intervention pursuant to Federal Rule of Civil Procedure 24); United States' Motion to Quash and for a Protective Order and Supporting Memorandum at 4-8, *Crater Corp.*, 625 F. Supp. 2d 790 (No. 98-00913) [hereinafter Motion to Quash in *Crater Corp.*], 1999 WL 34870264 (providing grounds for the state secrets privilege and protection pursuant to Federal Rules of Civil Procedure 26(c) and 45(c)).

state secrets privilege was an absolute bar to the suit moving forward.<sup>93</sup> Secretary of the Navy Richard Danzig and Acting Secretary of the Navy Hansford T. Johnson submitted classified and unclassified declarations in support.<sup>94</sup>

The *Crater Corp. v. Lucent Technologies* case illustrates the chicken-and-egg problem with patent disputes in the national security realm. It also underscores a certain judicial sloppiness that has crept its way into state secrets cases, with courts allowing the executive branch to draw a wide net—preventing a broad range of documents from entering the public domain—on the grounds that some portion of the material withheld qualifies as a state secret.

Crater Corporation argued that it did not need any classified information to make its case: the coupler was not a state secret.<sup>95</sup> The company objected to Lucent's claim, arguing that only the government could invoke—and argue—state secrets.<sup>96</sup> Lucent disagreed. Not only could the company argue state secrets, but dismissal was warranted: the exclusion of such privileged material would leave the plaintiff unable to mount its case and the defendant unable to confirm or deny the allegations.<sup>97</sup> Upon inspection of the documents in

<sup>93</sup> See Motion to Quash in *Crater Corp.*, *supra* note 92, at 1 (“Plaintiff in this case seeks to discover information from defendants and various third-parties whose disclosure is prohibited by the state secrets privilege. That privilege, as properly invoked by the United States here, acts as an absolute bar . . .”).

<sup>94</sup> *Crater Corp.*, 423 F.3d at 1263, 1265.

<sup>95</sup> See Plaintiff's Brief in Opposition to Defendants' Motion for Summary Judgment at 34, *Crater Corp.*, 625 F. Supp. 2d 790 (No. 98-00913), 2007 WL 5248865 (“This court should deny defendants['] motion for summary judgment because defendants['] state secret defense is false, because the Crater coupler was never a secret and the government intentionally allowed public presentation . . .”).

<sup>96</sup> Plaintiff Crater Corporation's Memorandum in Opposition to Defendants' Motion to Dismiss at 4, *Crater Corp.*, 625 F. Supp. 2d 790 (No. 98-00913), 2003 WL 25749187.

Defendants' claim that this case should be dismissed as a result of the State Secrets privilege should be rejected because the Government—the holder of the privilege—has not moved to dismiss on that ground. AT&T and Lucent do not have authority to assert the Government's state secret privilege offensively against Crater as grounds for dismissal. Only the Government can invoke the state secrets privilege in this manner. Moreover, Defendants lack standing and should not be permitted to argue here that operation of the state secrets privilege has prejudiced their defense to Crater's claims.

*Id.*

<sup>97</sup> See Defendants' Reply in Support of Its Motion to Dismiss, *Crater Corp.*, 625 F. Supp. 2d 790 (No. 98-00913), 2004 WL 5583982 (“[D]ismissal is appropriate when, as here, the state secrets privilege would prevent a defendant from either confirming or denying plaintiff's factual allegations.”); Defendants' Motion to Dismiss and Memo-

camera, the district court ordered that a substantial portion of the documents be disclosed.<sup>98</sup> The government refused. The district court then held a show-cause hearing, following which it determined that even if some documents could be released, others could not be—and that these documents were central to the plaintiffs establishing a prima facie case.<sup>99</sup> Although the Federal Circuit upheld the invocation of the state secrets privilege (without examining the documents), Judge Newman registered concern that the military had failed to distinguish between public information and documents that genuinely posed a threat to national security.<sup>100</sup> The court remanded the case for consideration of trade secrets, whether Crater and Lucent had a contract in place, and what its terms might have been.<sup>101</sup> The United States argued that the court did not even need to reach the state secrets question.<sup>102</sup> Lucent responded that it was “entitled to judgment as a matter of law due to the United States’ invocation of the state secrets privilege.”<sup>103</sup> The company wrote, “[n]either party can escape the iron curtain of the state secrets privilege. Crater cannot make out a prima facie case, and Lucent cannot adequately defend itself without evidence protected by the privilege.”<sup>104</sup> The court subsequently found insufficient evidence to support Crater’s claim that the coupler had been used.<sup>105</sup> In June 2009, the Court of Appeals for the Federal Circuit affirmed.<sup>106</sup>

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randum in Support at 1-2, *Crater Corp.*, 625 F. Supp. 2d 790 (No. 98-00913), 2003 WL 25749186 (“Crater’s remaining claims require it to prove . . . that Lucent somehow incorporated Crater’s technology into the Government’s classified device. Given the Government’s assertion of the state secrets privilege, however, neither Crater nor Lucent will be able to prove or disprove this allegation.”).

<sup>98</sup> *Crater Corp. v. Lucent Techs., Inc.*, No. 98-00913, 2004 WL 3609347, at \*2 (E.D. Mo. Feb. 19, 2004), *rev’d on other grounds sub nom.* *Lucent Techs., Inc. v. AT&T Co.*, 423 F.3d 1260 (Fed. Cir. 2005).

<sup>99</sup> *Id.* at \*2-3.

<sup>100</sup> *Lucent Techs., Inc. v. AT&T Co.*, 423 F.3d at 1270 (Newman, J., concurring in part and dissenting in part).

<sup>101</sup> *Id.* at 1268 (majority opinion).

<sup>102</sup> See United States’ Response to Plaintiff’s Informal Request for Information, and Response to Plaintiff’s Brief Concerning Case Scheduling and Report at 1, *Crater Corp.*, 625 F. Supp. 2d 790 (No. 98-00913), 2006 WL 5808938 (“[P]laintiff is ‘putting the cart before the horse’ by seeking information regarding damages when it has failed to prove that any wrongdoing occurred or even could have occurred.”).

<sup>103</sup> Defendants’ Memorandum in Support of Their Motion for Summary Judgment at 2, *Crater Corp.*, 625 F. Supp. 2d 790 (No. 98-00913), 2007 WL 5248864.

<sup>104</sup> *Id.* at 2-3.

<sup>105</sup> *Crater Corp.*, 625 F. Supp. 2d at 807.

<sup>106</sup> *Crater Corp. v. Lucent Techs., Inc.*, 319 F. App’x 900 (Fed. Cir. 2009) (per curiam).

The use of state secrets in the corporate realm may hamper efforts by employees to draw attention to contractor fraud. For example, this may have occurred in *United States ex. rel. Schwartz v. TRW, Inc.*<sup>107</sup> Dr. Nira Schwartz alleged violation of the False Claims Act,<sup>108</sup> on behalf of the United States against defendants TRW and Boeing; wrongful termination in violation of 31 U.S.C. § 3730(h), against TRW; and wrongful termination in violation of California public policy against TRW.<sup>109</sup> She stated that, starting in 1990, the United States began contracting with Boeing to develop an exoatmospheric kill vehicle to intercept incoming ballistic missiles as part of its national missile defense program.<sup>110</sup> Boeing, in turn, contracted with TRW to develop algorithms to enable the system to distinguish between decoys and the infrared signatures of incoming missiles.<sup>111</sup>

Schwartz alleged that TRW and Boeing misled and lied to the government by providing falsified data, rigging tests, concealing errors, and repeatedly failing to comply with the technical requirements and specifications to which they had agreed.<sup>112</sup> Schwartz claimed that her suspension and termination, ostensibly on grounds of misconduct, related to complaints she had lodged about the false representations.<sup>113</sup> On January 15, 2003, the U.S. government, which had failed to comply with *Reynolds* formalities in its first invocation of the state secrets privilege, invoked the privilege a second time through a motion to intervene and a motion to dismiss the suit. Five weeks later, the court granted the request.<sup>114</sup>

### B. *Negligence, Wrongful Death, and Bodily Injury*

Recourse to the state secrets privilege in suits brought against private actors for negligence, wrongful death, or bodily injury predates the Bush Administration. In 1974, for instance, the Southern District

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<sup>107</sup> 211 F.R.D. 388 (C.D. Cal. 2002); *see also* *United States ex rel. Schwartz v. Raytheon Co.*, 150 F. App'x 627, 628 (9th Cir. 2005) (affirming dismissal of the whistleblower lawsuit alleging Raytheon failed to perform on defense contract on state secrets grounds).

<sup>108</sup> 31 U.S.C. §§ 3729–3733 (2006).

<sup>109</sup> *Schwartz*, 211 F.R.D. at 390.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* at 390-91.

<sup>114</sup> Civil Minutes, *United States ex rel. Schwartz v. TRW, Inc.*, No. 96-3065 (C.D. Cal. Feb. 24, 2003).

of New York sustained the government's invocation of state secrets in regard to CIA documents in a personal injury case brought by Pan American World Airways against Aetna.<sup>115</sup> In 1989, a California district court dismissed an action brought against the United States and twelve defense contractors by the families of passengers and crew aboard an airliner shot down by missile fire from the U.S.S. Vincennes, based in part on the invocation of the state secrets privilege.<sup>116</sup> The following year, the Second Circuit granted the defendants' motion to dismiss in a suit brought by the estate of a sailor killed by Iraqi fire against the designers, manufacturers, testers, and marketers of an anti-missile system and weapons system on the U.S.S. Stark, on the grounds of state secrets, as well as the political question doctrine.<sup>117</sup> In 1993, a California district court held that the government's invocation of the state secrets privilege, in response to a suit brought by the family of a Marine killed in the Persian Gulf, precluded adjudication of the claim.<sup>118</sup> Looking at lawsuits from 2001 through 2009, it quickly becomes clear that similar suits include, but go considerably beyond, mere product liability.

### 1. Product Liability

The traditional product liability national security suit centers on weapons and equipment. Many of these have emerged, with a significant percentage of cases focused on helicopter malfunction.<sup>119</sup> In

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<sup>115</sup> *Pan Am. World Airways, Inc. v. Aetna Cas. & Sur. Co.*, 368 F. Supp. 1098, 1139-41 (S.D.N.Y. 1973), *aff'd*, 505 F.2d 989 (2d Cir. 1974).

<sup>116</sup> *Nejad v. United States*, 724 F. Supp. 753, 755-56 (C.D. Cal. 1989).

<sup>117</sup> *Zuckerbraun v. Gen. Dynamics Corp.*, 755 F. Supp. 1134, 1135, 1142 (D. Conn. 1990), *aff'd*, 935 F.2d 544, 548 n.1 (2d Cir. 1991). The Fifth Circuit followed suit in a case based on the same incident in *Bareford v. Gen. Dynamics Corp.*, 973 F.2d 1138, 1140, 1144 (5th Cir. 1992).

<sup>118</sup> *Bentzlin v. Hughes Aircraft Co.*, 833 F. Supp. 1486, 1495-97 (C.D. Cal. 1993).

<sup>119</sup> For instance, Duncan Ruth and Clayton Shearcroft died on November 3, 2005, when the Boeing-Vertol model BV 107-II helicopter they were piloting broke in midair and crashed to the ground. Complaint at 4, *Ruth v. Boeing Co.*, No. 07-04851 (E.D. Pa. Nov. 19, 2007), 2007 WL 4882640. Boeing removed the case from the Court of Common Pleas, Philadelphia County, Pennsylvania, to the U.S. District Court for the Eastern District of Pennsylvania on grounds of diversity jurisdiction. Notice of Removal at 2-4, *Ruth*, No. 07-04851 (E.D. Pa. Nov. 19, 2007), 2007 WL 4761731. *Ruth* codefendant Honeywell International raised state secrets as an affirmative defense. See Answer of Honeywell International Inc. to Plaintiffs' Complaint at 30, *Ruth*, No. 07-04851 (E.D. Pa. Nov. 27, 2007), 2007 WL 4874833 (asserting state secrets as the thirty-second affirmative defense).

In another case, family members of fourteen American servicemen killed in a Black Hawk helicopter crash near Kirkuk, Iraq, on August 22, 2007, sued the compa-

February 2007, for instance, a U.S. Army Chinook helicopter crashed in Afghanistan, killing eight soldiers and wounding fourteen others.<sup>120</sup> The following October, seven persons injured in the accident and some of their spouses, as well as the surviving heirs of seven decedents, brought suit in San Francisco County Superior Court against The Boeing Company, Honeywell International, Inc., and Goodrich Pump and

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nies responsible for helicopter maintenance. Plaintiffs' Original Complaint at 6, *McLead v. L-3 Commc'ns Vertex Aerospace, LLC*, No. 08-00264 (S.D. Tex. Aug. 7, 2008), 2008 WL 3924669. The plaintiffs alleged that negligence had resulted in a foreign object being left in the engine during a Phased Maintenance Inspection, causing the driveshaft to fail. *Id.* at 6. L-3 Communications responded to the complaint by asserting the state secrets privilege. *See* Defendant L-3 Communications Vertex Aerospace, LLC's Answer to Plaintiffs' Second Amended Complaint at 4, *McLead*, No. 08-00264 (S.D. Tex. Feb. 18, 2009), 2009 WL 464073 ("Plaintiffs' claims are barred in whole or in part by the political question doctrine and the state secrets doctrine.").

Yet another aircraft accident, this time involving a charter flight that crashed into a mountain in Afghanistan on November 27, 2004, resulted in an industrial state secrets assertion. Plaintiffs' Memorandum in Opposition to Defendants' Motion to Dismiss Amended Complaint at 2, 18, *McMahon v. Presidential Airways, Inc.*, 410 F. Supp. 2d 1189 (M.D. Fla. 2006) (No. 05-01002), 2006 WL 422219. The complaint alleged that all five defendants, operating under contract with the United States "to provide air transportation and operational support services to the Department of Defense ('DoD') in Afghanistan," negligently caused the deaths of the plaintiffs' spouses. Complaint at 5, 7-9, *McMahon v. Presidential Airways, Inc.*, 460 F. Supp. 2d 1315 (M.D. Fla. 2006) (No. 05-1002), 2005 WL 4902790. Blackwater, one of the defendants in the suit, moved to dismiss the case for lack of personal jurisdiction. Defendant Blackwater Lodge and Training Center, Inc.'s Motion to Dismiss for Lack of Personal Jurisdiction, *McMahon*, 460 F. Supp. 2d 1315 (No. 05-1002), 2005 WL 3806018. State secrets assertions—despite the government's statement that it would not step in to formally assert the privilege—played a role throughout the litigation. *See, e.g.*, Plaintiffs' Motion to Unseal Renewed Motion to Dismiss and Memorandum in Support at 1, 5, *McMahon v. Presidential Airways*, No. 05-1002 (M.D. Fla. Mar. 17, 2009), 2009 WL 773422 (moving for the court to unseal a renewed motion to dismiss and its supporting exhibits as no governmental secrets were at issue).

<sup>120</sup> Answer of Defendant Goodrich Pump & Engine Control Systems, Inc. to Amended Complaint at 1, *Getz v. Boeing Co.*, 690 F. Supp. 2d 982 (N.D. Cal. 2010) (No. 07-06396), 2008 WL 4762725; Amended Answer of Defendant The Boeing Company at 2, *Getz*, 690 F. Supp. 2d 982 (No. 07-6396), 2008 WL 744106; Notice of Removal of Civil Action from Superior Court of California, County of San Francisco at 2, *Getz*, 690 F. Supp. 2d 982 (No. 07-6396) [hereinafter Notice of Removal in *Getz*], 2007 WL 5017768; *US Troops Killed in Chopper Crash*, BBC NEWS, Feb. 18, 2007, [http://news.bbc.co.uk/2/hi/south\\_asia/6372813.stm](http://news.bbc.co.uk/2/hi/south_asia/6372813.stm). It was not the first Chinook to crash in Afghanistan and result in American casualties. *See US Troops Killed in Chopper Crash, supra* (discussing the April 2005 Chinook crash in which sixteen people died, thirteen of whom were U.S. personnel, as well as a July 2005 helicopter crash in which all sixteen soldiers on board were killed). A number of unreported cases that deserve further examination have dealt with prior Chinook crashes. *See, e.g.*, *Humphreys v. Boeing Co.*, No. 85-4524, 1986 WL 8129, at \*4 (E.D. Pa. July 17, 1986) (dismissing a lawsuit for injuries suffered in a helicopter crash based on the government contractor defense).

Engine Control Systems, Inc.<sup>121</sup> The defendants removed to federal court on December 18, 2007, based in part on Boeing's claim to the state secrets privilege as an affirmative defense.<sup>122</sup> Eighteen months later, the company still had not amassed sufficient information to file additional dispositive motions on the state secrets privilege—resulting in efforts to further push back discovery within the case management schedule.<sup>123</sup>

As in the *Lucent* case, discussed above, Judge Claudia Wilken noted the chicken-and-egg problem that accompanies such suits:

Defendants' state secret privilege and political question defenses present additional problems, since the viability of those defenses depends not only on evidence produced by the government, but also the evidence that the government refuses to produce to defendants. It is well settled that summary judgment is appropriate when the government's assertion of the state secrets privilege deprives a defendant of information that would support a valid defense to plaintiff's claim. Therefore, before the defendants can even prepare a motion based on the state secrets privilege, we have to wait and see what information the government produces and what information the government refuses to produce.<sup>124</sup>

The refusal of the government to provide even seemingly innocuous information could have a profound effect:

As the Ninth Circuit noted in *Kasza v. Browner*, 133 F.3d 1159 (9th Cir. 1998), "if seemingly innocuous information is part of a classified mosaic, the state secrets privilege may be invoked to bar its disclosure and the court cannot order the government to disentangle this information from other classified information." *Id.* at 1166. Under this standard, defendants anticipate that the government will withhold considerable information critical to their defenses herein. However, defendants cannot make such a showing until such time as the government produces doc-

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<sup>121</sup> Plaintiffs' Opposition to Defendants' Motion to Modify Case Management Order at 4 nn.1, 2, *Getz*, 690 F. Supp. 2d 982 (No. 07-06396) [hereinafter Plaintiffs' Opposition in *Getz*], 2009 WL 2407163; Notice of Motion and Motion for Summary Judgment and Memorandum of Points and Authorities in Support of Defendant the Boeing Company's Motion for Summary Judgment Based on the Government Contractor Defense at 2, *Getz*, 690 F. Supp. 2d 982 (No. 07-06396) [hereinafter Motion for Summary Judgment in *Getz*], 2009 WL 3785314.

<sup>122</sup> Plaintiffs' Opposition in *Getz*, *supra* note 121, at 4; Notice of Removal in *Getz*, *supra* note 120, at 5, 7. Additional affirmative defenses included the government contractor defense and the political question doctrine. Notice of Removal in *Getz*, *supra* note 120, at 5, 6.

<sup>123</sup> See Defendants' Reply Memorandum in Support of Defendants' Motion to Modify Case Management Order at 5, *Getz v. Boeing Co.*, No. 07-06396 (N.D. Cal. Aug. 3, 2009), 2009 WL 2407164 (explaining how the viability of the state secrets privilege depends on what documents the government refuses to produce).

<sup>124</sup> *Id.* (citations omitted).

uments in response to defendants' requests and asserts the state secrets privilege as to other information.<sup>125</sup>

Like the other aircraft cases cited above, *Getz v. Boeing Co.* relates to an accident in the theater of war. However, as in *Reynolds*, even where the incident involving aircraft is far removed from the actual battlefield, state secrets may still play a role.<sup>126</sup> This holds even in bizarre cases tangentially involving military aircraft, where government contractors claim in the first instance that state secrets are at stake.<sup>127</sup>

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<sup>125</sup> *Id.* at 5-6. In any event, the first card Boeing played was the government contractor defense. Motion for Summary Judgment in *Getz*, *supra* note 121. As of the time of this writing, the case has yet to be resolved.

<sup>126</sup> On November 2, 2007, Stephen Stilwell, on routine training maneuvers for the Missouri Air National Guard in restricted Military Operations Area airspace over south-central Missouri, executed a break turn in an F-15C Eagle. Complaint at 3-4, *Stilwell v. Boeing Co.*, No. 08-00395 (E.D. Mo. Mar. 21, 2008), 2008 WL 2364199. The plane allegedly began violently shaking and broke apart. *Id.* at 4. Stilwell, who ejected from the aircraft and was hit by parts of it, suffered debilitating injuries. *Id.* at 4-5. On March 21, 2008, he sued Boeing. *Id.* at 1. Boeing responded by arguing, *inter alia*, state secrets as an affirmative defense. See Defendant's Answer and Additional Defenses to Plaintiff's First Amended Complaint at 7, *Stilwell*, No. 08-00395 (E.D. Mo. Dec. 31, 2008), 2008 WL 5467424 ("The First Amended Complaint, and each purported cause of action therein, may be barred, in whole or in part, if the government invokes the state secrets privilege to preclude production of information necessary to Boeing's defense or to Plaintiff's prima facie case."). On April 16, 2009, the case was dismissed with prejudice. Stipulation for Dismissal with Prejudice, *Stilwell*, No. 08-00395 (E.D. Mo. Apr. 16, 2009), 2009 WL 1147055.

<sup>127</sup> See, e.g., Plaintiffs' Complaint for Wrongful Death, Personal Injuries, and Business Loss at 3, 5, *Sheffels v. United States*, No. 03-0355 (E.D. Wash. Oct. 10, 2003) [hereinafter Complaint in *Sheffels*], 2003 WL 23981154 (involving a suit on behalf of a deceased civilian pilot, Louis Roger Sheffels, who crashed on May 2001 in his Piper PA-18 aircraft). Wilbur, Washington, where the crash occurred, is a rural town with a population of 960, located sixty-five miles west of Spokane, Washington. Jonathan Martin, *Crop Circles Lure Visitors to Wilbur, Wash.*, SEATTLE TIMES, Aug. 13, 2009, at A1, available at 2009 WLNR 15825974. Sheffels's heirs and his surviving passenger, Michael J. Palmquist, brought an action against Boeing, alleging that the C-17 Globemaster III, manufactured by Boeing, had an ultrahazardous wake turbulence profile, posing an "unreasonable risk to general aviation aircraft," and that a C-17 had been the proximate cause of Sheffels's crash. Complaint in *Sheffels*, *supra*, at 5, 9-10. Boeing responded to the complaint by, *inter alia*, asserting state secrets as an affirmative defense. Defendant The Boeing Company's Amended Answer and Affirmative Defenses to Amended Complaint and Counterclaim at 10, *Kuch v. United States*, No. 03-0355 (E.D. Wash. Apr. 30, 2004), 2004 WL 3108354. The C-17, operated by the U.S. Air Force, is a military transport aircraft used for rapid airlift of troops and cargo to main and forward-operating bases. *C-17 Globemaster III*, BOEING, <http://www.boeing.com/defense-space/military/c17/index.htm> (last visited Sept. 15, 2010). The court granted the defendants' motions for judgment pursuant to Federal Rule of Civil Procedure 52(c). See Order Denying Plaintiffs' Motion to Reconsider Dismissal and Reconvene Trial, *Kuch v. United States*, No. 03-0355 (E.D. Wash. Oct. 23, 2007), 2007 WL 3129674, at \*1 (denying plaintiff's motion to have the court reconvene and consider additional testimony). In September 2007, plaintiffs filed a motion

Aircraft are not the only focus of such suits. Liability cases arise from a wide range of products. Some involve weapons, where the government may be particularly vulnerable to exposure. For instance, U.S. Navy combat pilot Lieutenant Nathan White's death from "friendly fire" while on patrol over Iraq led to a suit against the manufacturer of the errant Patriot missile.<sup>128</sup> On June 26, 2007, Raytheon moved to dismiss the suit, arguing that it raised a nonjusticiable political question: "the discretionary decision of the Army to deploy the Patriot system in 'Operation Iraqi Freedom.'"<sup>129</sup> The court denied the motion, and in December 2007 the parties began discovery.<sup>130</sup> Although the defendants claimed that state secrets were involved, the government had not yet intervened in the suit to invoke the privilege. Raytheon subsequently served a number of document requests on the U.S. Army, including reports on the internal investigation of the incident, communications between the government and Raytheon about the incident, information on the U.S. Army's missile defense operations, and the Patriot missile system's rules of engagement.<sup>131</sup> On September 5, 2008, Peter Geren, Secretary of the Army, filed an affidavit invoking the state secrets privilege.<sup>132</sup> The court upheld the state secrets invocation on December 17, 2008, concluding "that the information which the Secretary has claimed as privileged is relevant and necessary to prove and defend the Amended Complaint[,] and . . . its public disclosure would endanger vital security interests of the United States . . . . Therefore, I have no alternative but to order the case dismissed."<sup>133</sup>

Personal injury suits extend beyond dysfunctional weapons. In one case, plaintiffs Kevin R. McLane and Sharon Brown alleged that, while in Iraq on August 17, 2004, they were shocked by an antenna supplied

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to reopen the case. *Id.* At his first deposition on March 24, 2004, Palmquist testified that his last memory before the crash was flying over a field he was surveying and that he had not seen any other aircraft that day. *Id.* However, after undergoing hypnosis to enhance his memory, at his second deposition on October 13, 2004, Palmquist recalled seeing a large aircraft directly in front of their windshield. *Id.* After District Court Judge Suko dismissed the case on summary judgment, the Ninth Circuit affirmed the exclusion of the posthypnotic recollections but reversed the grant of summary judgment. *Id.* The district court subsequently declined to reopen the case under Federal Rule of Civil Procedure 59(a). *Id.* at \*2-3.

<sup>128</sup> White v. Raytheon Co., No. 07-10222, 2008 WL 5273290, at \*1 (D. Mass. Dec. 17, 2008).

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* at \*5.

by Honeywell Technology Solutions Inc. (HTSI).<sup>134</sup> In seeking removal to a federal court, HTSI noted, “If the equipment at issue was supplied by HTSI, it was delivered to the National Security A[gency] by HTSI under a classified contract with that agency.”<sup>135</sup> HTSI argued for removal under the Federal Officer Removal Statute,<sup>136</sup> and on the basis of the incident being located in a federal enclave.<sup>137</sup> Defendants further claimed state secrets as a colorable defense.<sup>138</sup>

In a similar case, Sergeant Chris Everett, a member of the Texas Army National Guard, died from electrocution while he was cleaning a Humvee in Iraq.<sup>139</sup> The generator providing electricity for the power washer was not properly grounded, a responsibility that his mother said fell squarely on the shoulders of defendants Arkel and Kellogg, Brown & Root Services, Inc. (KBR), who had contracted with the government to install, operate, and maintain the generator.<sup>140</sup> State secrets once again provided an affirmative defense.<sup>141</sup>

Personal injury due to radiation provides the nexus for a number of suits currently pending in the courts. From November 2002 through January 2003, dozens of people seeking recovery for exposure to ionizing radiation while working with Honeywell radar devices filed class action complaints in Texas, Massachusetts, and New Jersey.<sup>142</sup> In the *Norwood v. Raytheon Co.* actions, Honeywell claimed state

<sup>134</sup> Notice of Removal at 1-2, *McLane v. Honeywell Int’l Inc.*, No. 07-02816 (D. Md. Oct. 16, 2007), 2007 WL 4603347.

<sup>135</sup> *Id.* at 2.

<sup>136</sup> 28 U.S.C. § 1442(a)(1) (2006).

<sup>137</sup> Notice of Removal, *supra* note 134, at 2, 4.

<sup>138</sup> See Defendant Honeywell International Inc. and Honeywell Technology Solutions Inc.’s Answer to Plaintiff’s Complaint at 8, *McLane*, No. 07-2816 (D. Md. Oct. 23, 2007), 2007 WL 4603348 (“Plaintiffs’ claims and/or causes of action are barred, in whole or in part, because the government’s invocation of the state secrets privilege irrevocably prejudices the Honeywell Defendants’ ability to defend themselves.”).

<sup>139</sup> Memorandum in Support of Plaintiffs’ Motion to Remand at i, *McGee v. Arkel*, No. 08-4707 (E.D. La. Oct. 29, 2008), 2008 WL 5366105.

<sup>140</sup> *Id.*

<sup>141</sup> See *id.* at iv (“KBR claims that the state secret doctrine applies as a defense to this action, citing *United States v. Reynolds*, 345 U.S. 1 (1953). However, there is no doubt that proper electric grounding, generators, and power washers do not involve issues of national security.”). The Army’s public report of the incident, as well as Congress’s public investigation, helped strengthen the plaintiffs’ contentions. *Id.* (citing *Deficient Electrical Systems at U.S. Facilities in Iraq: Hearing Before the H. Comm. on Oversight and Gov’t Reform*, 110th Cong. 2 (2008) (statement of Rep. Henry A. Waxman, Chairman, Comm. on Oversight and Gov’t Reform)).

<sup>142</sup> Plaintiffs’ Opposition to Defendants’ Motion to Sever and Dismiss the German Plaintiffs’ Claims Pursuant to the Doctrine of Forum Non Conveniens at 3, *Tichenor v.*

secrets as an affirmative defense.<sup>143</sup> A Texas district court subsequently deemed Honeywell to have asserted its *Norwood* state secrets defense in that lawsuit as well.<sup>144</sup>

## 2. Infrastructure and Services

The integration of PMCs into military operations means that contractors are now providing a broad array of services that have become the subject of tort allegations. Indeed, one of the companies claiming that state secrets are at stake most frequently is KBR, which received nearly \$5 billion in government contracts in fiscal year 2007 alone.<sup>145</sup> The base operations and facilities management branch of KBR's government and defense market delivers on-demand logistical support services to national security clients across the full military mission cycle. This includes taking out the trash.<sup>146</sup>

Honeywell Int'l, Inc., No. 09-00014 (W.D. Tex. July 30, 2007) [hereinafter Plaintiff's Opposition in *Tichenor*], 2007 WL 6211225.

<sup>143</sup> *Norwood v. Raytheon Co.*, 455 F. Supp. 2d 597, 604 (W.D. Tex. 2006).

<sup>144</sup> Plaintiff's Opposition in *Tichenor*, *supra* note 142, at 15 ("Presumably, Defendants will raise those same defenses against all plaintiffs in these actions."). At defendants' request, the case had been removed to the U.S. District Court for the Western District of Texas. *Id.* at 3-4. Fort Bliss, located in El Paso, is home to the U.S. Army Air Defense Artillery Center and School and serves as the worldwide headquarters for training soldiers on the Nike and HAWK missile systems. *Id.* at 2-3. The Texas court downplayed the state secrets claim to the degree that it implicated the political question doctrine:

Plaintiffs' claims involve radar systems acquired during the Cold War, but American military strategy is not implicated by Plaintiffs' claims on the face of the pleadings. . . . [A]ny analysis by the court of the American military's use of the radar systems would not involve inquiries into rules of engagement, reactions of United States servicemen during combat, or any information that Defendants contend is protected by the state secrets privilege.

*Norwood*, 455 F. Supp. 2d at 604.

<sup>145</sup> *Federal Contractor Misconduct Database*, PROJECT ON GOV'T OVERSIGHT, <http://www.contractormisconduct.org> (last visited Sept. 15, 2010). Court documents similarly report that the company received billions of dollars in no-bid contracts in fiscal year 2003 for work in Iraq. See, e.g., Plaintiffs' Third Amended Complaint & Jury Demand at 2-3, *McManaway v. KBR, Inc.*, 695 F. Supp. 2d 883 (S.D. Ind. 2010) (No. 08-0186), 2009 WL 3253907; Defendants' First Amended Answer and Affirmative Defenses at 1-2, 9, *McManaway*, 695 F. Supp. 2d 883 (No. 08-0186), 2009 WL 108453; Plaintiffs' Original Complaint & Jury Demand at 2, *McManaway*, 695 F. Supp. 2d 883 (No. 08-0186), 2008 WL 5110377.

<sup>146</sup> *Base Operations / Facilities Management*, KBR, <http://www.kbr.com/Markets/Government-and-Defense/Base-Operations-Facilities-Management> (last visited Sept. 15, 2010); see also *Infrastructure & Minerals*, KBR, <http://www.kbr.com/About/Business-Units/Infrastructure-and-Minerals> (last visited Sept. 15, 2010).

Early in the war effort, millions of dollars went to KBR to dispose of waste on bases and camps in Iraq and Afghanistan.<sup>147</sup> The company allegedly said that it would minimize safety risks, environmental impact, and smoke exposure.<sup>148</sup> It then allegedly took tractors and indiscriminately pushed waste (e.g., trucks, tires, lithium batteries, Styrofoam, paper, petroleum-oil lubricating products, metals, hydraulic fluids, munitions boxes, medical waste, biohazard materials such as corpses and animal carcasses, medical supplies used during smallpox inoculations, latrine waste, paints, solvents, asbestos insulation, pesticides, dangerous chemicals, and plastic water bottles) into massive trenches and burned it.<sup>149</sup> The resulting flames reportedly extended hundreds of feet into the sky, burning blue, green, and other colors, with thick black and white smoke frequently filling nearby bases and living quarters.<sup>150</sup>

In May 2009, soldiers and others deployed to Iraq and Afghanistan brought a class action lawsuit, claiming injury from the toxic smoke, ash, and fumes.<sup>151</sup> Symptoms ranged from burning eyes, sharp pain in the lungs, and lesions in the nostrils, to upper respiratory congestion and infections, headaches, and loss of consciousness.<sup>152</sup> KBR claimed state secrets as an affirmative defense “to the extent that classified information is involved.”<sup>153</sup> The company further stated that it

<sup>147</sup> Complaint at 4, *Brister v. KBR, Inc.*, No. 09-00097 (D. Alaska May 18, 2009), 2009 WL 1499260.

<sup>148</sup> *Id.* In their answer, Defendants admitted only that KBR, pursuant to its Logistics Civil Augmentation Program III contract with the U.S. Army,

provides a number of essential services to support the United States Army in its military operations in Iraq and Afghanistan, including assistance with some aspects of waste disposal at some U.S. military bases and camps in Afghanistan. All waste disposal work performed by KBRSI under the LOGCAP III contract is done pursuant to contractual and regulatory requirements and under the supervision and control of the United States Army.

Defendants’ Answer, Affirmative Defenses and Demand for Jury Trial at 4, *Brister*, No. 09-00097 (D. Alaska June 5, 2009) [hereinafter Defendants’ Answer in *Brister*], 2009 WL 1642730.

<sup>149</sup> Complaint, *supra* note 147, at 4.

<sup>150</sup> *Id.* at 5-6.

<sup>151</sup> *Id.* at 1-2; Defendants’ Answer and Affirmative Defenses at 4, *Cain v. KBR, Inc.*, No. 09-00435 (W.D. Tex. June 5, 2009), 2009 WL 1632528; Notice of Removal at 2-4, *Cain*, No. 09-00435 (W.D. Tex. May 29, 2009), 2009 WL 1632118; Plaintiffs’ Original Petition at 2, *Cain*, No. 09-00435 (W.D. Tex. May 29, 2009), 2009 WL 1632117; Notice of Removal at 3-4, *Massman v. KBR, Inc.*, No. 09-0117 (D. Wyo. May 29, 2009), 2009 WL 3150062; Notice of Removal at 2-4, *Ochs v. KBR, Inc.*, No. 09-00094 (E.D.N.C. May 29, 2009), 2009 WL 2441836; Notice of Removal at 2-4, *Ochs v. KBR, Inc.*, No. 09-00237 (E.D.N.C. May 29, 2009), 2009 WL 2441839.

<sup>152</sup> Complaint, *supra* note 147, at 7-8.

<sup>153</sup> Defendants’ Answer in *Brister*, *supra* note 148, at 14.

was immune from all claims “stemming from the performance of official, discretionary duties pursuant to contracts with the United States to provide essential support services to the United States military in Iraq and Afghanistan.”<sup>154</sup>

In addition to providing direct support to military bases, KBR also helps to build infrastructure. The company has claimed state secrets in this domain as well. One suit has been brought against it for disregarding and downplaying the danger of site contamination by sodium dichromate, a toxic chemical used “as an anti-corrosive and containing nearly pure hexavalent chromium” at a water plant in Iraq.<sup>155</sup> The U.S. Department of Health and Human Services lists this hexavalent chromium (Chromium(VI) or Cr(VI)) as a known carcinogen.<sup>156</sup> According to the Centers for Disease Control, an increased risk of lung cancer has been demonstrated in workers exposed to Cr(VI) compounds. Other adverse health effects associated with Cr(VI) exposure include: “dermal irritation, skin ulceration, allergic contact dermatitis, occupational asthma, nasal irritation and ulceration, perforated nasal septa, rhinitis, nosebleed, respiratory irritation, nasal cancer, sinus cancer, eye irritation and damage, perforated eardrums, kidney damage, liver damage, pulmonary congestion and edema, epigastric pain, and erosion and discoloration of the teeth.”<sup>157</sup> In June 2008, congressional hearings drew attention to KBR’s apparent efforts to mask the continued contamination of its work site in Iraq.<sup>158</sup> In February 2010, the court dismissed the case for lack of personal jurisdiction.<sup>159</sup>

<sup>154</sup> *Id.* (citing 28 U.S.C. § 2679(d) (1988) and *Westfall v. Erwin*, 484 U.S. 292 (1988)).

<sup>155</sup> Plaintiffs’ Motion for Leave to Amend Complaint at 3, *McManaway v. KBR, Inc.*, 695 F. Supp. 2d 883 (S.D. Ind. 2010) (No. 08-0186).

<sup>156</sup> See DEP’T OF HEALTH & HUMAN SERVS., AGENCY FOR TOXIC SUBSTANCES AND DISEASE REGISTRY, PUBLIC HEALTH STATEMENT: CHROMIUM (2008), available at <http://www.atsdr.cdc.gov/ToxProfiles/tp7-cl-b.pdf> (stating inhalation of chromium(VI) has been shown to cause lung cancer, exposure to chromium(VI) in drinking water has been correlated with an increase in stomach tumors, and laboratory experiments have shown chromium(VI) to cause tumors in the stomach, intestinal tract, and lungs).

<sup>157</sup> *Hexavalent Chromium*, CTRS. FOR DISEASE CONTROL AND PREVENTION, <http://www.cdc.gov/niosh/topics/hexchrom> (last visited Sept. 15, 2010) (“The NIOSH 1988 testimony to OSHA on the air contaminants standard recommended that all Cr(VI) compounds, regardless of their degree of solubility in water, be considered occupational carcinogens.”).

<sup>158</sup> See, e.g., *The Exposure at Qarmat Ali: Contractor Misconduct and the Safety of U.S. Troops in Iraq*, Hearing Before the S. Democratic Policy Comm., 110th Cong. (2008) (featuring witnesses describing how KBR exposed contractors, workers, and soldiers to sodium dichromate, a potentially deadly chemical).

<sup>159</sup> *McManaway*, 695 F. Supp. at 896.

Like other government contractors, KBR has claimed state secrets even in cases seemingly insulated from actual hostilities. For example, on March 10, 2004, Texas resident Lonnie Amason and a KBR driver (whose identity is not provided in court records) were both driving nonmilitary vehicles when they had a car accident in Baghdad's Green Zone at the intersection of the road to the Al Rashid Hotel and the road to the North Gate.<sup>160</sup> Arguing for removal to a federal court, KBR claimed the following as colorable federal defenses: government contractor defense, the combatant activities exception to the Federal Tort Claims Act,<sup>161</sup> the political question doctrine, separation of powers, and the state secrets doctrine.<sup>162</sup> KBR's claim to state secrets as an affirmative defense echoes in numerous other cases against the company.<sup>163</sup>

### 3. Conduct of War

The subject matter of state secrets cases varies: in addition to personal injury suits that show a broad range of contractor involvement in national security (e.g., designing, maintaining, and operating aircraft, supplying missile systems, providing communications equipment, generating electricity, manufacturing radar equipment, disposing of waste at overseas bases, and building water plants), there are also tort claims based on contractors' involvement in what can best be understood as the actual conduct of war. Two observations follow: first, the growing military role of PMCs creates tension between ordinary soldiers and contractors. Thus, U.S. soldiers are now lodging suits complaining of failures in base security, the operation of supply convoys, and the like. Second, the involvement of contractors in the conduct of war has placed contractors in positions traditionally filled by the military, such as conducting counternarcotics missions, trans-

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<sup>160</sup> Motion to Remand at 2, *Amason v. Kellogg Brown & Root, Inc.*, No. 05-03029 (S.D. Tex. Oct. 3, 2005), 2005 WL 3133922.

<sup>161</sup> 28 U.S.C. § 2680(j) (2006).

<sup>162</sup> Motion to Remand, *supra* note 160, at 6.

<sup>163</sup> See, e.g., Defendants' Answer in *Brister*, *supra* note 148, at 14; Defendants' Answer and Affirmative Defenses, *supra* note 151, at 13; Notice of Removal, *Cain v. KBR, Inc.*, *supra* note 151, at 15; Notice of Removal, *Massman v. KBR, Inc.*, *supra* note 151, at 19; Notice of Removal, *Ochs v. KBR, Inc.*, No. 09-00094, *supra* note 151, at 15; Notice of Removal, *Ochs v. KBR, Inc.*, No. 09-00237, *supra* note 151, at 15; Memorandum in Support of Plaintiffs' Motion to Remand, *supra* note 139, at xxiii-xxiv; Plaintiffs' Motion to Remand at 23-25, *McGee v. Arkel Int'l, LLC*, No. 08-2709 (S.D. Tex. Oct. 3, 2008), 2008 WL 4499471; Defendant Kellogg Brown & Root, Inc.'s Motion to Dismiss Pursuant to Rule 12(b) and Memorandum in Support Thereof, *Lessin v. Kellogg Brown & Root* at 8 n.2, No. 05-01853 (S.D. Tex. Nov. 21, 2005) [hereinafter Motion to Dismiss in *Lessin*], 2005 WL 3663857.

ferring prisoners, and interrogating suspects—arguably with neither the oversight and discipline developed by the state, nor the legal protections traditionally extended to soldiers on the battlefield. Civilian claims against PMCs are thus emerging. In all of these cases, corporations claim state secrets as a colorable federal defense, often obtaining advantages even in the absence of federal corroboration.

One of the services provided by Halliburton, for instance, is base security. On December 21, 2004, a suicide bomber detonated explosives in the mess tent on Forward Operating Base Marez in Mosul, Iraq.<sup>164</sup> Survivors of Allan Keith Smith, one of the soldiers who died in the explosion, brought suit against Halliburton.<sup>165</sup> Defendants, based in part on their colorable federal defenses,<sup>166</sup> successfully petitioned for removal from the Eleventh Judicial District Court of Harris County, Texas, to the U.S. District Court for the Southern District of Texas.<sup>167</sup>

Supply convoys present a similar situation.<sup>168</sup> On March 26, 2004, for instance, a military escort assigned to provide security accompanied a supply convoy allegedly controlled and operated by KBR and was traveling along one of the principal supply routes into and out of Iraq.<sup>169</sup> En route to Kuwait, one of the trucks had an equipment mal-

<sup>164</sup> Notice of Removal at 1-2, *Smith v. Halliburton Co.*, No. 06-00462 (S.D. Tex. Feb. 10, 2006), 2006 WL 520176.

<sup>165</sup> *Id.*

<sup>166</sup> Such defenses included the state secrets doctrine, the government contractor defense, the combatant activities exception to the Federal Tort Claims Act, 28 U.S.C. § 2680(j) (2006), the political question doctrine, and the Defense Production Act of 1950, ch. 932, 64 Stat. 798 (codified as amended at 50 U.S.C. app. §§ 2061–2172)). Notice of Removal, *supra* note 164, at 1-2.

<sup>167</sup> Notice of Removal, *supra* note 164, at 1-2.

<sup>168</sup> *See, e.g.*, Complaint for Wrongful Death Damages, Estate Damages and Punitive Damages, *Whitaker v. Kellogg Brown & Root, Inc.*, 444 F. Supp. 2d 1277 (M.D. Ga. 2006) (No. 05-00078), 2005 WL 2303546. In April 2004, a soldier serving in the Second Armored Cavalry Regiment of the U.S. Army in Iraq was escorting trucks owned and operated by KBR on their return from Al Kut, Iraq, to the Convoy Support Center in Scania, Iraq. *Id.* at 3. As the convoy approached a bridge over the Tigris River, one of KBR's drivers lost control of the truck and went over the edge of the bridge, setting off a violent explosion as the truck fell. *Id.* at 5. Marquis A. Whitaker was operating a U.S. Army escort vehicle behind the truck and immediately stopped, but another KBR truck hit him from behind, causing his vehicle to teeter precariously on the edge of the bridge. *Id.* at 5-6. During his attempt to extricate himself from the vehicle, Whitaker fell off the bridge into the aqueduct and drowned. *Id.* at 6. In July 2005, his surviving heirs brought a wrongful death suit. *Id.* at 10. KBR asserted state secrets, as well as the political question doctrine; the court later dismissed the case as nonjusticiable under the political question doctrine. *Whitaker*, 444 F. Supp. 2d at 1282.

<sup>169</sup> Motion to Dismiss in *Lessin*, *supra* note 163, at 6.

function on its loading ramp and was forced to stop.<sup>170</sup> The military secured the perimeter and Sergeant Sean Lessin, a member of the U.S. Army's Bravo Battery, tried to help. The ramp assist arm struck and injured him, requiring him to be evacuated by Army helicopter.<sup>171</sup> In May 2005, Lessin and his wife sued KBR for negligence.<sup>172</sup> In its defense, KBR stated that the case was nonjusticiable under the political question doctrine and was preempted by federal law interpreting the "combatant activities" exception to the Federal Tort Claims Act.<sup>173</sup> The company expressly reserved the right to claim that state secrets were at stake:

[A]ny further prosecution or defense of this case may trigger the protections of the state secrets privilege because classified information may have been implicated regarding the supply needs of the United States military, its procedures for intelligence gathering and threat assessment, and its rules and protocols regarding force protection provided to civilian contractors.<sup>174</sup>

In other words, the company was not actually claiming that classified information was implicated—merely that it might arise in the future, thus presenting a bar to discovery or preventing the case from moving forward altogether. On the one hand, the inclusion of the reference may be seen as a good-faith effort to provide the court with notice of the issues that may arise. On the other hand, the manner in which such an executive privilege enters into private litigation, and the potential chilling effect of such statements on the progress of such suits, are equally relevant.

State secrets cases over the past eight years also include tort suits brought by nonmilitary personnel for contractor behavior related to the conduct of war. DynCorp International's work in offering major programs in law enforcement training and support, security services, base operations, aviation, contingency operations and logistics support to further "U.S. national security and foreign policy objectives" provides a prime example.<sup>175</sup> Its predecessor, Land-Air, Inc., began by providing teams of technicians to maintain aircraft. On its website, the company

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<sup>170</sup> *Id.*

<sup>171</sup> *Id.* The Army subsequently barred military convoy escort personnel from operating or repairing civilian vehicles absent direct command. *Id.*

<sup>172</sup> Plaintiffs' Original Complaint at 2-3, *Lessin v. Kellogg Brown & Root*, No. 05-1853 (S.D. Tex. May 23, 2005), 2005 WL 1512296.

<sup>173</sup> 28 U.S.C. § 2680(j) (2006).

<sup>174</sup> Motion to Dismiss in *Lessin*, *supra* note 163, at 8 n.2.

<sup>175</sup> *Overview*, DYNACORP INT'L, <http://www.dyn-intl.com/overview.aspx> (last visited Sept. 15, 2010).

boasts that it has now “broadened its reach” and has “recruited, trained, and deployed more than 6,000” soldiers to eleven countries, including Afghanistan and Iraq, for the U.S. Department of State.<sup>176</sup> Furthermore, the company provides “logistics and contingency support to the U.S. military around the world,” including major contract task orders in Afghanistan and Kuwait to augment U.S. Army logistics capabilities, as well as support for African Union peacekeepers in Somalia.<sup>177</sup> It also maintains more than 300 intelligence professionals within the United States and operates “on all continents except Antarctica.”<sup>178</sup>

DynCorp has at times found itself the focus of public attention. In 2009 the company terminated one of its senior vice presidents, who also served as the company’s chief compliance officer, following disclosures that the firm had bribed officials through its subcontractors to “expedite the issuance of a limited number of visas and licenses from foreign government agencies”—potentially violating the Foreign Corrupt Practices Act.<sup>179</sup> The company has been implicated in sex crimes, including trafficking girls as young as twelve years old and running prostitution rackets, as well as engaging in the illegal arms trade.<sup>180</sup> Ac-

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<sup>176</sup> *Id.*

<sup>177</sup> See *Contingency Operations*, DYNCORP INT’L, 1 (Feb. 2010), [http://www.dyn-intl.com/media/5585/dy376\\_dy322\\_033010\\_somalia\\_casestudy\\_2pg.pdf](http://www.dyn-intl.com/media/5585/dy376_dy322_033010_somalia_casestudy_2pg.pdf) (detailing how DynCorp equipped, deployed, sustained, and trained all African Union peacekeepers as part of its service to U.S. Department of State); Press Release, DynCorp Int’l, DynCorp International Awarded New LOGCAP IV Task Order for Southern Afghanistan Support (July 8, 2009) (announcing that the U.S. Army awarded DynCorp a new task order to provide existing Afghanistan bases with operations and maintenance support); Press Release, DynCorp Int’l, DynCorp International Has \$77 Million LOGCAP IV Task Order in Kuwait (Feb. 18, 2009) (stating that the U.S. Army Sustainment Command awarded a task order to make DynCorp responsible for movement control operations and management of logistics and facilities needed for U.S. military personnel arriving in and departing Kuwait).

<sup>178</sup> *Overview*, *supra* note 175. For more information on the history of DynCorp International, see KEN SILVERSTEIN, PRIVATE WARRIORS 182-87 (2000), which describes DynCorp as “a hydra-headed firm” involved in state matters in Africa and South America.

<sup>179</sup> DynCorp Int’l LLC, Quarterly Report (Form 10-Q), at 19 (Nov. 12, 2009); see also August Cole, *DynCorp Fires Executive Counsel*, WALL ST. J., Nov. 28–29, 2009, at B5 (reporting the termination of DynCorp’s senior vice president, executive counsel, and chief compliance officer shortly after the firm disclosed that subcontractors may have broken U.S. law).

<sup>180</sup> See OFFICE OF DEPUTY INSPECTOR GEN. FOR INVESTIGATIONS, DEP’T OF DEF. OFFICE OF THE INSPECTOR GEN., ASSESSMENT OF DOD EFFORTS TO COMBAT TRAFFICKING IN PERSONS: PHASE II—BOSNIA-HERZEGOVINA AND KOSOVO 10-11 (2003) [hereinafter OFFICE OF DEPUTY INSPECTOR GEN. FOR INVESTIGATIONS], available at [http://www.dodig.mil/fo/foia/HT-Phase\\_II.pdf](http://www.dodig.mil/fo/foia/HT-Phase_II.pdf) (investigating claims of human trafficking of underage women and a pornographic videotape that appeared to document a rape by DynCorp employees); see also Mary Alice Robbins, *RICO Used in Wrongful*

According to congressional reports, the contractor overcharged the government in providing much-needed fuel in Iraq.<sup>181</sup> The company also reportedly cut corners with regard to vital national security staffing, assigning “waitresses, security guards, cooks, and cashiers” to maintain combat aircraft.<sup>182</sup> In a seventy-page amended complaint, a previous employee alleged ten company schemes, several of which involved many subschemes, to defraud the U.S. government.<sup>183</sup>

DynCorp, on behalf of the U.S. government, also runs counter-narcotics operations in South America.<sup>184</sup> On September 11, 2001, a

*Termination Suit*, TEX. LAW., Apr. 2, 2001, at 1, available at 2001 WLNR 12941467 (reporting a suit by a DynCorp whistleblower alleging DynCorp employees purchased women and girls from Serbian Mafia members who brought them into Bosnia from other Eastern European countries); Robert Capps, *Sex-Slave Whistle-Blowers Vindicated*, SALON.COM, (Aug. 6, 2002), <http://dir.salon.com/story/news/feature/2002/08/06/dyncorp/index.html> (recounting that a tribunal in the U.K. vindicated a whistleblower of the DynCorp Bosnia sex trade by ruling in her favor).

<sup>181</sup> See OFFICE OF THE SPECIAL INSPECTOR GEN. FOR IRAQ RECONSTRUCTION, JANUARY QUARTERLY AND SEMI-ANNUAL REPORT 21 (2005), available at [http://www.sigir.mil/files/quarterlyreports/January2005/Report\\_-\\_January\\_2005.pdf](http://www.sigir.mil/files/quarterlyreports/January2005/Report_-_January_2005.pdf) (estimating that DynCorp may have overcharged the government by as much as \$600,000, with a potential additional claim of \$85,000).

<sup>182</sup> P. W. SINGER, *supra* note 58, at 156.

<sup>183</sup> The ten schemes were:

seeking double reimbursement for travel expenses; seeking reimbursement for inflated or unearned per diem, danger pay, and post differential allowances; charging the Government for services without verifying documentation, such as time cards; seeking reimbursement for employee living expenses such as cable television and lawn services that were not payable under the INLEA Contract; failing to return relocation expenses advanced by the Government when employees did not relocate or resigned shortly after relocating; failing to return payroll expenses advanced by the Government but never paid by DynCorp; seeking reimbursement for severance payments and associated attorneys' fees, which were not payable under the INLEA Contract; seeking reimbursement for employee expenses without supporting documentation; seeking reimbursement for compensation to unapproved employees; charging the Government for purported expenses that were actually embezzled by a DynCorp employee, and failing to reimburse the Government upon discovering the embezzlement; and seeking reimbursement for a variety of other general expenses either not earned or not permitted under the INLEA Contracts, including double-charging for vacation pay, seeking reimbursement for rental car damages that were paid by an insurance company, and seeking reimbursement for employees' personal travel and cell phone expenses.

United States *ex rel.* Longest v. DynCorp, No. 03-0816, 2006 WL 47791, at \*2 (M.D. Fla. Jan. 9, 2006).

<sup>184</sup> See Defendants' Answer at 1, *Quinteros v. DynCorp*, 677 F. Supp. 2d 330 (D.D.C. 2007) (No. 07-01042), 2007 WL 4459753 (admitting that the company had “acted pursuant to its contracts with the United States government to assist with the

class action lawsuit on behalf of 10,000 citizens of Ecuador was filed in the U.S. District Court for the District of Columbia against DynCorp and several previous affiliates.<sup>185</sup> The complaint alleged personal injury, property damage, and wrongful death resulting from DynCorp's fumigation of crops in Colombia and adjacent land in Ecuador.

Four more lawsuits relating to the same underlying allegations followed on December 4, 2006, December 29, 2006, March 14, 2007, and April 24, 2007.<sup>186</sup> Three of these suits, filed on behalf of three Ecuadorian provinces, alleged violations of Ecuadorian law, international law, and Florida state statutory and common law, including negligence, trespass, and nuisance; the fourth case, filed on behalf of 1663 citizens of the Ecuadorian provinces of Esmeraldas and Sucumbíos, alleged personal injury, negligence, trespass, battery, assault, intentional infliction of emotional distress, violations of the Alien Tort Claims Act,<sup>187</sup> and violations of international law.<sup>188</sup> DynCorp claimed as its fifth defense that it may not be able to defend itself in the suit "based on the U.S. government's claims of confidentiality or 'military and state secrets' regarding documents that are necessary to prove the defendants' lack of responsibility or culpability for the claims made against them in this suit."<sup>189</sup> The court consolidated the four suits on May 22, 2007, and transferred the case to the U.S. District Court for the District of Columbia.<sup>190</sup>

In DynCorp's Quarterly Report filed with the Securities and Exchange Commission on November 7, 2007, the company explained why it would not be held accountable for its actions: "The spraying

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aerial eradication of coca and poppy plants in the Republic of Colombia"); *see also* DynCorp Int'l LLC, Quarterly Report, *supra* note 179, at 10.

<sup>185</sup> *Id.*

<sup>186</sup> *Id.* at 9.

<sup>187</sup> 28 U.S.C. § 1350 (2006).

<sup>188</sup> Consolidated Complaint at 14, *Quinteros*, 677 F. Supp. 2d 330 (No. 07-1042), 2007 WL 4459752; *see also* DynCorp Int'l LLC, Quarterly Report, *supra* note 179, at 16.

<sup>189</sup> Defendants' Answer, *supra* note 184, at 16.

<sup>190</sup> Consolidated Complaint, *supra* note 188, at 1-2. The same set of facts gave rise to *Province of Sucumbios v. DynCorp Int'l LLC*, No. 06-61926 (S.D. Fla. filed Dec. 27, 2006) and *Province of Esmeraldas v. DynCorp Int'l LLC*, No. 07-60311 (S.D. Fla. filed Mar. 5, 2007). These two cases were consolidated into No. 06-61760 on May 18, 2008. Later, *Quinteros v. DynCorp Aerospace Operations LLC*, No. 06-61760 (S.D. Fla. filed Nov. 21, 2006) and *Province of Carchi, Republic of Ecuador v. DynCorp Aerospace Operations LLC*, No. 07-60550 (S.D. Fla. filed Apr. 17, 2007) were consolidated into No. 06-61760 on September 15, 2010. *Province of Carchi*, No. 07-60550, at 2-3 (S.D. Fla. May 18, 2007) (order consolidating the actions and administratively closing case number 07-60550); Defendants' Answer, *supra* note 184, at 1; *see also* DynCorp Int'l LLC, Quarterly Report, *supra* note 179, at 10.

operations were and continue to be conducted under a DoS [State Department] contract in cooperation with the Colombian government. The terms of the DoS contract provide that the DoS will indemnify the company against third-party liabilities arising out of the contract, subject to certain limitations.”<sup>191</sup>

Among the most prominent of the state secrets suits are those centered on coercive interrogation and rendition. While much of the focus has been on suits lodged against the executive branch and successive administrations’ stance on the privilege, precious little attention has been paid to such suits as a species of private indemnity. In *Mohamed v. Jeppesen Dataplan*, five plaintiffs alleged that the company logged flight plans for the so-called “extraordinary rendition” of suspects to third countries, where they were tortured and held without charge.<sup>192</sup> Plaintiffs filed suit on May 30, 2007.<sup>193</sup> Unusually, the United States moved to intervene in the case in October 2007—before Jeppesen even answered the complaint.<sup>194</sup> CIA Director General Michael Hayden then submitted declarations of state secrets.<sup>195</sup> The district court, following an in camera, ex parte review of the classified version, concluded that the very subject matter of the suit represented a state secret, thus warranting dismissal.<sup>196</sup> In January 2009, the Obama Administration issued an executive order to ensure that the interrogation

<sup>191</sup> DynCorp Int’l LLC, Quarterly Report, *supra* note 179, at 10.

<sup>192</sup> *Mohamed v. Jeppesen Dataplan, Inc.*, 563 F.3d 992, 997-98 (9th Cir. 2009), *amended and superseded by* 579 F.3d 949 (9th Cir. 2009), *reh’g granted*, 586 F.3d 1108 (9th Cir. 2009), *rev’d*, 614 F.3d 1070 (9th Cir. 2010) (en banc).

<sup>193</sup> *Mohamed v. Jeppesen Dataplan, Inc.*, 539 F. Supp. 2d 1128, 1129-30 (N.D. Cal. 2008), *rev’d*, 563 F.3d 992 (9th Cir. 2009), *amended and superseded by* 579 F.3d 949 (9th Cir. 2009), *reh’g granted*, 586 F.3d 1108 (9th Cir. 2009), *aff’d*, 614 F.3d 1070 (9th Cir. 2010) (en banc).

<sup>194</sup> *Mohamed v. Jeppesen Dataplan, Inc.*, No. 07-02798, at 2 (N.D. Cal. Feb 13, 2008) (order granting the United States’ motion to intervene and granting the United States’ motion to dismiss with prejudice); Civil Minutes, *Jeppesen Dataplan, Inc.*, 539 F. Supp. 2d 1128 (No. 07-02798); Reply in Support of Motion to Dismiss, or, in the Alternative, for Summary Judgment by the United States of America at 7, *Jeppesen Dataplan, Inc.*, 539 F. Supp. 2d 1128 (No. 07-02798), 2008 WL 273865; Memorandum of Plaintiffs in Opposition to the United States’ Motion to Dismiss or, in the Alternative, for Summary Judgment at 19, *Jeppesen Dataplan, Inc.*, 539 F. Supp. 2d 1128 (No. 07-02798), 2007 WL 4438281; Notice of Motion and Motion to Intervene at 2, *Jeppesen Dataplan, Inc.*, 539 F. Supp. 2d 1128 (No. 07-02798), 2007 WL 3194319; Notice of Motion and Motion to Dismiss, or, in the Alternative, for Summary Judgment by the United States of America at 2, *Jeppesen Dataplan, Inc.*, 539 F. Supp. 2d 1128 (No. 07-02798), 2007 WL 3223297.

<sup>195</sup> See *Jeppesen Dataplan, Inc.*, 563 F.3d at 999 (stating that Hayden filed two declarations in support of the motion to dismiss, one of which was classified and the other public).

<sup>196</sup> *Jeppesen Dataplan, Inc.*, 539 F. Supp. 2d at 1132, 1136.

of individuals held by the United States be conducted in a manner consistent with the Geneva Conventions.<sup>197</sup> The document went on to create a special task force to study rendition, with the purposes of

ensur[ing] that such practices comply with the domestic laws, international obligations, and policies of the United States and do not result in the transfer of individuals to other nations to face torture or otherwise for the purpose, or with the effect, of undermining or circumventing the commitments or obligations of the United States to ensure the humane treatment of individuals in its custody or control.<sup>198</sup>

While it is important to distinguish between interrogation, rendition, and extraordinary rendition, these and other steps taken by the new Administration signaled a shift in U.S. policy away from transferring prisoners to other countries for coercive interrogation.<sup>199</sup> Leon Panetta, moreover, subsequently stated during his confirmation hearings for CIA Director that he would no longer engage in extraordinary rendition, as it had been outlawed by executive order.<sup>200</sup> Nevertheless, the Obama Administration maintained its stance that the *Jeppesen* suit centered on a state secret and should not be allowed to proceed.

The Ninth Circuit reversed the district court.<sup>201</sup> Judge Hawkins, writing for the panel, held that the suit was not barred under either *Totten* or *Reynolds*, that classification alone did not compel a finding of state secrets, and that the case should be allowed to proceed with state

<sup>197</sup> See Exec. Order No. 13,491, 74 Fed. Reg. 4893, 4894 (Jan. 27, 2009) (prohibiting “violence to life and person” and “[o]utrages upon personal dignity . . . whenever such individuals are in the custody or under the effective control of an officer, employee, or other agent of the United States Government or detained within a facility owned, operated, or controlled by a department or agency of the United States”).

<sup>198</sup> *Id.* at 4895; see also Exec. Order No. 13,493, 74 Fed. Reg. 4901, 4901 (Jan. 27, 2009) (creating a special task force to review lawful options with respect to the detention and transfer of individuals apprehended in armed conflict and counterterrorism operations consistent with national security and foreign policy interests).

<sup>199</sup> A U.S. Department of Justice Press Release in August 2009 stated that the United States would continue to send suspects to third-party countries after obtaining assurances that the prisoners would be treated humanely and after securing the ability to periodically monitor their individual situations. See Daphne Eviatar, *Commission Inquiry into Rendition May Rankle Obama Administration*, WASH. INDEPENDENT, Aug. 27, 2009, <http://washingtonindependent.com/56888/commission-inquiry-into-rendition-may-rankle-obama-administration> (comparing the Obama Administration’s approach to that of the Bush Administration and suggesting that the Department of Justice Press Release indicates the Obama Administration may be resistant to an inquiry into rendition).

<sup>200</sup> Editorial, *Not Even a Little Torture*, L.A. TIMES, Feb. 14, 2009, at A24.

<sup>201</sup> *Mohamed v. Jeppesen Dataplan, Inc.*, 563 F.3d 992 (9th Cir. 2009), *amended and superseded by* 579 F.3d 949 (9th Cir. 2009), *reh’g granted*, 586 F.3d 1108 (9th Cir. 2009), *rev’d*, 614 F.3d 1070 (9th Cir. 2010) (en banc).

secrets treated as an evidentiary rule, not a justiciability doctrine.<sup>202</sup> On December 15, 2009, the Ninth Circuit assembled en banc to reconsider the case.<sup>203</sup> In a 6-5 decision, the court ruled that the five plaintiffs could not use even public documents to make a case that the company played a pivotal role in the rendition program.<sup>204</sup> Judge Raymond Fisher, writing for the majority, suggested that the executive branch could make reparations to the five men—or the legislature could open an investigation, pass a private bill, or introduce remedial legislation. But the judiciary’s hands were tied.<sup>205</sup>

*Jeppesen* is not the only case to challenge the role of private contractors in the exercise of interrogation. On June 30, 2008, an Iraqi filed a complaint against CACI International, L-3 Services (formerly Titan Corporation), and Timothy Dugan, formerly employed as a screener and interrogator for CACI International, in the U.S. District Court for Ohio, Southern District, Eastern Division.<sup>206</sup> The plaintiff alleged repeated torture at the hands of defendants (including electric shock, beatings, food deprivation, sleep deprivation, sensory deprivation, extreme temperature exposure, forced nakedness, stress positions, and death threats) while imprisoned in Abu Ghraib.<sup>207</sup> The suit centered on violations of domestic and international law, with counts including cruel, inhuman, and degrading treatment; torture; war crimes; assault and battery; sexual assault and battery; intentional infliction of emotional distress; negligent hiring and supervision; and civil conspiracy, as well as aiding and abetting to many of the same.<sup>208</sup> The court granted the defendant’s motion to change venue in August 2008, at which point the case was transferred to the Eastern District of Virginia.<sup>209</sup> The court subsequently dismissed the plaintiff’s claims against L-3 and Dugan without prejudice, accepting an amended

<sup>202</sup> *Id.* at 1004-07.

<sup>203</sup> *Jeppesen Dataplan, Inc.*, 614 F.3d at 1070.

<sup>204</sup> *See id.* at 1094 (Hawkins, J., dissenting) (“[Plaintiffs] are not even allowed to attempt to prove their case by the use of nonsecret evidence in their own hands or in the hands of third parties.”).

<sup>205</sup> *Id.* at 1091-92 (majority opinion); *see also* Laura K. Donohue, *State Secrets: Contractors’ Easy Out*, WASH. POST, Oct. 8, 2010, at A19.

<sup>206</sup> Civil Complaint and Jury Demand at 1-3, *Al Shimari v. Dugan*, No. 08-0637 (S.D. Ohio June 30, 2008).

<sup>207</sup> *Id.* at 4-5.

<sup>208</sup> *Id.* at 16-29.

<sup>209</sup> *Al Shimari*, No. 08-0637 (S.D. Ohio Aug. 7, 2008) (order granting transfer of venue).

complaint on September 15, 2008.<sup>210</sup> The case, which continued against CACI, is currently on appeal following partial denial of CACI's motion to dismiss.

As of the time of writing, although CACI has claimed protection under the state secrets privilege, the Department of Defense has represented that it does not intend to intervene.<sup>211</sup> Nevertheless, the case illustrates how uneasily the PMC phenomenon sits within the current law. Had the contractors been troops enlisted in service of the U.S. government, and had the state come forward to claim the state secrets privilege, the court's hands would be tied. However, it is not at all clear how the court should treat a similar assertion from a private corporation—nor is it clear how, exactly, international law could be applied to a private actor:

THE COURT: You want me to go way down the road on this, and I'm trying to understand how do I instruct the jury on such a thing. . . .

. . . .

. . . [T]he soldier would be absolutely immune if the government came forward and asserted immunity.

[ATTORNEY FOR THE PLAINTIFFS]: That's correct, Your Honor. And in the same way, what they're asking for here basically is to put themselves in the shoes of the soldiers. And they're not allowed to be in the shoes of the soldiers for a couple reasons. They're corporate employees who had a contractual duty to obey the law. And the United States, the military, has not intervened. . . .

. . . .

The military has also represented that it does not intend to invoke the state secrets. So what you're really dealing with here is you're dealing with a group of people, some of whom are military and some of whom are corporate employees, all of whom are bad actors in the sense that they conspired to torture.

Now, they have different—they have different levels of immunity. . . . But the duty, the duty is the same. They all have the same duty not to torture.

THE COURT: Well, I don't think that anyone disputes nor I don't [sic] think that CACI is saying it has any right to torture. . . .

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<sup>210</sup> *Al Shimari v. CACI Int'l, Inc.*, No. 08-0827 (E.D. Va. Sept. 12, 2008) (order dismissing claims against Dugan without prejudice); *Al Shimari*, No. 08-0827 (E.D. Va. Aug. 20, 2008) (order dismissing claims against L-3 without prejudice); Amended Complaint, *Al Shimari*, No. 08-0827 (E.D. Va. Sept. 15, 2008).

<sup>211</sup> Transcript of Motions Hearing at 20, *Al Shimari*, No. 08-0827 (E.D. Va. Oct. 24, 2008).

The more precise legal question I have today is whether the victim of torture in a battlefield circumstances [sic] who has been detained in the military prison can come into federal court and assert some type of tort claim against the soldiers or the private—more precisely the private contractor who carried out the interrogation and allegedly carried out the torture. That is the legal question. . . .

. . . .

. . . [T]he claim here is one of some type of negligence of some sort, and I don't know what that is. I mean, I know that it violates Geneva Convention and the law. You shouldn't torture people. But what is the duty here? . . .

. . . .

. . . [M]y question has to do with the government contractors who are interrogators or others who are breaking the law by torturing people in a battle zone in a military prison whether such a case has been brought to trial in federal court.

. . . .

Why shouldn't a government contractor who has been engaged to carry on a government function which is interrogation of detainees in a military detention be held immunized from suit as if they were soldiers? Aren't they soldiers in all but uniform?<sup>212</sup>

Indeed, why *shouldn't* government contractors, fulfilling the same functions as soldiers, benefit from the same legal protections? The question is whether contractors would thus be subject to the same military rules which, in the absence of civil penalties, apply to soldiers.<sup>213</sup>

The case also brings out the difficult position in which a court confronted with such cases finds itself.

[ATTORNEY FOR THE PLAINTIFFS]: [P]erhaps on your precise question as to whether a government contractor has been brought to a jury, the answer to that I believe is no.

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<sup>212</sup> Transcript of Motions Hearing, *supra* note 211, at 19-23, 31.

<sup>213</sup> In 2006, Congress amended one of the jurisdictional provisions of the Uniform Code of Military Justice, 10 U.S.C. § 802(a) (2006), to extend jurisdiction over "persons accompanying the armed forces in the field" to include both contingency operations and declared wars. John Warner National Defense Authorization Act for Fiscal Year 2007, Pub. L. No. 109-364, § 552, 120 Stat. 2083, 2217 (2006) (codified at 10 U.S.C. § 802(a)). The change could allow courts-martial jurisdiction to reach contractors. There is some question as to whether this provision would survive judicial review. *See Reid v. Covert*, 354 U.S. 1, 3, 39-41 (1957) (holding that the military could not try the civilian wife of a soldier under military jurisdiction for the murder of her husband, which occurred on a military base). Appellate review of this authority has yet to occur.

THE COURT: So I would be the first district judge in America to allow such a claim to go forward?

[ATTORNEY FOR THE PLAINTIFFS]: Yes, Your Honor.

THE COURT: The first out of 1,236 district judges to let it go forward?

[ATTORNEY FOR THE PLAINTIFFS]: Your Honor, Judge Robertson in the District of Columbia just a few miles across the river was letting it go forward. It's up on appeal, but he let it go forward. . . .

THE COURT: I know Judge Robertson. I would follow his opinion if I thought that it was judicially sound. And it may be in a D.C. Circuit.

I'm in the Fourth Circuit and as you know, we've had Hamdi and several other cases involving Moussaoui where this circuit is really conservative and they are, you know, very expansive in their view of what the government can do particularly in a wartime and a battlefield.

District judges around here have been beaten down three or four times involving those issues. It's only been the Supreme Court that stood up and said well, wait a minute in Hamdi, the right of habeas corpus does apply on the battlefield to people detained here.

So, I'm in a Fourth Circuit circumstance where I've got to be very thoughtful about how I do this. And so, if I'm going to do this, this one sentence from Judge Robertson's opinion is not going to help me.<sup>214</sup>

The application of international law to contractors involved in hostilities in Afghanistan and Iraq raises novel questions. Courts appear uneasy about being the first to forge into such new territory.

Additional suits against CACI, alleging torture, are working their way through the courts.<sup>215</sup> These and other cases demonstrate the dif-

<sup>214</sup> *Id.* at 24-26.

<sup>215</sup> In June 2004, a class action lawsuit alleging violations of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961-1968 (2006), the Alien Tort Claims Act, 28 U.S.C. § 1350, the Geneva Conventions, the U.S. Constitution, and common law torts was brought against Titan Corporation, CACI International, and contractors at Abu Ghraib. *Class Action Alleging Violations of RICO, Conspiracy to Violate RICO, Violations of the Alien Tort Claims Act, Violations of the Geneva Convention, Violations of the United States Constitution, Violations of the Religious Land Use and Institutionalized Persons Act, and Common Law Torts at 1, Al Rawi v. Titan Corp.*, 353 F. Supp. 2d 1087 (S.D. Cal. 2004) (No. 04-1143), 2004 WL 2545652. The complaint stated,

Defendants contracted with the United States to provide interrogation and other related intelligence services. Instead of providing such services in a lawful manner, they conspired with each other and with certain United States government officials to direct and conduct a scheme to torture, rape, and, in some instances, summarily execute Plaintiffs.

*Id.* Plaintiff sought a permanent injunction against the conduct, compensatory and punitive damages, treble damages, attorneys' fees under RICO, declaratory relief, and

ficuity of addressing the role of PMCs under more traditional military doctrines.<sup>216</sup> For the most part, these suits are still in their early stages; it is too soon to know on which defenses the defendants will rely or whether the Department of Defense will step in to support their state secrets claims. These suits reflect the many different functions private industry has assumed in national security, both in the multitude of industries implicated and the degree to which private actors now populate traditional military operations.

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a permanent injunction against any future contracting with the U.S. government. *Id.* In a parallel case, also brought in the Southern District of California, plaintiffs again lodged a suit against Titan, CACI International, and others. *See Saleh v. Titan Corp.*, 361 F. Supp. 2d 1152, 1155 (S.D. Cal. 2005) (suing for alleged abuses in Iraqi prisons). For a discussion of the relationship between these cases, see Motion to Intervene for Purposes of Opposing Plaintiffs' Motion to Enjoin Pending 'Duplicative Action' in District of Columbia and Brief in Support Thereof at 1-3, *Saleh*, 361 F. Supp. 2d 1152 (No. 04-1143), 2004 WL 2714618. The defendants in *Saleh* asked the court to enjoin another suit brought in the District of Columbia, Complaint, *Ibrahim v. Titan Corp.*, 556 F. Supp. 2d 1 (D.D.C. 2007) (No. 04-01248), 2004 WL 1773191, on the grounds that the *Ibrahim* suit was duplicative and sought redress for the same harms. *See Iraqi Prisoners Fight Dismissal of Suit Against Contractors*, ANDREWS LITIG. REP., Dec. 16, 2004, at 3, 3-4 (summarizing the claims in *Al Rawi* and the parallel litigation pursued in *Ibrahim*). CACI objected that

[b]ecause most, if not all, of the evidence relating to each detainee's arrest and detention is likely highly sensitive and in the possession of the United States government, it also is likely that the United States will assert a state secrets privilege to prevent discovery of these materials. . . . This is precisely the type of wartime claim that defies resolution through the judicial process.

Memorandum of Points and Authorities in Support of the Motion of Defendants CACI International Inc., CACI INC.-FEDERAL, and CACI N.V. to Dismiss Plaintiffs' Second Amended Complaint at 15-16, *Saleh*, 361 F. Supp. 2d 1152 (No. 04-01143), 2004 WL 5577919.

<sup>216</sup> *See, e.g., Fisher v. Halliburton*, 454 F. Supp. 2d 637, 642-44 (S.D. Tex. 2006) (deciding whether certain actions were taken by the Army or the private military contractor), *rev'd sub nom. Lane v. Halliburton*, 529 F.3d 548, 568 (5th Cir. 2008). Some suits have been dismissed on the grounds that they raise nonjusticiable political questions. *See, e.g., Smith v. Halliburton Co.*, No. 06-0462, 2006 WL 2521326, at \*5-6 (S.D. Tex. Aug. 30, 2006) ("Even if defendants had some responsibility for implementing force protection measures promulgated by the military, the court would still be called upon to examine the military's decision-making in many respects . . ."); *Whitaker v. Kellogg Brown & Root, Inc.*, 444 F. Supp. 2d 1277, 1282 (M.D. Ga. 2006) (finding that "no judicially discoverable and manageable standards" existed to resolve the questions presented). But not all such suits have come out this way, as PMC cases often sit uneasily in the *Baker* analysis. *See, e.g., Lane*, 529 F.3d at 568 ("It appears . . . that these tort-based claims of civilian employees against their civilian employers can be separated from the political questions that loom so large in the background."); *cf. Baker v. Carr*, 369 U.S. 186, 228 (1962) ("[T]he nonjusticiability of claims resting on the Guaranty Clause which arises from their embodiment of questions that were thought 'political' can have no bearing upon the justiciability of the equal protection claim presented in this case.").

Two final points are left to make about these contractor cases. First, in many of them, defendants answered complaints by claiming state secrets as an affirmative defense well before—and often in the absence of—the government intervening and formally invoking the privilege. But as seen in the foregoing examples, and by the amount of time such suits take to work their way through the courts, the specter of state secrets may play a significant role. The mere assertion of state secrets by a government contractor may help to get a suit removed to federal court, at which point lengthy delays may ensue as the contractor, either unable or unwilling to pressure the government to provide enough information even to sustain the state secrets claim, draws out the suit.

Second, the effect of companies claiming that state secrets are at stake in one suit may have important carryover effects on the immediate suit and in parallel, related actions—even without the state formally intervening and invoking the privilege. On September 11, 2004, for example, a Hellenic Army CH-47D Chinook helicopter crashed into the Aegean Sea.<sup>217</sup> Three years later, the survivors of four Greek passengers who died in the accident brought suit in Cook County, Illinois, alleging product liability.<sup>218</sup> The following day, the plaintiffs filed a virtually identical complaint in the U.S. District Court for the Eastern District of Pennsylvania.<sup>219</sup> Boeing removed the case to the U.S. District Court for the Northern District of Illinois on the grounds of federal officer removal and federal jurisdiction arising from the Death on the High Seas Act;<sup>220</sup> it then filed a motion to transfer the case to the Eastern District of Pennsylvania, where the two cases could be consolidated.<sup>221</sup> In doing so, Boeing again claimed both a government contractor and a state secrets privilege defense.

Boeing invokes the State Secrets Privilege. The CH-47D helicopter is the United States Army's primary multi-mission, heavy-lift transport helicopter, providing tactical and combat support for armed forces at wartime. The CH-47D helicopter is also a key combat support tool for the Hellenic Army's armed forces. Furthermore, the crash of the subject helicopter occurred while members of the Hellenic Army were transporting a number of high officials of the Greek Orthodox Church, including Petros VII, the Patriarch of the Church. Some information relevant to is-

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<sup>217</sup> Defendant The Boeing Company's Opposition to Plaintiffs' Motion to Remand at 1, *Papapetrou v. Boeing Co.*, No. 07-5862 (N.D. Ill. Dec. 4, 2007), 2007 WL 4874802.

<sup>218</sup> *Id.*

<sup>219</sup> *Id.*

<sup>220</sup> 46 U.S.C. §§ 30301–30308 (2006).

<sup>221</sup> *Id.* at 1-2.

sues herein may, therefore, be state secrets about which the United States and/or Greek Governments may assert privilege, thereby impairing Boeing's ability to defend itself herein.<sup>222</sup>

Honeywell International, also named as a defendant in the suit, similarly raised state secrets as an affirmative defense.<sup>223</sup> And Boeing again raised state secrets as a defense in a parallel suit.<sup>224</sup>

### C. *State Secrets as a Litigation Strategy*

The contractor cases suggest that we are just now starting to see lawsuits coming out of the wars in Afghanistan and Iraq, that we should expect to see more of them in the years ahead, and that private corporations are counting on the government to intervene on their behalf.

For many of these suits, it is too early to know what will happen.<sup>225</sup> Thus far, at least, the executive seems to have adopted a conservative

<sup>222</sup> Defendant The Boeing Company's Notice of Removal at 5, *Papapetrou*, No. 07-5892 (N.D. Ill. Oct. 17, 2007), 2007 WL 4874834 (citations omitted).

<sup>223</sup> Answer of Honeywell International Inc. to Plaintiffs' Complaint at 13, *Papapetrou*, No. 07-5892 (N.D. Ill. Oct. 19, 2007), 2007 WL 3232423.

<sup>224</sup> See The Boeing Company's Answer to Plaintiff's Complaint at Law at 10, *Nolan Law Grp. v. Boeing Co.*, No. 09-8056 (Ill. Cir. Ct. Dec. 30, 2009) (stating as the sixth affirmative defense: "The Complaint, and each purported cause of action therein, may be barred, in whole or in part, if either the United States Government or the Greek Government invokes the state's secrets privilege to preclude production of information necessary to Boeing's defense or to Plaintiffs' *prima facie* case."); see also Complaint and Demand for Jury Trial at 2, *Kerwood v. Lear Siegler Servs.*, No. 05-61790 (S.D. Fla. Nov. 21, 2005), 2005 WL 3522813 (alleging a helicopter crash on November 23, 2003); Answer and Affirmative Defenses of Defendant Smith's Aerospace LLC to Second Amended Complaint and Demand for Jury Trial at 10, *Kerwood*, No. 05-61790 (S.D. Fla. Jan. 30, 2005), 2005 WL 3791283 (claiming a denial of due process if the United States invokes the state secrets privilege to limit discovery). The state secrets privilege was similarly asserted in a sister suit. See Answer and Affirmative Defenses of Defendant Smith's Aerospace LLC to Amended Complaint and Demand for Jury Trial at 10, *La-Pointe-Plumhoff v. Lear Siegler Servs., Inc.*, No. 05-61791 (S.D. Fla. Jan. 30, 2006), 2006 WL 424023 ("Invocation of the state secrets privilege by the United States government will preclude SMITHS from obtaining full and necessary discovery, and thereby result in a denial of due process.").

<sup>225</sup> Many more cases, ripe for state secrets assertions, loom on the horizon. For example, on September 9, 2007, Blackwater employees opened fire in Al Wathba Square, Baghdad, killing unarmed civilians in an incident described in the complaint as merely "one episode in a lengthy pattern of egregious misconduct by Xe-Blackwater acting in Iraq, Afghanistan and around the world." Complaint at 4, *In re Xe Servs. Alien Tort Litig.*, 665 F. Supp. 2d 569 (E.D. Va. 2009) (No. 09-00616), 2009 WL 2390908. This case was one of five similar claims brought against the company, alleging violation of the Alien Tort Statute and the Racketeer Influenced Corrupt Organizations Act—suits consolidated for purposes of discovery and retrial motions. See *In re Xe Servs. Alien Tort Litig.*, 665 F. Supp. 2d at 569, 573 (combining Nos. 09-0615, 09-0616, 09-0617, 09-0618, and 09-0645). In total, some sixty-four plaintiffs (forty-five Iraqi nationals

approach: it only joins once it is clear that a suit is going to move forward, and, even then, only in a subset of cases. At the broadest level, it appears that breach of contract, patent disputes, trade secrets, and tort cases centered on traditional military equipment give rise to more federal intervention than do class action torts or conduct-of-war disputes. But hedging must accompany any such tentative conclusions, as it is really too early to ascertain what the executive will do.<sup>226</sup>

What does appear to be consistent is that once an administration becomes involved and invokes the privilege, subsequent administrations hold the line. Why they do so may be important: for instance, it may be that, in every case, the new administration scrutinizes the list of cases it has inherited and concludes that the invocation of the privilege is valid. This explanation suggests that a merits analysis would find little out of order in how the doctrine operates in the courts. As a practical matter, however, this explanation is unlikely, not least because the Obama Administration appears to be the first to try to compile a list of state secrets cases. It is also highly doubtful that, over the past seven decades, not a single case out of hundreds demonstrated an improper invocation. *Reynolds* itself was based on a questionable claim.<sup>227</sup> More plausible explanations might point to bureaucratic inertia or the continued presence of the same civil servants that played a key role in the earlier period. Or it may be that there is very little downside to continuing the previous administration's policies while, on the other hand, there is much to gain by invoking state secrets. In some cases, it may simply relate to agencies' broad policies—such as intelligence organizations' blanket refusal to confirm or deny employment contracts—and to raise the state secrets privilege whenever such issues reach court.

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and the estates of nineteen deceased Iraqi nationals) sought damages for wrongful death and personal injury when Blackwater contractors shot or beat them. *Id.* at 573-74. Thus far, the suit has turned in large measure on the political question doctrine, but the pattern closely fits other tort claims in which the defendants assert the state secrets privilege.

<sup>226</sup> Dozens of cases are still working their way through the courts, the outcomes of which could significantly skew the statistics.

<sup>227</sup> *United States v. Reynolds*, 345 U.S. 1 (1953). The declassified report later demonstrated that the crash was caused by a fire in the aircraft's engine. Petition for a Writ of Error *Coram Nobis* to Remedy Fraud Upon This Court app. at 10a, *In re Herring*, 539 U.S. 940 (2003) (No. 02-0076) (Report of Special Investigation of Aircraft Accident Involving TB-29-100XX No. 45-21866). A subsequent application to the Supreme Court for a writ of error *coram nobis* failed. *In re Herring*, 539 U.S. at 940. The case was refiled. See *Herring v. United States*, 424 F.3d 384, 392 (3d Cir. 2009) (finding no fraud in the government's assertion of the privilege in 1953 on the grounds that some of the information contained in the report, in historic context, might have compromised national security).

Setting aside questions of justice, practical arguments militate against the use of state secrets in regard to breach of contract and patent disputes. Under such conditions, the state secrets privilege may prevent whistleblowers from being able to draw attention to contractors' failure to perform. For example, in a June 4, 2001, whistleblower qui tam action alleging that Raytheon had failed to perform on a defense contract, the Bush Administration invoked the state secrets privilege on January 15, 2003, and moved to dismiss the case, a request granted on February 24, 2003.<sup>228</sup> The state secrets privilege may similarly encourage contractors to engage in poor business practices with regard to subcontractors. Thus, pilots and flight crewmembers denied promised "hazard pay" for flights into and out of Baghdad, Iraq and Kabul, Afghanistan brought a class action lawsuit against Vision Airlines.<sup>229</sup> The defendant in the case claimed state secrets in relation to its contracts and payments with upstream contractors.<sup>230</sup> Smaller companies that specialize in cutting-edge technologies, moreover, may become reluctant to partner with corporations who essentially steal their technologies and then draw the veil of state secrets over the dispute. And larger companies may see little incentive not to adopt such predatory behavior.

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<sup>228</sup> Civil Minutes, United States *ex rel.* Schwartz v. Raytheon Co., No. 01-4937 (C.D. Cal. Feb. 24, 2003).

<sup>229</sup> Class Action Complaint at 2, Hester v. Vision Airlines, Inc., No. 09-00117 (D. Nev. Jan. 20, 2009), 2009 WL 274237.

<sup>230</sup> The docket records dispute the degree to which Vision Airlines is asserting state secrets. Compare Plaintiff's Reply in Support of the Motion to Compel at 5-6, *Hester*, No. 09-00117 (D. Nev. Aug. 6, 2009), 2009 WL 2481871 ("Vision's statement that its 'objections on the basis of the State Secrets Doctrine [are] limited to items requesting discovery related to its contracts and payments there under [sic] with upstream contractors, mainly Capital and McNeil' is demonstrably false. It has made no such effort to limit the assertion of this privilege, which it has no right to assert in any event, and instead has made blanket use of it in response to requests for production number 1, 9, 13, 15, and 19, and as to interrogatories number 1, 2, and 4. As we understand it, only the government contract itself is classified. Further, we do not believe that Vision is in possession of any classified documents, making its objections on this ground bad faith."), with Defendant Vision Airlines, Inc.'s Opposition to Plaintiff's Motion to Compel and Defendant Vision Airlines, Inc.'s Counter-motion to Compel at 13-14, *Hester*, No. 09-00117 (D. Nev. July 27, 2009), 2009 WL 2350802 (arguing that the defendants successfully invoked the privilege), and Defendant Vision Airlines, Inc.'s Opposition to Plaintiff's Motion to Compel and Defendant Vision Airlines, Inc.'s Counter-motion to Compel at 13, *Hester*, No. 09-00117 (D. Nev. July 27, 2009), 2009 WL 2350803 ("Defendant VISION'S objections on the basis of the State Secrets Doctrine is limited to items requesting discovery related to its contracts and payments there under [sic] with upstream contractors, mainly Capital and McNeil.").

On the contractor side, the suits implicate a spectrum of legal claims, and they involve a range of industries. The changing role of contractors in mainstream military activities, though, sits uneasily in the current legal regime. Private companies are not subject to the same constraints as the military. They do not fall directly within the U.S. command-and-control structure, and they often provide services that blur the lines between civilian and military functions. A U.S. military study on DoD contractors, created in response to concern that private entities were engaging in criminal activity, found that although contract employees were considered part of the military fighting force, they were “not subject to the same restrictions that are placed on U.S. Service members.”<sup>231</sup> The study explained:

[C]ontractor employees are sometimes permitted to live outside U.S.-controlled military installations and, with few restrictions, to circulate in host country communities. . . . DoD contractors also employ many host country nationals, all of whom live in local communities and whose behavior is neither restricted nor monitored by DoD authorities. As members of SFOR and KFOR, contractor employees are forbidden from patronizing establishments designated by the United Nations or the European Union Police Mission as off-limits because of illegal prostitution and human trafficking concerns. However, we found that while some contractors make an effort to monitor their employees’ activities and address employee misconduct, contractor behavior in this regard is not uniform. Not surprisingly, anecdotal evidence suggested some level of DoD contractor employee involvement in activities related to human trafficking in Bosnia-Herzegovina and Kosovo.<sup>232</sup>

Efforts to control corporate entities through contractual requirements may only be of limited effect. Between 2001 and 2009, for instance, Blackwater (recently renamed Xe Services), obtained some \$1.5 billion in government contracts.<sup>233</sup> The company’s founder and former Navy SEAL, Erik Prince, later confirmed that the company had participated in highly sensitive military and intelligence operations, including raids on suspected militants in Iraq and Afghanistan, and claimed that at one point the CIA asked the company to assassinate Pakistani nuclear scientist, A. Q. Khan.<sup>234</sup>

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<sup>231</sup> OFFICE OF DEPUTY INSPECTOR GEN. FOR INVESTIGATIONS, *supra* note 180, at 2.

<sup>232</sup> *Id.*

<sup>233</sup> Adam Ciralsky, *Tycoon, Contractor, Soldier, Spy*, VANITY FAIR, Jan. 2010, at 74, 75-76.

<sup>234</sup> Ciralsky, *supra* note 233, at 121; *see also Blackwater USA: Hearing Before the H. Comm. On Oversight and Gov’t Reform*, *supra* note 141, at 23 (statement of Erik D. Prince, Chairman, The Prince Group, LLC and Blackwater USA) (examining the impact of privatization on U.S. military forces); James Risen, *Blackwater Chief at Nexus of Military*

On September 16, 2007, Blackwater contractors were assigned to a Tactical Support Team, call sign “Raven 23,” whose function was to provide back-up fire support for other Blackwater personal security details operating in the city of Baghdad.”<sup>235</sup> The contractors “opened fire with automatic weapons and grenade launchers on unarmed civilians located in and around Nisur Square in central Baghdad, killing at least fourteen people, wounding at least twenty people, and assaulting but not injuring at least eighteen others.”<sup>236</sup> In December 2008, a federal grand jury indicted five of the company’s security guards on charges of manslaughter and weapons violations, while a sixth pled guilty to charges of voluntary manslaughter.<sup>237</sup>

In this case, the defendants’ signing of conditions for employment as State Department contractors played a role in the plea, as the State Department’s Mission Firearms Policy required that the use of deadly force to be objectively reasonable under all the circumstances known to the individual at the time.<sup>238</sup> The State Department contract, however, was not sufficient for a District of Columbia court to uphold a parallel civil action brought for war crimes under the Alien Tort

*and Business*, N.Y. TIMES, Oct. 8, 2007, at A6 (analyzing the relationship between Erik Prince’s political connections and his success).

<sup>235</sup> Factual Proffer in Support of Guilty Plea at 2, *United States v. Ridgeway*, No. 08-0341 (D.D.C. Nov. 18, 2008); *see also* *United States v. Slough*, 677 F. Supp. 112, 115 (D.D.C. 2009) (“In their zeal to bring charges against the defendants in this case, the prosecutors and investigators aggressively sought out statements the defendants had been compelled to make to government investigators in the immediate aftermath of the shooting and in the subsequent investigation.”); Information, *Ridgeway*, No. 08-0341 (D.D.C. Dec. 4, 2008) (alleging voluntary manslaughter and attempt to commit voluntary manslaughter).

<sup>236</sup> Factual Proffer in Support of Guilty Plea, *supra* note 235, at 2. However, *Slough* describes the factual circumstances differently.

[A] shooting incident erupted, during which the defendants allegedly shot and killed fourteen persons and wounded twenty others. The government contends that the dead and wounded were unarmed civilians who were the victims of unprovoked violence by the defendants. The defendants maintain that they came under attack by insurgents and that their actions constituted a legitimate response to a mortal threat.

*Slough*, 677 F. Supp. 2d at 116 (citation omitted).

<sup>237</sup> Indictment at 1, 3, *Slough*, 677 F. Supp. 2d 112 (No. 08-0360); *see also* Factual Proffer in Support of Guilty Plea, *supra* note 235, at 2 (describing the factual circumstances surrounding the deaths that occurred in Nisur Square). Judge Urbina later dismissed the indictment against Paul Slough, Evan Liberty, Dustin Heard, Donald Ball, and Nicholas Slatten on the grounds that the government utilized statements made to Department of State investigators that had been compelled under threat of job loss. *Slough*, 677 F. Supp. 2d at 115-16, 166.

<sup>238</sup> Factual Proffer in Support of Guilty Plea, *supra* note 235, at 3.

Claims Act, assault and battery, wrongful death, intentional and negligent infliction of emotional distress, and negligent hiring, training, and supervision.<sup>239</sup>

Contractor use of the state secrets privilege as an affirmative defense does have important benefits: it gives the other party early notice that concerns about confidential state material may hamper discovery or the development of the suit. In this capacity, private corporations' reference to the privilege may end up saving litigants money and resources, even as it alerts the courts to potentially problematic aspects of the claims in question. Such reference may also serve as a trigger for executive branch action, thus putting the burden on private corporations and not on the state to alert it to the public release of potentially damaging information. This does not absolve the government of its responsibility to recognize where its interests might be implicated, but it may be thought of as providing a safety net.

The mention of state secrets also may have other intended or unintended consequences: as illustrated above, federal courts may remove cases from the state level, based in part on the state secrets claim.<sup>240</sup> Such claims often appear to lead to lengthy lawsuits. In an altercation with Overland Storage, Inc., for example, Raytheon claimed that its "government customer of the programs at issue ha[d] informed Raytheon that these programs are state secrets"; however, efforts to obtain "a formal letter asserting the state secrets privilege" had "required the use of intermediaries," which had slowed the

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<sup>239</sup> See *Estate of Abtan v. Blackwater Lodge & Training Ctr.*, 611 F. Supp. 2d 1, 1, 4 (D.D.C. 2009) (staying the defendants' motion to allow plaintiffs to request discovery on venue).

<sup>240</sup> In addition to the documents cited above, see Plaintiffs' Opposition in *Getz*, *supra* note 121, at 1, which contends that the defendants had not identified the additional, specific information they needed from the Army. See also Defendant The Boeing Company's Opposition to Plaintiffs Motion to Remand, *supra* note 217, at 2 (arguing that the removal was not "defective"); Motion to Remand, *supra* note 160, at 6 (pointing out defendant's "weak" assertions). For example, Defendant's Notice of Removal in *Finnegan* contains the following:

In addition, because Plaintiffs' claims may implicate military classified information, the federal doctrine of state secrets is potentially applicable. Under *United States v. Reynolds*, 345 U.S. 1 (1953), the Executive Branch may invoke an absolute evidentiary privilege encompassing state secrets whose disclosure would harm the national security. . . .

Removal to this Court is proper in that federal question jurisdiction exists . . .

Notice of Removal at 4, *Finnegan v. Lucent Techs. Inc.*, No. 07-03261 (D.N.J. July 13, 2007), 2007 WL 4648084.

process.<sup>241</sup> In another Raytheon case, at the defendant's urging, the court extended the deadline for the government to intervene and invoke state secrets—with a consequence of further drawing out the litigation.<sup>242</sup> Lengthy time delays have become a common complaint of those involved in such suits.<sup>243</sup>

Facing a long process, which, in light of the credible threat determination, may well end in dismissal prior to trial, may prove a significant deterrent to litigants. Plaintiffs in tort cases, who may be suing for medical and other basic expenses, may not have the resources to engage in litigation, particularly if there is a high probability that the suit will be voided owing to the presence of state secrets further down the line. The same may hold for small technology companies, suing over patent rights or breach of contract. This may be no less true for suits lodged against the U.S. government where the potential applicability of the state secrets privilege is claimed or a stay of proceedings is requested to consider the state secrets implications.<sup>244</sup>

<sup>241</sup> Raytheon Company's Opposition to Overland Storage Inc's Motion to Compel Production of Documents Relating to Classified Programs at 2, *Raytheon Co. v. Overland Storage, Inc.*, No. 03-0013 (E.D. Tex. Mar. 3, 2004), 2004 WL 3359781.

<sup>242</sup> *See Wells v. Raytheon Sys. Co.*, No. 00-10922, at 2 (C.D. Cal. May 29, 2001) (order extending the deadline for government assertion of the state secrets privilege to July 13, 2001); *Wells*, No. 00-10922, at 23-25 (C.D. Cal. July 11, 2001) (order granting in part and denying in part defendant's motion for review and reconsideration) (extending the state secret assertion deadline to August 3, 2001, and refusing plaintiff's argument that Raytheon waived the privilege by failing to assert it); *Wells*, No. 00-10922, at 1, 35 (C.D. Cal. Jan. 17, 2002) (order from January 17, 2002, granting summary judgment for the defendant, which was then filed on January 25, 2002).

<sup>243</sup> *See, e.g.*, Plaintiffs' Opposition to Individual Capacity Defendants' Motion for Relief from the Court's Orders of April 27, 2009, and May 8, 2009 at 1, *Jewel v. Nat'l Sec. Agency*, No. 08-4373 (N.D. Cal. Aug. 24, 2009), 2009 WL 2876650 ("In the over three years that these cases have been pending, despite the ongoing nature of the harms and the accumulation of a mountain of pleadings and boxes of evidence in support of Plaintiffs' claims, the Government's strategy of raising and re-raising the same arguments based on the state secrets privilege and other governmental privileges has successfully limited forward motion toward the merits. This, despite repeated rejection of those arguments . . ."); Plaintiffs' Memorandum in Opposition to Defendants' Motion to Dismiss at 5, *Whitehead v. Baxter Healthcare Corp.*, No. 08-0421 (E.D. Mo. Feb. 23, 2009), 2009 WL 1092206 ("The tangled web of issues was due largely, in part, to what ultimately had nothing to do with the Whitehead Plaintiffs: state secrets privilege. Nonetheless, the state secrets issue plagued the Whiteheads for over one year, beginning on March 2, 2007." (emphasis omitted)).

<sup>244</sup> *See, e.g.*, Defendant United States of America's Reply Memorandum in Support of Its Motion to Stay Proceedings at 2, *Stevens v. United States*, No. 03-81110 (S.D. Fla. Mar. 5, 2004), 2004 WL 3705982 ("It is understandable that Plaintiff wishes a speedier resolution of the anthrax murders, but Plaintiff's good intentions will not lessen the damage that proceeding with this action would cause to the criminal investigation."); *see also* discussion *infra* Part III.

If the privilege is casting this shadow, the obvious question is whether we should be concerned about it. The government does have information that would, in the public domain, have a significant impact on U.S. national security. Dependent on the help of private contractors, the government is not the sole entity with access to such data. As for removal, we may well want cases potentially affecting state secrets to be dealt with in a federal forum. Whatever delays that exist may be minimal, and the intimidation that other parties may feel may be no different, or even less concerning than other power disparities that mark litigation. As long as the claim that state secrets may apply is a legitimate assertion, should the shadow matter?

But the cases studied point to an additional consideration: the potential for what could be considered a form of “graymail.” An increasing number of companies have intimate access to a broad range of government data. Although properly classified materials may be subject to other constraints, companies may threaten to reveal legally damaging or politically embarrassing information in the course of the lawsuit unless the state steps in to protect it. If the state refuses, the company may then start lodging subpoenas in an effort to draw out even more information with the knowledge of where weaknesses may be exploited—thus spurring the government to become involved.<sup>245</sup>

Even where the companies do not intend to elicit a protective response from the government, the nature of the information that would be required for the private entity to mount a reasonable defense may legally or politically compromise the government. The effect would thus be similar to efforts to involve the state in the judicial proceedings.

Quite apart from the potential use of sensitive information to draw the government into a suit, the government independently may have every motivation to do so: its security, after all, may depend on the viability of the corporate entity. Consider Raytheon, the fifth-largest U.S. government contractor.<sup>246</sup> According to the U.S. government, the company obtained between \$15.7 and \$16.2 billion in government contracts for fiscal year 2009.<sup>247</sup> The company produces the Patriot

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<sup>245</sup> This appears to be precisely what happened in *White v. Raytheon Co.*, No. 07-10222, at \*1-2 (D. Mass. Dec. 17, 2008), 2008 WL 5273290. See also *supra* notes 128-33 and accompanying text.

<sup>246</sup> See *Federal Contractor Misconduct Database*, PROJECT ON GOV'T OVERSIGHT, <http://www.contractormisconduct.org/index.cfm> (last visited Sept. 15, 2010).

<sup>247</sup> See *id.* (listing Raytheon as receiving an award of \$15.7 billion in fiscal year 2009); *Raytheon Company*, USASPENDING.GOV, <http://www.usaspending.gov> (search “Raytheon Company,” then check “2009” in the “By Fiscal Year” box) (last visited Sept. 15, 2010) (noting over \$16 billion dollars awarded to Raytheon).

ground-based air-defense missile system; ground-based phased-array radars integral to the U.S. Army's Theater Missile Defense Program; the Advanced Medium Range Air-to-Air Missile (AMRAAM), which is the primary air-to-air missile for the U.S. Air Force and Navy fighter aircraft; as well as the Tomahawk, TOW, Stinger, Maverick, Standard, High Speed Anti-Radiation Missile, Paveway laser-guided bombs, Extended Range Guided Munitions, and others.<sup>248</sup> It is also the prime contractor for the NATO Sea Sparrow Surface to Air Missile System.<sup>249</sup> Its Electronic Systems business segment focuses on electronic warfare, infrared, laser, and GPS technologies, as well as surveillance, reconnaissance, targeting, navigation, commercial, and scientific systems.<sup>250</sup> With the company so deeply embedded in the U.S. national security establishment, Raytheon can become indispensable during wartime. The bankruptcy of or significant financial losses to Raytheon could threaten national defense, as well as the provision of vital services.

Occasionally, the executive files a statement of interest, or explicitly reserves the right to invoke the state secrets privilege, without actually doing so.<sup>251</sup> At other times, it takes no action whatsoever. Under these circumstances, the tactical importance of state secrets claims ought not to be overlooked. In *In re September 11 Litigation*, the plaintiffs claimed state secrets as a tactical argument for why discovery involving the National Security Council (NSC) might be bothersome.<sup>252</sup>

<sup>248</sup> Raytheon Co., Annual Report (Form 10-K), at 4 (Mar. 24, 2003).

<sup>249</sup> *Id.*

<sup>250</sup> *Id.*

<sup>251</sup> *See, e.g.*, *Penn v. Aerospace Corp.*, No. 08-0620, 2009 WL 585839, at \*1 (E.D. Va. Mar. 6, 2009) (noting that the case was filed on June 13, 2008); *Penn*, No. 08-0620 (E.D. Va. Nov. 12, 2008) (order advising the government to be prepared on December 5, 2008, to report whether it intends to assert the state secrets privilege); *Penn*, No. 08-0620 (E.D. Va. Mar. 6, 2009) (order granting the defendant's summary judgment motion and dismissing the case with prejudice); *see also* *Amidax Trading Grp. v. S.W.I.F.T. SCRL*, 607 F. Supp. 2d 500, 508 (S.D.N.Y. 2009) (acknowledging that the defendants raised the possible invocation of the state secrets privilege in their memorandum, potentially obstructing the defendants' data from all plaintiffs); *Ibrahim v. Dep't of Homeland Sec.*, No. 06-00545, 2009 WL 5069133, at \*6 (N.D. Cal. 2009) (reserving the federal defendants' right to assert the state secrets privilege if the other privileges claimed relating to sensitive security information and law enforcement are found not to apply); Defendants' Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment and in Support of Defendants' Cross-Motion for Summary Judgment at 29 n.22, *Amnesty v. McConnell*, 646 F. Supp. 2d 633 (S.D.N.Y. 2008) (No. 08-6259), 2008 WL 4819852 ("To the extent classified information concerning the operation of surveillance under FAA did become an issue in this case or necessary to its resolution, the Government reserves the right to assert the privilege at such time.").

<sup>252</sup> *See, e.g.*, Revised Memorandum of Law in Opposition to the Motion of the Aviation Defendants for So-Called "Focused" Discovery from the Government at 20 n.17, *In re*

Los Alamos National Security, LLC also argued that “retaliatory actions will require judgments about classified information. The Sponsor may well intervene in this matter to assert a state secrets defense under *U.S. v. Reynolds* . . . .”<sup>253</sup> Overtly threatening language permeates these and other suits.<sup>254</sup>

Such claims, especially but not exclusively when supported by a statement of interest, may well be regarded as a credible threat because these companies *do* have access to a range of classified materials. While it is not known what the executive will do in the future, there is precedent in each of these areas where the government has intervened to invoke the state secrets privilege, and there is a framework of statutes and executive orders that supports such claims. The privilege, even when only threatened and not actually invoked by the executive, may thus affect both the courts and the litigants.

In conclusion, a final point deserves notice: set against the paltry number of corporate cases that have thus far made their way into the state secrets debate (e.g., *D.T.M. Research, L.L.C. v. AT&T Corp.*, *United States ex rel. Schwartz v. TRW, Inc.*, *Schwartz v. Raytheon Co.*, and the earlier *McDonnell Douglas Corp. v. United States*),<sup>255</sup> the multitudinous

September 11 Litig., Nos. 21-0097, 21-0101 (S.D.N.Y. June 5, 2007) [hereinafter Revised Memorandum of Law in *In re September 11 Litig.*], 2007 WL 2272256 (“[I]t is questionable whether the Aviation Defendants could depose *any* individual from the NSC without running afoul of the executive privilege or state secrets privilege given that the very function of the NSC . . . is to advise the president on national security.”).

<sup>253</sup> Defendants’ Memorandum in Opposition to Plaintiffs’ Motion to Remand at 15, Files v. Los Alamos Nat’l Sec., LLC, No. 08-0636 (D.N.M. July 31, 2008), 2008 WL 5706495 (footnote omitted).

<sup>254</sup> See, e.g., Revised Memorandum of Law in *In re September 11 Litig.*, *supra* note 252, at 20 n.17; Memorandum in Support of Defendant’s Motion to Dismiss Pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure at 2-3 n.1, *White v. Raytheon Co.*, No. 07-10222 (D. Mass. 2007), 2007 WL 1910325 (“[A]ny further prosecution or defense of this case may trigger protections of the state secrets privilege because classified information is implicated in virtually every fact and circumstance necessary to adjudicate this matter.”); Answer and Affirmative Defenses of Defendant Smith’s Aerospace LLC to Amended Complaint and Demand for Jury Trial at 10, *Walters v. Lear Siegler Servs., Inc.*, No. 05-61789 (S.D. Fla. Jan. 30, 2000), 2000 WL 34602661 (“Invocation of the state secrets privilege by the United States government will preclude SMITHS from obtaining full and necessary discovery.”).

<sup>255</sup> See *Schwartz v. Raytheon Co.*, 150 F. App’x 627, 628 (9th Cir. 2005) (acknowledging that the United States asserted the privilege and Schwartz failed to show how the parties could litigate the case without access to privileged and sensitive material); *McDonnell Douglas Corp. v. United States*, 323 F.3d 1006, 1022 (Fed. Cir. 2003) (noting, in a breach of contract case, that the state secrets privilege’s proper invocation by the government precluded the hearing of plaintiff’s superior knowledge claim); *D.T.M. Research, L.L.C. v. AT&T Corp.*, 245 F.3d 327, 334-35 (4th Cir. 2001) (allowing the case to proceed despite the assertion of state secrets); *United States ex rel. Schwartz*

suits discussed above—many of which are pending in relation to military contractual relationships—point to significant gaps in our understanding of the privilege. A similar situation holds for the telecommunications cases, despite scholarly and public attention.<sup>256</sup>

## II. TELECOMMUNICATIONS CASES

More than four-dozen state secrets cases between 2001 and 2009 stem from President Bush's authorization of the NSA's Terrorist Surveillance Program (TSP) in the aftermath of 9/11 and the program's

v. TRW, Inc., 211 F.R.D. 388, 393 (C.D. Cal. 2002) (noting, in a wrongful death case, the government's failure to assert the state secrets privilege validly through a formal claim by a head of a government department); *see also* Crater Corp v. Lucent Techs., Inc., 423 F.3d 1260, 1268 (Fed. Cir. 2005) (finding that the privilege was properly invoked but the district court wrongly dismissed the suit).

Chesney's and Frost's discussion includes all five of these cases. *See* Chesney, *supra* note 6, at 1301 (concluding the Bush Administration does not differ substantially in its use of the privilege). *But see* Frost, *supra* note 6, at 1939 ("I disagree, however, with [Professor Chesney's] conclusion that these numbers prove that the Bush Administration's assertion of the privilege does not differ from that of previous administrations.").

Other publications discussed the uniqueness of these five state secrets corporate cases. *See* Martha Bellisle, *eTrepid Case Gets Special Treatment: Justice Department Engages in Unusual Fight to Bypass State Secrets Privilege*, RENO GAZETTE-J., Apr. 19, 2007, at A01, available at 2007 WLNR 27960663 (discussing the Department of Justice's unusual attempt to use a protective order to preserve sharing of information over which the Director of National Intelligence asserted the state secrets privilege, unlike in the *Crater* litigation, where the government followed the assertion with a motion to dismiss that was granted at the trial stage); William J. Broad, *Missile Defense Hits Bump in Court: A Whistleblower Says Her Lawsuit Will Show the System Doesn't Work. The Government Says a Trial Will Jeopardize Military Secrets*, GRAND RAPIDS PRESS, Feb. 9, 2003, at A10, available at 2003 WLNR 13822408 (summarizing the controversy over the TRW litigation); Suman Guha Mozumder, *MIT Researcher Drops Bombshell on Missile Defense Contracts*, INDIA ABROAD (New York), Apr. 14, 2006, at A12, available at 2006 WLNR 11109534 (reporting on an accusation by a government analyst that the Government Accountability Office had falsely exonerated Boeing and TRW of wrongdoing); Hampton Stephens, *Supreme Court Filing Claims Air Force, Government Fraud in 1953 Case*, INSIDE THE AIR FORCE, Mar. 14, 2003, available at <http://www.fas.org/sgp/news/2003/03/iaf031403.html> (describing the letter Sen. Charles Grassley and Rep. Howard Berman sent to Attorney General John Ashcroft, warning him against misuse of the privilege, after it was invoked in *U.S. ex rel. Schwartz v. TRW, Inc.* in a claim by Schwartz under the whistleblower-protection law Grassley and Berman authored).

<sup>256</sup> *See, e.g.,* Michael Avery, *The Constitutionality of Warrantless Electronic Surveillance of Suspected Foreign Threats to the National Security of the United States*, 62 U. MIAMI L. REV. 541, 569-82 (2008) (discussing the viability of judicial review of the Terrorist Surveillance Program in the face of the state secrets privilege); Paul M. Schwartz, *Warrantless Wiretapping, FISA Reform, and the Lessons of Public Liberty: A Comment on Holmes's Jorde Lecture*, 97 CALIF. L. REV. 407, 428 (2009) (advocating narrowing the state secrets privilege so as not to duplicate the FAA's telecommunications privilege).

continuing reauthorization every forty-five days.<sup>257</sup> Yet, owing in part to the incredible complexity of the litigation and the consolidation of most of the suits through the multidistrict litigation (MDL) process, little has been understood about how the privilege played out in the suits. Of the fifty cases brought before the Northern District of California through the MDL process, moreover, not one of the forty-six dismissals that ensued was based on state secrets—a result likely, under the current academic approach, to disqualify each of these from being considered a state secrets case. Yet the privilege has had a profound effect on the course of the litigation.

These cases draw attention to the dynamics surrounding state secrets claims. The Office of Legal Counsel (OLC) played a key role in developing the legal underpinnings for the presidential authorizations that became the foundation for the government's defense of state secrets—suggesting a close relationship between a closely held executive office jurisprudence and state secrets.<sup>258</sup> Similar to both defense contractor and criminal cases, in the telecommunications suits, courts have at times simply assumed the state secrets privilege applies without requiring the government to invoke it, suggesting a parallel, carryover effect from prior suits in which the privilege was asserted. Finally, the visible machinations between the executive, the judiciary, and Congress in the telecommunications cases serve to highlight the deeper separation-of-powers issues that attend.

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<sup>257</sup> OFFICES OF INSPECTORS GEN. OF THE DEP'T OF DEF., DEP'T OF JUSTICE, CENT. INTELLIGENCE AGENCY, NAT'L SEC. AGENCY, OFFICE OF THE DIR. OF NAT'L INTELLIGENCE, UNCLASSIFIED REPORT ON THE PRESIDENT'S SURVEILLANCE PROGRAM I, 6 (2009) [hereinafter OFFICERS OF INSPECTORS GEN.], *available at* <http://judiciary.house.gov/hearings/pdf/IGTSPReport090710.pdf> (providing a review of the President's Surveillance Program to the Senate Select Committee on Intelligence, the Senate Committee on the Judiciary, the House Permanent Select Committee on Intelligence, and the House Committee on the Judiciary as required by Title III of the Foreign Intelligence Surveillance Act Amendments Act of 2008, Pub. L. No. 110-261, 122 Stat. 2436 (codified in scattered sections of 18 and 50 U.S.C.)). Thirty-eight of the multidistrict litigation telecommunications cases discussed in this Part are suits filed against corporate actors; they could thus be equally included in the foregoing Part, looking at constitutional challenges brought to corporate actors. However, because of the strong links between the telecommunications cases, regardless of whether the state acts as plaintiff, intervenor, or defendant, this Article considers this group of cases under a separate heading.

<sup>258</sup> A Deputy Assistant Attorney General would not normally speak for the entire Department of Justice; indeed, the Attorney General's role in neither recusing himself nor signing the memos should here be noted. For the ensuing discussion, however, this Article focuses on the author of the memos with the understanding that broader conclusions about the Department of Justice's position on the questions posed thereby apply.

A. *Executive Branch Jurisprudence and State Secrets*

TSP, a warrantless wiretapping program that President Bush instituted in the weeks following September 11, 2001, relied heavily on the OLC to justify its continuance. Before each presidential authorization, OLC reviewed CIA (later, National Counterterrorism Center) memoranda on terrorist threats and intelligence obtained through the program and then advised the attorney general whether a Fourth Amendment constitutional standard of reasonableness had been met such that continuing the program was warranted.<sup>259</sup> These OLC memos, as well as related documents, provide detail about the Administration's reasoning regarding the NSA program and its subsequent invocation of state secrets.

One of the first and most important memos, written September 25, 2001, focused on whether the proposed shift under FISA from foreign intelligence being "the purpose" of a search to being "a purpose" was consistent with the Fourth Amendment.<sup>260</sup> Deputy Assistant Attorney General John Yoo found the new standard constitutional but cautioned that the historical deference granted to the Department of Justice depended in some measure on ensuring that criminal investigations would not become the primary purpose of FISA.<sup>261</sup> He offered a strong Hamiltonian rationale:

After the attacks on September 11, 2001, the government interest in conducting searches related to fighting terrorism is perhaps of the highest order—the need to defend the nation from direct attack. As the Supreme Court has said, "It is 'obvious and unarguable' that no governmental interest is more compelling than the security of the Nation."<sup>262</sup>

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<sup>259</sup> OFFICES OF INSPECTORS GEN., *supra* note 257, at 2, 6-8.

<sup>260</sup> Memorandum from John C. Yoo, Deputy Assistant Att'y Gen., to David S. Kris, Assoc. Deputy Att'y Gen. (Sept. 25, 2001), *available at* <http://www.justice.gov/opa/documents/memoforeignsurveillanceact09252001.pdf>.

<sup>261</sup> The memorandum from John Yoo explains:

Some warrant applications might be rejected by the courts if prosecutors become too involved in the planning and execution of FISA searches. Nonetheless, as we observed in 1995, "the courts have been exceedingly deferential to the government and have almost invariably declined to suppress the evidence, whether they applied the 'primary purpose' test or left open the possibility of a less demanding standard." We believe that the Department would continue to win such deference from the courts if it continues to ensure that criminal investigation not become a primary purpose of FISA surveillance.

*Id.* at 1-2 (citation omitted) (describing the Dellinger memorandum, the full contents of which remain classified).

<sup>262</sup> *Id.* at 5 (quoting *Haig v. Agee*, 453 U.S. 280, 307 (1981)).

In the context of *Federalist No. 23*, “circumstances which may affect the public safety” are not “reducible within certain determinate limits”; therefore, “it must be admitted, as a necessary consequence, that there can be no limitation of that authority, which is to provide for the defen[c]e and protection of the community, in any matter essential to its efficacy.”<sup>263</sup> Yoo’s constitutional argument presaged the President’s subsequent claim of legal authority for the NSA wiretapping program.

The text, structure and history of the Constitution establish that the Founders entrusted the President with the primary responsibility, and therefore the power, to ensure the security of the United States in situations of grave and unforeseen emergencies. Intelligence gathering is a necessary function that enables the President to carry out that authority. The Constitution, for example, vests in the President the power to deploy military force in the defense of the United States by the Vesting Clause, art. II, § 1, cl. 1, and by the Commander in Chief Clause, § 2, cl. 1. Intelligence operations, such as electronic surveillance, very well may be necessary and proper for the effective deployment and execution of military force against terrorists.<sup>264</sup>

Yoo then alluded to executive branch jurisprudence: “This Office has maintained, across different administrations and different political parties, that the President’s constitutional responsibility to defend the nation may justify reasonable, but warrantless, counter-intelligence searches.”<sup>265</sup> In support, he cited a string of OLC decisions that reached back to 1980.<sup>266</sup> The President’s Commander-in-Chief authorities included, by implication, the authority to collect whatever information may be necessary for their exercise.<sup>267</sup> When considered alongside the Authorization for Use of Military Force (AUMF),<sup>268</sup> the constitutional authority provided sufficient grounds for the legal underpinnings.<sup>269</sup> Yoo wrote,

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<sup>263</sup> *Id.* (quoting THE FEDERALIST NO. 23, at 147-48 (Alexander Hamilton) (Jacob E. Cooke ed., 1961)). The memo also cites various cases supporting a broad understanding of presidential power. *See, e.g.*, *Dames & Moore v. Regan*, 453 U.S. 654, 662 (1981) (noting that the President “exercis[es] the executive authority in a world that presents each day some new challenge with which he must deal”); *Hamilton v. Regents of the Univ. of Cal.*, 293 U.S. 245, 264 (1934) (observing that federal war powers are “well-nigh limitless” in extent).

<sup>264</sup> Memorandum from John C. Yoo, *supra* note 260, at 6.

<sup>265</sup> *Id.* at 7.

<sup>266</sup> *Id.*

<sup>267</sup> *Id.*

<sup>268</sup> Pub. L. No. 107-40, 115 Stat 224, 224 (2001) (codified at 15 U.S.C. § 1541 note (2006)).

<sup>269</sup> Memorandum from John C. Yoo, *supra* note 260, at 8.

The courts have observed that even the use of deadly force is reasonable under the Fourth Amendment if used in self-defense or to protect others. Here, for Fourth Amendment purposes, the right to self-defense is not that of an individual, but that of the nation and of its citizens. If the government's heightened interest in self-defense justifies the use of deadly force, then it certainly would also justify warrantless searches.<sup>270</sup>

Within weeks of writing the September 25, 2001, memo, Yoo was "read into" the compartmented NSA program.<sup>271</sup> The only other non-FBI officials from the Department of Justice brought into the program were Attorney General John Ashcroft and Counsel for Intelligence Policy James Baker.<sup>272</sup>

On October 23, 2001, Yoo developed the reasoning behind his FISA analysis in a memo addressing domestic military operations. Although intended to apply to active military operations, the arguments he put forward would appear again in relation to the NSA initiative. He wrote, "[T]he Fourth Amendment does *not* apply to domestic military operations designed to deter and prevent further terrorist attacks."<sup>273</sup> Even if it did apply, the reasonableness requirement provided a loophole:

[W]e believe that the courts would not generally require a warrant, at least when the action was authorized by the President or other high executive branch officials. The Government's compelling interest in protecting the nation from attack and in prosecuting the war effort would outweigh the relevant privacy interests, making the search or seizure reasonable.<sup>274</sup>

Although "courts could decide otherwise," Yoo "conclude[d] that the President has both constitutional and statutory authority to use the armed forces in military operations, against terrorists, within the United States."<sup>275</sup>

On the day Yoo sent this memo, Representative Sensenbrenner introduced the USA PATRIOT bill into the House of Representatives.<sup>276</sup>

<sup>270</sup> *Id.* (citations omitted).

<sup>271</sup> OFFICES OF INSPECTORS GEN., *supra* note 257, at 10.

<sup>272</sup> *Id.* On the same day that he was read into the program, Ashcroft certified that it was consistent with the Constitution. *Id.* at 11.

<sup>273</sup> Memorandum from John C. Yoo, Deputy Assistant Att'y Gen., and Robert J. DeLahunty, Special Counsel, to Alberto R. Gonzales, Counsel to the President, and William J. Haynes, II, General Counsel, Department of Defense 25 (Oct. 23, 2001), *available at* <http://www.justice.gov/opa/documents/memomilitaryforcecombat10232001.pdf>.

<sup>274</sup> *Id.* at 2.

<sup>275</sup> *Id.* at 34, 37.

<sup>276</sup> Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001, H.R. 3162,

Two days later, White House officials and Lieutenant General Michael Hayden, NSA Director, began providing briefings on the NSA warrantless intercept program to members of Congress and their staffs.<sup>277</sup> It was not until November 2, 2001, however, after the NSA program was underway, that Yoo was asked to provide a memo directly on the wiretapping initiative.<sup>278</sup> This memo closely followed the reasoning of the earlier two missives.

Yoo acknowledged that FISA “purports to be the exclusive statutory means for conducting electronic surveillance for foreign intelligence,” but, he argued, “[s]uch a reading of FISA would be an unconstitutional infringement on the President’s Article II authorities.”<sup>279</sup> FISA was merely a “safe harbor for electronic surveillance”—it could not “restrict the President’s ability to engage in warrantless searches that protect the national security.”<sup>280</sup> The test for warrantless searches was the Fourth Amendment—which did not apply to electronic surveillance in “direct support of military operations.”<sup>281</sup> Yoo suggested that “unless Congress made a clear statement in FISA that it sought to restrict presidential authority to conduct warrantless searches in the national security area—which it has not—then the statute must be construed to avoid such a reading.”<sup>282</sup>

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107th Cong. (introduced to the House on Oct. 23, 2001) (codified as amended in scattered sections of 8, 15, 18, 22, 31, 42, 49, and 50 U.S.C.).

<sup>277</sup> OFFICES OF INSPECTORS GEN., *supra* note 257, at 6-7. The first briefings were given to Nancy Pelosi and Porter Gross, the Chairman and Ranking Member of the House Permanent Select Committee on Intelligence. *Id.* at 16. From October 25, 2001, to January 17, 2007, Hayden and NSA Director Keith Alexander conducted approximately forty-nine briefings on the NSA warrantless wiretapping program to members of Congress and their staff; seventeen took place before the December 2005 media reports. *Id.* For reference to earlier briefings on NSA electronic surveillance programs, see Letter from Nancy Pelosi, Ranking Democrat on House Intelligence Comm., to Lieutenant General Michael Hayden, Nat’l Sec. Agency Dir. (Oct. 11, 2001), available at <http://pelosi.house.gov/news/press-releases/2006/01/releases-Jan06-declassified.shtml>, which expressed concern about NSA electronic surveillance activities and the authority under which surveillance was being conducted.

<sup>278</sup> OFFICES OF INSPECTORS GEN., *supra* note 257, at 11.

<sup>279</sup> *Id.* (quoting Yoo’s memo from November 2, 2001).

<sup>280</sup> *Id.* (same).

<sup>281</sup> *Id.* at 12 (same).

<sup>282</sup> *Id.* at 11-12 (same). Subsequent memos left the analysis largely intact. See Second Redacted Declaration of Steven G. Bradbury at 9, Elec. Privacy Info. Ctr. v. Dep’t of Justice, 584 F. Supp. 2d 65 (D.D.C. 2008) (No. 06-00096) (discussing OLC 115, a two-page memorandum for the Attorney General from the Deputy Assistant Attorney General regarding the Attorney General’s review of the legality of the President’s Authorization for the NSA wiretapping program); OFFICES OF INSPECTORS GEN., *supra* note 257, at 13 (noting that on October 11, 2002, Yoo drafted another opinion

For nearly two years, these memoranda provided the legal rationale for upholding the constitutionality of the TSP. But following Yoo's resignation from the Department of Justice in 2003 and his replacement by Patrick Philbin, the November memo, which ignored the fifteen-day war exemption that FISA authorized,<sup>283</sup> began to cause substantial concern. Equally distressing was the absence of any discussion of *Youngstown Sheet & Tube Co. v. Sawyer*,<sup>284</sup> a leading case on the distribution of government power between the executive and legislative branches. Indeed, there was no detailed description of the activities actually taking place under the NSA program.<sup>285</sup> Once he was read into the program, Philbin convinced David Addington, Counsel to the Vice President, to read Jack Goldsmith, Jay Bybee's replacement, into the program.<sup>286</sup> Philbin and Goldsmith further noted that FISA prevents intentional electronic surveillance "under color of law except as authorized by [statute]."<sup>287</sup> In autumn 2003, Philbin and Goldsmith therefore began to develop an alternative analysis that drew heavily from the AUMF.<sup>288</sup> They alerted Ashcroft, Addington, and White House Counsel Alberto Gonzales to their concerns.<sup>289</sup>

### B. *The Onslaught of Litigation*

With TSP classified at security clearance level "Top Secret-SCI" and OLC memoranda hidden, the program remained largely shielded from public view. However, in autumn 2004, journalists Eric Lichtblau and James Risen uncovered TSP's existence.<sup>290</sup> Citing the extreme danger that would be created for national security, the White

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concerning the TSP at Ashcroft's request, reiterating legal analysis laid out in the November 2, 2001, memo).

<sup>283</sup> See 50 U.S.C. § 1811 (2006) (limiting the duration of electronic surveillance without a court order to fifteen days).

<sup>284</sup> 343 U.S. 579 (1952).

<sup>285</sup> See OFFICES OF INSPECTORS GEN., *supra* note 257, at 13 (describing Yoo's omission of the *Youngstown* case from his memoranda as an "important factor" in OLC's reconsideration of Yoo's work and describing Yoo's "factual discussion" of spying activities as "insufficient").

<sup>286</sup> *Id.* at 19-20.

<sup>287</sup> *Id.* at 20 (quoting 50 U.S.C. § 1809(a)(1)).

<sup>288</sup> *Id.*

<sup>289</sup> *Id.*

<sup>290</sup> See ERIC LICHTBLAU, BUSH'S LAW 186-211 (2008) (discussing the story's genesis); see also Eric Lichtblau, *The Education of a 9/11 Reporter: The Inside Drama Behind the Times' Warrantless Wiretapping Story*, SLATE (Mar. 26, 2008, 7:08 PM), <http://www.slate.com/id/2187498/pagenum/all> (retelling a portion of the story).

House pressured the *New York Times* not to publish the information.<sup>291</sup> For thirteen months, the newspaper held the story.<sup>292</sup> The journalists desisted, but their renewed interest in the story earned them an invitation to the White House in early December 2005.<sup>293</sup> Secretary of State Condoleezza Rice and other officials threatened that publication would not only hurt national security but also financially devastate the telephone carriers who had cooperated, causing them public embarrassment.<sup>294</sup> Officials argued that the reporters' patriotic duty was to prevent the information from becoming public.

On December 15–16, 2004, as a coronal mass ejection hit Earth, causing severe geomagnetic storms,<sup>295</sup> a political storm of equal intensity broke: Lichtblau discovered that the Bush Administration had considered seeking a Pentagon Papers–type injunction to prevent the story from becoming public.<sup>296</sup> Sensitive to this historic event, in which their paper had played a prominent role, the editors of the *New York Times* decided to put the story online the night before it was due to run in the paper.<sup>297</sup> According to Lichtblau, “The administration might be able to stop the presses with an injunction, but they couldn’t stop the Internet.”<sup>298</sup>

The article, which appeared online Thursday evening, December 15, 2005, reported that President Bush had signed an order in 2002 authorizing the NSA to intercept telephone and e-mail communica-

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<sup>291</sup> See LICHTBLAU, *supra* note 290, at 193-95 (describing his meetings with top government officials); Lichtblau, *supra* note 290 (depicting the anxiety of *New York Times* staff as they met with “White House VIPs”).

<sup>292</sup> James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005, at A1.

<sup>293</sup> Lichtblau, *supra* note 290.

<sup>294</sup> *Id.* The argument that information should not become public because it would embarrass the corporations who engaged in the behavior and lead to financial harm has also arisen in the academic literature in relation to corporate complicity in rendition. See Dhooge, *supra* note 6, at 509-10 (arguing that potential damage to a company’s reputation is reason to prevent disclosure of its involvement in rendition programs).

<sup>295</sup> Dec. 15, 2004, SPACEWEATHER.COM, <http://www.spaceweather.com/archive.php?day=15&month=12&year=2004&view=view> (last visited Sept. 15, 2010); Dec. 16, 2004, SPACEWEATHER.COM, <http://www.spaceweather.com/archive.php?day=16&month=12&year=2004&view=view> (last visited Sept. 15, 2010).

<sup>296</sup> Lichtblau, *supra* note 290.

<sup>297</sup> *Id.*

<sup>298</sup> *Id.* Risen and Lichtblau went on to win the 2006 Pulitzer Prize for National Reporting for their coverage of the NSA warrantless wiretapping program. 2006 *Winners and Finalists*, THE PULITZER PRIZES, <http://www.pulitzer.org/awards/2006> (last visited Sept. 15, 2010).

tions within the United States, without court-approved warrants.<sup>299</sup> Other newspapers quickly picked up the story, and by Monday, the White House was on the defensive.<sup>300</sup>

In his first press conference that addressed the program, the President announced that he had authorized the NSA to intercept international communications into and out of the United States by individuals linked to Al Qaeda.<sup>301</sup> Echoing Yoo's legal memoranda, he cited as his authority "the Constitution, as well as the authorization of force by the United States Congress."<sup>302</sup> He added, "I want to make it clear to the people listening that this program is limited in nature to those that are known al Qaeda ties and/or affiliates."<sup>303</sup> The calls were "not intercepted within the country, they are from outside the country to in the country or vice versa. So in other words, if you're calling from Houston to L.A., that call is not monitored."<sup>304</sup> FISA would be the appropriate vehicle for such interceptions. When pressed on the legal underpinnings, the President said, "I think I've got the authority to move forward. I mean, this is what—and the attorney general was out briefing this morning about why it's legal to make the decisions I make."<sup>305</sup> He then warned that it would be imprudent to discuss the legal questions: "[A]n open debate about law would say to the enemy, 'Here's what we're going to do.' And this is an enemy which adjusts."<sup>306</sup>

It soon appeared that the scope of the program was broader than first admitted.<sup>307</sup> Lawsuits challenging the legal and constitutional

<sup>299</sup> Risen & Lichtblau, *supra* note 292.

<sup>300</sup> See, e.g., Dan Eggen, *Bush Authorized Domestic Spying*, WASH. POST, Dec. 16, 2005, at A01 (reporting on the *Times* story and discussing Eggen's pursuit of a response from the Bush Administration).

<sup>301</sup> See *Bush: U.S. Must Think, Act Differently*, CNN.COM, Dec. 19, 2005, <http://www.cnn.com/2005/POLITICS/12/19/bush.transcript/index.html> (transcribing President Bush's press conference on December 19, 2005).

<sup>302</sup> *Id.*

<sup>303</sup> *Id.*

<sup>304</sup> *Id.*

<sup>305</sup> *Id.*

<sup>306</sup> *Id.*

<sup>307</sup> See, e.g., *Hearing Before the H. Comm. on the Judiciary*, 109th Cong. 27 (2006) (statement of Alberto Gonzales, Att'y Gen.) (stating that he could "not . . . rule . . . out" that the White House had legal authority to monitor domestic traffic without a warrant); see also Eric Lichtblau, *Gonzales Suggests Legal Basis for Domestic Eavesdropping*, N.Y. TIMES, Apr. 7, 2006, at A23 ("The attorney general made his comments, which critics said reflected a broadened view of the president's authority . . ."); Leslie Cauley, *NSA Has Massive Database of Americans' Phone Calls*, USA TODAY, May 11, 2006, [http://www.usatoday.com/news/washington/2006-05-10-nsa\\_x.htm](http://www.usatoday.com/news/washington/2006-05-10-nsa_x.htm) (reporting that the NSA wiretapping program was significantly more expansive than the White

underpinnings followed. The Center for Constitutional Rights lodged the first action just over a month after the *New York Times* ran the story.<sup>308</sup> On January 30, 2006, the Electronic Frontier Foundation launched the second case, *Hepting v. AT&T*.<sup>309</sup> The third case, *Al-Haramain Islamic Foundation, Inc. v. Bush*, emerged in late February.<sup>310</sup> Thereafter, it was relatively quiet, until May of that year—which was a bad month to be a telecommunications company. In all, some twenty-seven cases were filed, most of which targeted private companies.<sup>311</sup> In June, six more cases followed.<sup>312</sup>

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House acknowledged in 2005 and naming AT&T, Verizon, and BellSouth as the three largest telecommunications companies involved).

Senator Russ Feingold expressed his displeasure on the program's scope from the Senate floor:

The President was blunt. He said that he had authorized the NSA's domestic spying program, and he made a number of misleading arguments to defend himself. His words got rousing applause from Republicans, and I think even from some Democrats.

The President was blunt, so I will be blunt. This program is breaking the law, and this President is breaking the law. Not only that, he is misleading the American people in his efforts to justify this program . . . .

Congress has lost its way if we don't hold this President accountable for his actions.

152 CONG. REC. 5758 (daily ed. Feb. 7, 2006) (statement of Sen. Russ Feingold).

<sup>308</sup> See Complaint at 1, Ctr. for Constitutional Rights v. Bush, No. 06-00313 (N.D. Cal. Jan. 17, 2006) (requesting injunctive relief halting the program).

<sup>309</sup> 439 F. Supp. 2d 974 (N.D. Cal. 2006).

<sup>310</sup> Complaint, *Al-Haramain Islamic Found., Inc. v. Bush*, 451 F. Supp. 2d 1215 (D. Or. 2006) (No. 06-0274) (bearing a date of February 29, 2006).

<sup>311</sup> See, e.g., *Herron v. Verizon Global Networks, Inc.*, No. 06-2491 (E.D. La. filed May 12, 2006); *Fuller v. Verizon Commc'ns, Inc.*, No. 06-0077 (D. Mont. filed May 12, 2006); *Hines v. Verizon Nw., Inc.*, No. 06-0694 (D. Or. filed May 12, 2006); *Conner v. AT&T*, No. 06-01557 (Cal. Sup. Ct. filed May 12, 2006); *Joll v. AT&T Corp.*, No. 06-2680 (N.D. Ill. filed May 15, 2006); *Dolberg v. AT&T Corp.*, No. 06-0078 (D. Mont. filed May 15, 2006); *Bissitt v. Verizon Commc'ns, Inc.*, No. 06-0220 (D.R.I. filed May 15, 2006); *Mahoney v. AT&T Commc'ns, Inc.*, No. 06-0223 (D.R.I. filed May 15, 2006); *Mahoney v. Verizon Commc'ns, Inc.*, No. 06-0224 (D.R.I. filed May 15, 2006); *Shubert v. Bush*, No. 06-2282 (E.D.N.Y. filed May 17, 2006); *Trevino v. AT&T Corp.*, No. 06-0209 (S.D. Tex. filed May 17, 2006); *Suchanek v. Sprint Nextel Corp.*, No. 06-0071 (W.D. Ky. filed May 18, 2006); *Harrington v. AT&T, Inc.*, No. 06-0374 (W.D. Tex. filed May 18, 2006); *Marck v. Verizon Commc'ns, Inc.*, No. 06-2455 (E.D.N.Y. filed May 19, 2006); *Terkel v. AT&T Inc.*, No. 06-02837 (N.D. Ill. filed May 22, 2006); *Waxman v. AT&T Corp.*, No. 06-2900 (N.D. Ill. filed May 24, 2006); *Solomon v. Verizon Commc'ns, Inc.*, No. 06-02193 (E.D. Pa. filed May 24, 2006); *Lebow v. BellSouth Corp.*, No. 06-1289 (N.D. Ga. filed May 25, 2006); *Cross v. AT&T Commc'ns, Inc.*, No. 04-0605 (Ind. Sup. Ct. filed May 25, 2006); *Riordan v. Verizon Commc'ns, Inc.*, No. 06-03574 (Cal. Super. Ct. filed May 26, 2006); *Campbell v. AT&T Commc'ns of Cal.*, No. 06-452626 (Cal. Super. Ct. filed May 26, 2006); *Dubois v. AT&T Corp.*, No. 06-00085 (W.D. Mich. filed May 26, 2006); *Electron Tubes, Inc. v. Verizon Commc'ns*, No. 06-

At the end of June, the Supreme Court's decision in *Hamdan v. Rumsfeld*<sup>313</sup> opened the field even more to legal challenge. If the AUMF was insufficient grounds to overcome the limits on military commissions implicit in 10 U.S.C. §§ 821, 836(b), then it was rather a stretch to say that the AUMF superseded FISA's express requirement that FISA and Title III provide the "exclusive means" of engaging in surveillance—or for it to overcome the fifteen-day wartime surveillance provision, allowing surveillance until December 3, 2001, but no longer.<sup>314</sup>

As more cases emerged,<sup>315</sup> the multidistrict panel ordered on August 9, 2006, for the cases to be consolidated and transferred to Chief Judge Vaughn Walker of the Northern District of California, who had been presiding over *Hepting* since January and *Al-Haramain* since February and was furthest along in the telecommunications suits.<sup>316</sup> By

04048 (S.D.N.Y. filed May 26, 2006); *Roe v. AT&T Corp.*, No. 06-3467 (N.D. Cal. filed May 30, 2006); *Hardy v. AT&T Corp.*, No. 06-2853 (E.D. La. filed May 30, 2006); *Basinski v. Verizon Commc'ns, Inc.*, No. 06-4169 (S.D.N.Y. filed May 31, 2006).

<sup>312</sup> See, e.g., *Payne v. Verizon Commc'ns, Inc.*, No. 06-4193 (S.D.N.Y. filed June 2, 2006); *Fortnash v. AT&T Corp.*, No. 06-60828 (S.D. Fla. filed June 12, 2006); *Chulsky v. Celco P'ship*, No. 06-2530 (D.N.J. filed June 13, 2006); *United States v. O'Donnell*, 06-02683 (D.N.J. filed June 14, 2006); *Crockett v. Verizon Wireless (VAW) LLC*, No. 06-00345 (D. Haw. filed June 26, 2006); *Derosier v. Cingular Wireless LLC*, No. 06-00917 (W.D. Wash. filed June 28, 2006).

<sup>313</sup> 548 U.S. 557 (2006).

<sup>314</sup> Letter from Curtis A. Bradley, Professor of Law, Duke Univ., et al. to Sen. Bill Frist et al. 4 (Feb. 2, 2006), available at <http://balkin.blogspot.com/FISA.AUMF.ReplytoDOJ.pdf>.

<sup>315</sup> *Spiefogel-Landis v. MCI, LLC*, No. 06-04221 (N.D. Cal. filed July 7, 2006); *Mink v. AT&T Commc'ns of the Sw., Inc.*, No. 06-01113 (E.D. Mo. filed July 20, 2006); *Bready v. Verizon Md., Inc.*, No. 06-05961 (Md. Cir. Ct. filed July 21, 2006).

<sup>316</sup> *In re Nat'l Sec. Agency Telecomm. Records Litig.*, No. 06-1791 (N.D. Cal. filed Aug. 14, 2006). This case appears to be the first time that the Judicial Panel on Multi-District Litigation (JPMDL) has transferred and consolidated national security constitutional challenges into a single federal district court. It raises important questions about whether the MDL process is appropriate for this type of suit as opposed to commercial mass tort lawsuits. Such consolidation prevents circuit splits on questions of first impression, which may be particularly helpful to the Supreme Court's subsequent attention to novel challenges. It also risks glossing over important nuances between the cases: in the telecommunications context, for instance, there are multiple defendants, with the government itself acting variously as plaintiff, defendant, and intervenor. Further, the inclusion of state secrets matters alters the incentive structure. Instead of being more efficient, many cases may be tied up for a much longer period of time, owing to the difficulties that attend the use of classified materials. Additionally, the question of distribution of resources postjudgment plays out very differently when injunctive relief, and not monetary remuneration, is sought.

These unique challenges posed by the use of MDLs in the national security context have not been addressed by writers focused on this process. See, e.g., RICHARD A. NAGAREDA, *MASS TORTS IN A WORLD OF SETTLEMENT* 21-22 (2007) (focusing on more conventional mass torts such as asbestos, tobacco, and pharmaceuticals); Deborah R.

June 3, 2009, a total of fifty telecommunications cases had been assembled before his court; the scene was set for a monumental battle between the branches.<sup>317</sup>

### C. *State Secrets, Judicial Independence, and Congressional Action*

Between May 2006 and March 2008, the federal government invoked the state secrets privilege in thirty-three out of fifty telecommunications cases (including all cases against Verizon from April 2007).<sup>318</sup>

Hensler, *Revisiting the Monster: New Myths and Realities of Class Action and Other Large Scale Litigation*, 11 DUKE J. COMP. & INT'L L. 179, 185-86 (2001) (addressing antitrust, securities, and mass tort multidistrict litigation); Deborah R. Hensler, *The Role of Multi-Districting in Mass Tort Litigation: An Empirical Investigation*, 31 SETON HALL L. REV. 883, 895-96 (2001) (neglecting to include national security as a relevant type of MDLs); Richard L. Marcus, *Cure-All for an Era of Dispersed Litigation? Toward a Maximalist Use of the Multidistrict Litigation Panel's Transfer Power*, 82 TUL. L. REV. 2245, 2295 (2008) (analyzing the critical role the JPMDL has played in the resolution and "posttransfer handling . . . of the cases it has transferred"); Charles Silver & Geoffrey P. Miller, *The Quasi-Class Action Method of Managing Multi-District Litigations: Problems and a Proposal*, 63 VAND. L. REV. 107, 114-18 (2010) (examining MDLs generally using three medical products examples).

<sup>317</sup> In addition to the foregoing cases, see *Clayton v. AT&T Commc'ns of the Sw., Inc.*, No. 06-04177 (W.D. Mo. filed Aug. 10, 2006); *United States v. Adams*, No. 06-00097 (D. Me. filed Aug. 21, 2006); *Souder v. AT&T Corp.*, No. 06-01058 (S.D. Cal. filed Aug. 22, 2006); *United States v. Palermino*, No. 06-01405 (D. Conn. filed Sept. 6, 2006); *United States v. Volz*, No. 06-00188 (D. Vt. filed Oct. 2, 2006); *Cross v. AT&T Commc'ns, Inc.*, No. 06-0932 (S.D. Ind. filed Oct. 3, 2006); *Guzzi v. Bush*, No. 06-0136 (N.D. Ga. filed Oct. 3, 2006); *Roche v. AT&T Corp.*, No. 06-4252 (D. Minn. filed Oct. 23, 2006); *Jacobs v. AT&T Corp.*, No. 07-60365 (S.D. Fla. filed Mar. 14, 2007); *Anderson v. Verizon Commc'ns, Inc.*, No. 06-03650 (S.D.N.Y. filed Apr. 10, 2007); and *McMurray v Verizon Commc'ns, Inc.*, No. 08-6264 (S.D.N.Y. filed July 10, 2008).

<sup>318</sup> For cases in which the government intervened or acted as defendant or where it also asserted state secrets privilege, see *Ctr. for Constitutional Rights v. Bush*, No. 06-00313 (S.D.N.Y. filed Jan. 17, 2006); *Al-Haramain Islamic Found., Inc. v. Bush*, No. 06-00274 (N.D. Cal. filed Feb. 28, 2006); *Herron v. Verizon Global Networks, Inc.*, No. 06-2491 (E.D. La. filed May 12, 2006); *Fuller v. Verizon Commc'ns, Inc.*, No. 06-0077 (D. Mont. filed May 12, 2006); *Hines v. Verizon Nw., Inc.*, No. 06-0694 (D. Or. filed May 12, 2006); *Conner v. AT&T*, No. 06-01557 (Cal. Sup. Ct. filed May 12, 2006); *Hepting v. AT&T Corp.*, No. 06-00672 (N.D. Cal. filed May 13, 2006); *Bissitt v. Verizon Commc'ns, Inc.*, No. 06-0220 (D.R.I. filed May 15, 2006); *Shubert v. Bush*, No. 06-2282 (E.D.N.Y. filed May 17, 2006); *Marck v. Verizon Commc'ns, Inc.*, No. 06-2455 (E.D.N.Y. filed May 19, 2006); *Solomon v. Verizon Commc'ns, Inc.*, No. 06-02193 (E.D. Pa. filed May 24, 2006); *Cross v. AT&T Commc'ns, Inc.*, No. 04-0605 (Ind. Sup. Ct. filed May 25, 2006); *Dubois v. AT&T Corp.*, No. 06-00085 (W.D. Mich. filed May 26, 2006); *Campbell v. AT&T Commc'ns of Cal.*, No. 06-452626 (Cal. Super. Ct. filed May 26, 2006); *Riordan v. Verizon Commc'ns, Inc.*, No. 06-03574 (Cal. Super. Ct. filed May 26, 2006); *Roe v. AT&T Corp.*, No. 06-3467 (N.D. Cal. filed May 30, 2006); *Basinski v. Verizon Commc'ns, Inc.*, No. 06-4169 (S.D.N.Y. filed May 31, 2006); *Payne v. Verizon Commc'ns, Inc.*, No. 06-4193 (S.D.N.Y. filed June 2, 2006); *Chulsky v. Cellco P'ship*, No. 06-2530 (D.N.J. filed June 13, 2006); *Crockett v. Verizon Wireless (VAW) LLC*, No.

In the state cases—a handful of suits brought by the federal government against state entities to enjoin investigation into matters linked to the NSA wiretapping program—the government stated that the subject at issue in the suits was the same as in the telecommunications cases. The government had invoked state secrets in those cases, and state secrets similarly applied to these cases. It did not, however, enter formal motions to recognize the privilege.<sup>319</sup> This strategy would be

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06-00345 (D. Haw. filed June 26, 2006); Spielfogel-Landis v. MCI LLC, No. 06-04221 (N.D. Cal. filed July 7, 2006); Bready v. Verizon Md., Inc., No. 06-05961 (Md. Cir. Ct. filed July 21, 2006); Clayton v. AT&T Commc'ns of the Sw., Inc., No. 06-04177 (W.D. Mo. filed Aug. 10, 2006); Jacobs v. AT&T Corp., No. 07-60365 (S.D. Fla. filed Mar. 14, 2007); and Anderson v. Verizon Commc'ns, Inc., No. 06-03650 (S.D.N.Y. filed Apr. 10, 2007). Note that on July 10, 2008, a new Verizon case, *McMurray v. Verizon Communications*, was filed after the motion to stay all proceedings against Verizon, but Chief Judge Walker subsequently included it in these cases. *McMurray v. Verizon Commc'ns, Inc.*, No. 08-6264 (S.D.N.Y. filed July 10, 2008).

<sup>319</sup> *United States v. Gaw*, No. 06-01132 (E.D. Mo. filed July 25, 2006), provides a good example. There, the plaintiff argued that

in other related proceedings, the Director of National Intelligence, supported by the Director of the National Security Agency, has asserted the federal state secrets privilege, in part, to protect information directly implicated by the Missouri subpoenas: whether to confirm or deny that telecommunications carriers are (or are not) assisting the NSA. . . . [A]ctions of the State Defendants are therefore preempted under this authority as well.

Indeed, the DNI recently successfully asserted the state secrets privilege with regard to the kind of information requested, including whether or not the information even existed.

Plaintiff's Memorandum of Points and Authorities in Support of Its Motion for Summary Judgment at 1, 7, *Gaw*, No. 07-01242 (N.D. Cal. Sept. 7, 2006), 2006 WL 2618346. Additionally, the plaintiff's complaint provided:

The Federal Government also has an absolute privilege to protect military and state secrets from disclosure. Only the Federal Government can waive that privilege, which is often called the "state secrets privilege." . . . In both the *Hepting* and *Terkel* cases, the state secrets privilege has been formally asserted by the Director of National Intelligence, John D. Negroponte, and the Director of the National Security Agency, Lieutenant General Keith B. Alexander.

Complaint at 5, 7, *Gaw*, No. 06-01132 (E.D. Mo. July 25, 2006), 2006 WL 2362967; *see also* Plaintiff's Memorandum of Points and Authorities in Opposition the State Defendants' Motion to Dismiss at 2, *United States v. Rabner*, No. 06-2683 (D.N.J. Oct. 13, 2006), 2006 WL 3037955 ("State Defendants' expansive discussion of the state secrets privilege misses the mark. [They] are simply incorrect that the United States must actually invoke the state secrets privilege in order to state a claim for relief. It is beyond argument that the complaint states a claim . . ."); Complaint at 7-9, *United States v. Volz*, No. 06-00188 (D. Vt. Oct. 2, 2006) (discussing the government's use of the state secrets privilege in other cases); Complaint at 7-9, *United States v. Palermino*, No. 06-01405 (D. Conn. Sept. 6, 2006) (citing invocation of the state secrets privilege in *Hepting* and *Terkel*); Complaint at 6, *United States v. Adams*, No. 06-00097 (D. Me. Aug. 21, 2006) (pointing toward state secrets claims in *Hepting* and *Terkel*); Complaint at 7,

missed in studies narrowly focused on cases in which government actually invokes the state secrets privilege; yet the approach—treating related cases *as though* the state secrets privilege applied, even in the absence of express declaration or any judicial ruling—is not unique.<sup>320</sup> The telecommunications cases in which state secrets seemingly did not appear were granted either formal or informal stays pending the outcome of *Hepting*—again, suggesting a parallel effect implicit in the invocation of the state secrets privilege.<sup>321</sup>

*Hepting* itself illustrates the application and influence of the state secrets privilege; it underscores the importance of looking at the underlying executive branch jurisprudence. On April 28, 2008, the Department of Justice, pursuant to 28 U.S.C. § 517, issued a Statement of Interest, saying that it intended to invoke the state secrets privilege and requesting dismissal of the case.<sup>322</sup> Approximately three weeks later, on May 13, 2006, the United States formally intervened and moved to dismiss the suit on grounds of state secrets. The government included declarations by John Negroponte, Director of National Intelligence, and Keith Alexander, NSA Director, as well as additional classified material.<sup>323</sup> The government argued all three grounds laid

United States v. O'Donnell, No. 06-02683 (D.N.J. June 14, 2006) (mentioning invocation of state secrets by Negroponte in the *Hepting* case).

<sup>320</sup> In *Project on Government Oversight v. Ashcroft*, for instance, the government merely noted that the same information was at issue in the case as that classified under the state secrets privilege in *Edmonds v. Department of Justice*, without formally asserting state secrets. Compare *Edmonds v. U.S. Dep't of Justice*, 323 F. Supp. 2d 65, 81-82 (D.D.C. 2004) (concluding the government's invocation of the state secrets privilege was proper and dismissing the suit), and Plaintiff's Reply in Support of Its Motion for Summary Judgment, and Opposition to Defendants' Cross-Motion for Summary Judgment at 7, *Project on Gov't Oversight v. Ashcroft*, No. 04-01032 (D.D.C. Dec. 13, 2004), 2004 WL 3628302 ("[D]efendants emphasize that the information POGO desires to disseminate was classified on October 18, 2002, in an original classification of the mosaic of information related to Ms. Edmonds' employment case . . ." (internal quotation marks omitted)), with *Burnett v. Al Baraka Inv. & Dev. Corp.*, 323 F. Supp. 2d 82, 82-83 (D.D.C. 2004) (involving deposition of Sibel Edmonds in which court granted the government's July 6, 2004, refusal to release documents falling under the state secrets privilege exception).

<sup>321</sup> AT&T requested the stay, which Chief Judge Walker explicitly granted on March 14, 2007. See *In re Nat'l Sec. Agency Telecomms. Record Litig.*, No. 06-01791, at 3 (N.D. Cal. Mar. 14, 2007) (stipulation and order granting stay in *Roe, Campbell, Mahoney, Souder, Trevino, Dolberg, Terkel, Herron, Harrington, Joll, Conner*, both *Cross* cases, *Waxman, Fortnash, Dubois, Chulsky, Hardy, Mink, Roche, and Mayer*, but excluding "cases against non-AT&T Defendants," "cases in which the United States is a plaintiff," *Clayton*, and *Hepting*).

<sup>322</sup> See First Statement of Interest of the United States at 2, 5, *Hepting v. AT&T Corp.*, 439 F. Supp. 2d 974 (N.D. Cal. 2006) (No. 06-0672) (noting that the government would assert the state secrets privilege pursuant to its authority under 28 U.S.C. § 517 (2006)).

<sup>323</sup> *Hepting*, 439 F. Supp. 2d at 979.

out in *Reynolds*: the “very subject matter” of the litigation related to privileged information; the plaintiffs could not make out a prima facie case without secret material; and the defendants could not mount a defense.<sup>324</sup> Moreover, because the contract in question had been forged between the government and AT&T, dismissal under *Totten* was warranted.<sup>325</sup>

As related suits rapidly proliferated, Chief Judge Walker announced in June 2006 that in order to ascertain whether and to what extent state secrets applied, the court would need to review certain classified materials.<sup>326</sup> He directed the government to produce the materials for in camera review, explaining:

The court is mindful of the extraordinary due process consequences of applying the privilege the government here asserts. The court is also mindful of the government’s claim of exceptionally grave damage to the national security of the United States that failure to apply the privilege could cause. At this point, review of the classified documents affords the only prudent way to balance these important interests.<sup>327</sup>

On July 20, 2006, Chief Judge Walker denied the government’s motion to dismiss, announcing that *Totten* was not applicable because the program, and AT&T’s participation in it, was already in the public domain.<sup>328</sup> Moreover, there was simply no precedent for dismissing a case under state secrets when plaintiffs alleged “ongoing, widespread violations of individual constitutional rights.”<sup>329</sup> Based on the public and classified materials, it did not appear that permitting a case to proceed would create a “reasonable danger” to national security.<sup>330</sup> It was too early in the case’s development to determine whether a prima facie case or a valid defense could be established.<sup>331</sup> And unlike the

<sup>324</sup> *Id.* at 984.

<sup>325</sup> *Id.*

<sup>326</sup> See *Hepting*, No. 06-0672, at 1 (N.D. Cal. June 6, 2006) (order on access to secret documents), 2006 WL 1581965, at \*1 (stating that “this case cannot proceed and discovery cannot commence until the court examines the classified documents to assess whether and to what extent the state secrets privilege applies.”).

<sup>327</sup> *Id.* at \*4 (citations omitted) (internal quotation marks omitted).

<sup>328</sup> See *Hepting*, 439 F. Supp. 2d. at 993 (“[T]he government has disclosed the general contours of the ‘terrorist surveillance program,’ which requires the assistance of a telecommunications provider, and AT&T claims that it lawfully and dutifully assists the government in classified matters when asked.”).

<sup>329</sup> *Id.*

<sup>330</sup> *Id.* at 994.

<sup>331</sup> See *id.* (finding that deciding these claims would be “premature,” but that plaintiffs could proceed with some discovery).

court's decision in *El-Masri*, no blanket grant would be given to the executive branch:

[I]t is important to note that even the state secrets privilege has its limits. While the court recognizes and respects the executive's constitutional duty to protect the nation from threats, the court also takes seriously its constitutional duty to adjudicate the disputes that come before it. To defer to a blanket assertion of secrecy here would be to abdicate that duty . . . . The compromise between liberty and security remains a difficult one. But dismissing this case at the outset would sacrifice liberty for no apparent enhancement of security.<sup>332</sup>

To afford the plaintiff an opportunity to seek judicial remedy for the alleged violation of his constitutional rights, discovery would proceed.<sup>333</sup> Chief Judge Walker certified the case for immediate interlocutory appeal pursuant to 28 U.S.C. § 1292(b).<sup>334</sup>

In addition, the court considered the appointment of a special expert, under Federal Rule of Evidence 706, to help in determining whether disclosure of certain evidence would create a reasonable danger to national security.<sup>335</sup> This potential solution echoes a host of similar judicial efforts over time to balance the national security interests of the government and the interests of the plaintiffs in seeking redress for their grievances; however, many of these cases, which have been sealed or unreported, or which do not ultimately turn on the state secrets question, have escaped academic analysis.<sup>336</sup>

In August 2006, as aforementioned, the multidistrict panel began consolidating and transferring cases to the Northern District of Cali-

<sup>332</sup> *Id.* at 995 (citations omitted).

<sup>333</sup> *See id.* at 993-94 (observing that, because an alleged violation of constitutional rights was the state interest at issue, the plaintiff was entitled to limited discovery).

<sup>334</sup> *Id.* at 1011.

<sup>335</sup> *See id.* (ordering the parties to show cause for why the court should not appoint an expert); *see also* FED. R. EVID. 706 (permitting a court to appoint an expert witness on its own motion).

<sup>336</sup> *See, e.g., In re Under Seal*, 945 F.2d 1285, 1287 (4th Cir. 1991) (indicating that a lower court issued a protective order requiring a deposition to be conducted in a secure facility with government officers present to direct what information could be revealed); *Loral Corp. v. McDonnell Douglas Corp.*, 558 F.2d 1130, 1132-33 (2d Cir. 1977) (deeming the appointment of a special master, without parties' consent, appropriate; applying Federal Magistrate's Act, 28 U.S.C. § 636(b)(2) (1976); and indicating that Federal Rule of Civil Procedure 53(b) "permits reference to a master on a showing that some exceptional condition requires it"); *In re "Agent Orange" Prod. Liab. Litig.*, 97 F.R.D. 427, 431-32 (E.D.N.Y. 1983) (upholding a special master's recommended procedures for discovery, including having the government submit documents to the special master for in camera review).

fornia.<sup>337</sup> Accordingly, on November 22, 2006, Chief Judge Walker required all parties to “show cause in writing [as to] why the *Hepting* order should not apply to all cases or claims to which the government assert[ed] the state secrets privilege.”<sup>338</sup> The government moved for a stay of proceedings, pending disposition of an interlocutory appeal in *Hepting*.<sup>339</sup> On January 5, 2007, Chief Judge Walker ordered all plaintiffs to prepare, file, and serve consolidated complaints on each telecommunications defendant.<sup>340</sup> On July 24, 2007, Walker took steps similar to those in *Hepting*, denying without prejudice the government’s motion to dismiss the state cases, as well as denying as moot the state officials’ motions for summary judgment.<sup>341</sup>

What started as the invocation of state secrets doctrine, backed by executive jurisprudence, morphed into a power struggle between the branches of government. Four days after the court’s order, President Bush announced that he had submitted a bill to amend FISA, a statute that he considered to be out of date and technologically behind the times: it fit uneasily in a world dominated by mobile phones and Internet-based communications.<sup>342</sup> He requested that Congress pass the bill before the August 2007 recess, suggesting that any future attacks, in the absence of new legislation, would be on the backs of the legislators.<sup>343</sup> A sentence that was deleted from the draft of the broadcast explained, “[E]very day that Congress puts off these reforms increases the danger to our nation.”<sup>344</sup>

<sup>337</sup> See *supra* note 316 and accompanying text (describing the challenges inherent in consolidating cases involving questions of national security).

<sup>338</sup> *In re Nat’l Sec. Agency Telecomms. Records Litig.*, No. 06-1791, at 2 (N.D. Cal. Nov. 22, 2006) (pretrial order scheduling hearings) (emphasis omitted).

<sup>339</sup> Motion of United States for a Stay Pending Disposition of Interlocutory Appeal in *Hepting v. AT&T Corp.*, *In re Nat’l Sec. Agency*, No. 06-1791 (N.D. Cal. Nov. 8, 2006).

<sup>340</sup> See *In re Nat’l Sec. Agency*, No. 06-1791, at 1 (N.D. Cal. Jan. 5, 2007) (order resetting deadlines) (ordering service of “Master Complaints”).

<sup>341</sup> See *In re Nat’l Sec. Agency*, No. 06-1791, at 2 (N.D. Cal. July 24, 2007) (order denying summary judgment) (stating that, as *Hepting*’s appeal was pending, and as the court would not address the government’s state secrets argument, both motions would be denied).

<sup>342</sup> See George W. Bush, *President’s Radio Address* (Office of the Press Secretary radio broadcast July 28, 2007), available at <http://georgewbush-whitehouse.archives.gov/news/releases/2007/07/print/20070728.html> (noting that technology has changed dramatically in the thirty years since FISA’s passage).

<sup>343</sup> See *id.* (“Congress needs to act immediately to pass this bill, so that our national security professionals can close intelligence gaps and provide critical warning time for our country.”).

<sup>344</sup> Jim Rutenberg, *Wielding the Threat of Terrorism, Bush Outmaneuvers the Democrats*, N.Y. TIMES, Aug. 7, 2007, at A14.

On August 3, 2007, in a rough party-line divide, the Senate passed Senate Bill 1927 (60-28),<sup>345</sup> and the House its equivalent (227-183).<sup>346</sup> The resultant Protect America Act of 2007 superseded the litigation.<sup>347</sup> The Act authorized direct communications service providers to help the federal government acquire foreign intelligence when such acquisitions targeted third persons reasonably believed to be outside the United States.<sup>348</sup> The Director of National Intelligence (DNI) and Attorney General (AG) became empowered to authorize, for up to one year, “the acquisition of foreign intelligence information concerning persons reasonably believed to be outside the United States”<sup>349</sup> where five criteria were met: (a) reasonable procedures were in place to ensure that the target was reasonably believed to be located outside the United States, (b) acquisitions did not constitute “electronic surveillance,”<sup>350</sup> (c) surveillance would require the help of a communications service provider, (d) a significant purpose was to obtain foreign intelligence information, and (e) the minimization procedures met the requirements of 50 U.S.C. § 1801(h).<sup>351</sup> With a few exceptions, the determination was to be made in the form of a written certification “supported as appropriate by affidavit of appropriate officials in the national security field.”<sup>352</sup>

The executive branch appears to have quickly issued directives under the Act to communications service providers, requesting the as-

<sup>345</sup> See Roll Call Votes 110th Congress—1st Session, U.S. SENATE (Aug. 3, 2007), [http://www.senate.gov/legislative/LIS/roll\\_call\\_lists/roll\\_call\\_vote\\_cfm.cfm?congress=110&session=1&vote=00309](http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=110&session=1&vote=00309) (indicating that the Senate passed S. 1927 as amended with sixty “yeas” and twenty-eight “nays”).

<sup>346</sup> See Final Vote Results for Roll Call 836, U.S. HOUSE OF REPRESENTATIVES (Aug. 4, 2007), <http://clerk.house.gov/evs/2007/roll836.xml> (passing the House with 227 “yeas” and 183 “nays,” with most of the support from Republicans and most of the opposition from Democrats).

<sup>347</sup> See Protect America Act of 2007, Pub. L. No. 110-55, 121 Stat. 552 (granting greater authority to access electronic communications concerning foreign intelligence related to persons outside the United States), *repealed by* Foreign Intelligence Surveillance Act of 1978 Amendments Act of 2008, Pub. L. No. 110-261, 122 Stat. 2436 (codified as amended in scattered sections of 18 and 50 U.S.C.).

<sup>348</sup> *Id.* §§ 2–3.

<sup>349</sup> *Id.* § 2.

<sup>350</sup> The Protect America Act of 2007 conceived of electronic surveillance as *excluding* surveillance of anyone believed to be outside the United States. See *id.* (“Nothing in the definition of electronic surveillance . . . shall be construed to encompass surveillance directed at a person reasonably believed to be located outside of the United States.”).

<sup>351</sup> *Id.*

<sup>352</sup> *Id.*

sistance needed.<sup>353</sup> The legislation required officials to notify the FISA Court within seventy-two hours of surveillance authorization, allowed for data monitoring, and removed the foreign-agent requirement that previously had been included in the statute.<sup>354</sup> The Act further limited the Foreign Intelligence Surveillance Court's (FISC's) role to simply accepting or rejecting the guidelines for targeting individuals for intelligence information.<sup>355</sup>

In accordance with the six-month sunset provisions, the new powers were to expire on February 5, 2008.<sup>356</sup> Following repeated extensions,<sup>357</sup> however, the existing directives and authorizations remained in place through the formal repeal of the Protect America Act and its effective replacement in July 2008, the FISA Amendments Act (FI-SAAA).<sup>358</sup> This new legislation removed the warrant requirement for government surveillance of foreign intelligence targets "reasonably believed" to be outside the United States.<sup>359</sup> In an unusual move, it provided retroactive immunity to telecommunications providers for any past violations of FISA when the attorney general certified to one of five conditions:

- (1) any assistance by that person was provided pursuant to an order of the court established under section 103(a) directing such assistance;
- (2) any assistance by that person was provided pursuant to a certification in writing under section 2511(2)(a)(ii)(B) or 2709(b) of title 18, United States Code;
- (3) any assistance by that person was provided pursuant to a directive under section 102(a)(4), 105B(e), as added by section 2 of the Protect America Act of 2007 (Public Law 110-55), or 702(h) directing such assistance;

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<sup>353</sup> See *In re Directives* [redacted text] Pursuant to Section 105B of the Foreign Intelligence Surveillance Act, 551 F.3d 1004, 1007 (FISA Ct. Rev. 2008) ("Beginning in [redacted text] 2007, the government issued directives to the petitioner commanding it to assist in warrantless surveillance of certain customers . . ." (alteration in original)).

<sup>354</sup> Protect America Act § 2.

<sup>355</sup> *Id.*

<sup>356</sup> *Id.* § 6(c).

<sup>357</sup> See ELIZABETH B. BAZAN, CONG. RESEARCH SERV., RL 34143, P.L. 110-55, THE PROTECT AMERICA ACT OF 2007: MODIFICATIONS TO THE FOREIGN INTELLIGENCE SURVEILLANCE ACT 20 (2008), available at <http://www.fas.org/sgp/crs/intel/RL34143.pdf> (discussing repeated extensions, which failed to allow the powers to sunset).

<sup>358</sup> See Foreign Intelligence Surveillance Act of 1978 Amendments Act of 2008 (FISA Amendments Act of 2008), Pub. L. No. 110-261, § 403, 122 Stat. 2436, 2473-74 (repealing selected sections of the Protect America Act). For continuation of existing orders, see *id.* § 404(a)(1).

<sup>359</sup> FISA Amendments Act of 2008 § 703, 50 U.S.C. § 1881(b) (Supp. II 2009).

(4) in the case of a covered civil action, the assistance alleged to have been provided by the electronic communication service provider was—

(A) in connection with an intelligence activity involving communications that was—

(i) authorized by the President during the period beginning on September 11, 2001, and ending on January 17, 2007; and

(ii) designed to detect or prevent a terrorist attack, or activities in preparation for a terrorist attack, against the United States; and

(B) the subject of a written request or directive, or a series of written requests or directives, from the Attorney General or the head of an element of the intelligence community (or the deputy of such person) to the electronic communication service provider indicating that the activity was—

(i) authorized by the President; and

(ii) determined to be lawful; or

(5) the person did not provide the alleged assistance.<sup>360</sup>

Efforts to challenge the directives and authorizations through the FISC met with little success and resulted in the second public opinion the FISC appellate court issued.<sup>361</sup> The presiding judges in this case (Judge Royce Lamberth, followed by Judge Colleen Kollar-Kotelly) had been read into the NSA warrantless wiretap program between January 2002 and January 2006.<sup>362</sup> The resulting opinion for *In re Directives* was published (in redacted form) on January 15, 2009.<sup>363</sup> In it, the review court considered the petitioner's refusal to comply with directives issued in 2007 under the Protect America Act.<sup>364</sup> Under threat of civil

<sup>360</sup> *Id.* § 802, 50 U.S.C. § 1885a.

<sup>361</sup> See *In re Directives* [redacted text] Pursuant to Section 105B of the Foreign Intelligence Surveillance Act, 551 F.3d 1004, 1007 (FISA Ct. Rev. 2008) (assessing the “validity of the actions at issue” under the Protect America Act). The first published opinion followed the initial en banc FISC opinion, *In re All Matters Submitted to the Foreign Intelligence Surveillance Court*, 218 F. Supp. 2d 611 (FISA Ct. 2002). See also *In re Sealed Case*, 310 F.3d 717, 742-45 (FISA Ct. Rev. 2002) (holding that amending the surveillance requirement for a “significant purpose” into a “primary purpose” was reasonable under the Fourth Amendment). Note that in dicta in the 2002 case, the court referred to “the President’s inherent constitutional authority to conduct warrantless foreign intelligence surveillance”—again echoing the sentiments of the OLC memos underlying the NSA warrantless wiretapping program. *Id.* at 746.

<sup>362</sup> OFFICES OF INSPECTORS GEN., *supra* note 257, at 17.

<sup>363</sup> See *In re Directives*, 551 F.3d 1004 (No. 08-0001) (order permitting publication of redacted opinion); see also *In re Directives*, 551 F.3d at 1004.

<sup>364</sup> See *In re Directives*, 551 F.3d at 1007-08 (detailing the history of petitioner’s refusal to follow government orders); see also Protect America Act of 2007, Pub. L. No. 110-55, 121 Stat. 552, *repealed by* Foreign Intelligence Surveillance Act of 1978 Amend-

contempt and with a lack of success in obtaining a stay pending appeal to the FISC court, the petitioner had been forced to comply.<sup>365</sup>

While the FISC case proceeded behind closed doors, the Ninth Circuit consolidated *Al-Haramain* and *Hepting*, with Judges Harry Pregerson, Michael Hawkins, and M. Margaret McKeown hearing argument in August 2007.<sup>366</sup> Soon thereafter, the judges severed the cases,<sup>367</sup> and a year later, they ordered the district court to reconsider *Hepting* in light of the FISAAA.<sup>368</sup>

On September 18, 2008, Attorney General Michael Mukasey issued a certification under FISAAA section 802 to immunize the telecommunications companies for their actions.<sup>369</sup> Based on Mukasey's certification, the following day, the Department of Justice filed a motion in relation to thirty-eight of the consolidated telecommunications cases.<sup>370</sup> Without specifying which of the five conditions applied, Mukasey stated that "the claims asserted in the civil actions pending in these consolidated proceedings . . . fall within at least one provision contained in Section 802(a)."<sup>371</sup> The government moved to dismiss all claims against the electronic communications service providers in the MDL.<sup>372</sup>

ments Act of 2008, Pub. L. No. 110-261, 122 Stat. 2436 (codified as amended in scattered sections of 18 and 50 U.S.C.).

<sup>365</sup> *In re Directives*, 551 F.3d at 1008.

<sup>366</sup> *Al-Haramain Islamic Found., Inc. v. Bush*, 507 F.3d 1190, 1192, 1196 (9th Cir. 2007), *see also id.* at 1196 ("We granted interlocutory review and consolidated this appeal with *Hepting v. AT&T Corp.* . . .").

<sup>367</sup> *See id.* at 1196 n.3 ("[W]e are concurrently entering an order stating that the cases are no longer consolidated for any purpose.").

<sup>368</sup> *Hepting v. AT&T Corp.*, 539 F.3d 1157, 1158 (9th Cir. 2008) (order remanding the case to district court).

<sup>369</sup> Certification of the Attorney General of the United States, *In re Nat'l Sec. Agency Telecomms. Records Litig.*, No. 06-1791 (N.D. Cal. Sept. 19, 2008); *see also* Plaintiffs' Federal Rule of Evidence Section 1006 Summary of Voluminous Evidence Filed in Support of Plaintiffs' Opposition to Motion of the United States Seeking to Apply FISAAA § 802 (50 U.S.C. § 1885a) to Dismiss These Actions, *In re Nat'l Sec. Agency*, No. 06-1791 (N.D. Cal. Oct. 16, 2008) (arguing in support of Mukasey's certification to immunize the telecommunications companies).

<sup>370</sup> *See* United States' Notice of Motion to Dismiss, or in the Alternative, for Summary Judgment, *In re Nat'l Sec. Agency*, No. 06-1791 (N.D. Cal. Sept. 19, 2008) [hereinafter U.S. Motion to Dismiss in *In re NSA*] (moving to dismiss all claims against the electronic communications service providers in a multidistrict-litigation matter brought by individuals against telecommunications companies).

<sup>371</sup> *In re Nat'l Sec. Agency*, No. 06-1791, at 6 (N.D. Cal. June 3, 2009) (order granting motion to dismiss) (internal quotation marks omitted).

<sup>372</sup> U.S. Motion to Dismiss in *In re NSA*, *supra* note 370, at 2.

On December 2, 2008, Chief Judge Walker heard oral argument on the motion to dismiss.<sup>373</sup> The FISC appellate decision was made public the following January.<sup>374</sup> Then, on July 21, 2009, Chief Judge Walker formally dismissed *Hepting* under FISAAA section 802.<sup>375</sup> Ten days later, the plaintiffs appealed.<sup>376</sup>

#### D. *State Secrets in the Aftermath*

With substantial jurisprudence undergirding its assertion of constitutional authority, the executive branch had proven itself willing and able to prevent a challenge to the wiretapping program. The ensuing battle essentially rendered the invocation of state secrets moot. So what, then, of the fifty related cases?

Two of these cases resulted in voluntary dismissal.<sup>377</sup> The effect of state secrets on these cases, as in others, was that upon the government's invocation of state secrets, plaintiffs voluntarily withdrew their case. This effect has largely escaped academic analysis. In light of FISAAA, *Hepting* no longer controlled for the forty-eight remaining cases. On June 3, 2009, Chief Judge Walker issued two orders, dismissing forty-four of the remaining cases.<sup>378</sup> The first order applied to thirty-eight cases, and stated that the FISA amendments at 50 U.S.C. § 1885(a) preempted all claims, granting immunity to the telecom-

<sup>373</sup> Civil Minutes, *In re Nat'l Sec. Agency*, No. 06-1791 (N.D. Cal. Dec. 2, 2008).

<sup>374</sup> See *In re Directives* [redacted text] Pursuant to Section 105B of the Foreign Intelligence Surveillance Act, 551 F.3d 1004 (FISA Ct. Rev. 2008) (showing text of ruling); James Risen & Eric Lichtblau, *Court Affirms Wiretapping Without Warrants*, N.Y. TIMES, Jan. 16, 2009, at A13 (discussing the unsealing of the opinion several months after the judgment was handed down).

<sup>375</sup> See *Hepting v. AT&T Commc'ns*, No. 06-0672 (N.D. Cal. July 21, 2009) (rendering judgment in favor of the defendants according to the court's June 3, 2009, order); *In re Nat'l Sec. Agency*, No. 06-1791, at 1-2 (N.D. Cal. June 3, 2009) (order granting motion to dismiss) (noting that the basis for the government's motion to dismiss was FISA Section 802); see generally FISA Amendments Act of 2008 § 802, 50 U.S.C. § 1885a (Supp. II 2009).

<sup>376</sup> Joint Notice of Appeal of Designated Plaintiffs and Actions, *In re Nat'l Sec. Agency*, No. 06-1791 (N.D. Cal. July 31, 2009) [hereinafter Joint Notice of Appeal in *In re NSA*].

<sup>377</sup> *In re Nat'l Sec. Agency*, No. 06-1791 (N.D. Cal. Feb. 22, 2007) (order on notice of voluntary dismissal), *dismissing* Complaint, Electron Tubes Inc. v. Verizon Commc'ns, No. 06-06433 (S.D.N.Y. filed May 26, 2006); *In re Nat'l Sec. Agency*, No. 06-1791 (N.D. Cal. Feb. 22, 2007) (order on notice of voluntary dismissal), *dismissing* Complaint, Trevino v. AT&T Corp., No. 06-05268 (S.D. Tex. filed May 17, 2006).

<sup>378</sup> *In re Nat'l Sec. Agency*, No. 06-1791 (N.D. Cal. June 3, 2009) (order granting motion to dismiss), ECF No. 639; *In re Nat'l Sec. Agency*, No. 06-1791 (N.D. Cal. June 3, 2009) (order granting motion for summary judgment), ECF No. 640.

munications companies.<sup>379</sup> (All thirty-eight cases are currently on appeal.<sup>380</sup>) The second order applied to the state cases (i.e., the cases in which states were subpoenaing documents from telecommunications companies, with the exception of *Clayton*, where Clayton is the plaintiff).<sup>381</sup> The controlling provision for these state cases fell within FISAAA's amendments to section 803 of FISA, codified at 50 U.S.C. § 1885b (a provision which authorizes the federal government to bring suit to enforce the provisions that deny states the authority to investigate, regulate, or impose administrative sanctions, or to commence a civil action or other proceeding in regards to disclosure of information concerning electronic communication service providers' alleged assistance to the intelligence community).<sup>382</sup> This provision applied to *any action pending on* or commenced after the date of the amendment's enactment.<sup>383</sup> None of the state cases were appealed.

According to the approach taken to date within the academic literature, *none of these cases is a state secrets case*, as the court did not, in the end, rule on whether state secrets doctrine applied; rather, FISAAA preempted the state secrets question. Yet the executive branch jurisprudence underlying the cases, the manner of their development, and

<sup>379</sup> See *In re Nat'l Sec. Agency*, No. 06-1791, at 18 (N.D. Cal. June 3, 2009) (order granting motion to dismiss), ECF No. 639 (“[S]ection 802 creates an immunity, albeit one that is activated in an unusual way.”).

<sup>380</sup> Joint Notice of Appeal in *In re NSA*, *supra* note 376.

<sup>381</sup> See, e.g., *Clayton v. AT&T Commc'ns of the Sw., Inc.*, No. 07-1187 (N.D. Cal. transferred Feb. 28, 2007) (originating in W.D. Mo.); Complaint, *United States v. Volz*, No. 06-0188 (D. Vt. filed Oct. 2, 2006). In 2006, the Vermont Department of Public Service petitioned the Vermont Public Service Board to open investigations of Verizon and AT&T. The Board ordered the carriers to respond. On October 2, 2006, the federal government sued to enjoin the investigation. See *In re Nat'l Sec. Agency Telecomms. Records Litig.*, No. 06-1791, at 5-7 (N.D. Cal. June 3, 2009) (order granting motion for summary judgment), ECF No. 640; see also *United States v. Palermino*, 238 F.R.D. 118, 120 (D. Conn. 2006) (showing intervention by the U.S. government in an action by a Connecticut agency to compel telecommunications carriers to disclose government information); Complaint, *United States v. Adams*, No. 06-00097 (D. Me. Aug. 21, 2006) (arguing that the states do not have the authority to access federal government information); Complaint, *United States v. Gaw*, No. 06-01132 (E.D. Mo. July 25, 2006) (same); Complaint, *United States v. Farber*, No. 07-01324 (D.N.J. June 14, 2006) (same); Procedural Order, Nos. 7183, 7192 & 7193 (Vt. Pub. Serv. Bd. July 18, 2008) (inviting comment on how to proceed in light of FISA amendments significantly limiting the permissible scope of investigation). For the renaming of the cases, see *In re Nat'l Sec. Agency Telecomms. Records Litig.*, No. 06-1791 (N.D. Cal. June 3, 2009) (order granting motion for summary judgment), ECF No. 640.

<sup>382</sup> See FISA Amendments Act of 2008 § 803, 50 U.S.C. § 1885b (Supp. II 2009) (providing that states have no authority to investigate these national intelligence matters, and that the United States may bring suit to enforce this provision).

<sup>383</sup> *Id.* § 803(d).

the impact of state secrets throughout litigation are central to understanding the privilege and how the courts deal with allegations of constitutional violations and national security interests. The battle, moreover, went to the heart of the separation-of-powers principle. The manner in which the cases unfolded, additionally, sheds new light on the relationship between FISA and state secrets.

The remaining four cases represent suits brought against governmental entities (as opposed to telecommunication companies in the first court order and state governments in the second court order). In regard to the first of these cases, *Al-Haramain Islamic Foundation v. Obama*, in March 2010, Chief Judge Walker ruled that the warrantless interception of an Islamic charity's telephone calls had violated FISA.<sup>384</sup> The court said that the plaintiffs had been subjected to unlawful surveillance, making the government liable for civil damages.<sup>385</sup> Plaintiffs subsequently requested punitive damages of \$183,600 for each plaintiff.<sup>386</sup> As of this writing, the second case, *Center for Constitutional Rights v. Bush*, is awaiting motions for summary judgment.<sup>387</sup> The third, *Shubert v. Bush*, is currently on appeal,<sup>388</sup> following a judgment in favor of defendants.<sup>389</sup> The fourth, *Guzzi v. Bush*, was dismissed in March 2010.<sup>390</sup> In each of these, the state secrets doctrine has been central to the case. Careful examination of the related transcripts, memoranda, and legal documents sheds important light on the manner in which the executive branch invokes the privilege; how the courts respond to in camera, ex parte examination of the materials; how the judiciary treats information already in the public domain; and the relationship between FISA and state secrets.

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<sup>384</sup> Plaintiffs' Memorandum of Points and Authorities in Support of Claim for Punitive Damages at 1, *Al-Haramain Islamic Found. v. Obama*, Nos. 07-010, 06-1791 (N.D. Cal. May 7, 2010) [hereinafter Plaintiffs' Claim for Damages in *Al-Haramain*].

<sup>385</sup> *Id.* The plaintiffs also requested punitive damages. See *id.* at 1-7 ("Defendants sought to put themselves above the law, in the manner of a monarch. That is a profound abuse of America's trust. It calls for strong medicine."). Cf. Defendants' Opposition to Plaintiffs' Request for Punitive Damages, *Al-Haramain*, Nos. 07-0109, 06-1791 (N.D. Cal. May 21, 2010).

<sup>386</sup> Plaintiffs' Claim for Damages in *Al-Haramain*, *supra* note 384, at 1.

<sup>387</sup> Motion for Summary Judgment, *Ctr. for Constitutional Rights v. Bush*, No. 07-01115 (N.D. Cal. Jan. 9, 2010).

<sup>388</sup> Brief of Shubert Appellants, *Shubert v. Bush*, Nos. 10-15616, 06-1791 (9th Cir. Aug. 13, 2010).

<sup>389</sup> *Shubert v. Bush*, Nos. 07-00693, 06-1791 (N.D. Cal. Jan. 25, 2010).

<sup>390</sup> See *Guzzi v. Bush*, No. 06-6225 (N.D. Cal. Mar. 5, 2010) (order dismissing case) (dismissing the case based on the stipulated dismissal by the parties).

In *Al-Haramain*, for instance, District Court Judge King decided on August 18, 2006, to review the documents submitted *after* the government invoked the state secrets privilege in camera and ex parte, but he declined to review in kind documents submitted *prior* to the declaration.<sup>391</sup> He subsequently found that “[a]s a result of these official statements and publications, the existence of the Surveillance Program is not a secret.”<sup>392</sup> Confirming or denying whether the plaintiffs had been subject to surveillance would not create a reasonable danger to national security, at least in regard “to the surveillance event or events disclosed in the Sealed Document, and without publicly disclosing any other information in the Sealed Document.”<sup>393</sup> The court found that disclosure of further surveillance efforts, however, “could harm national security.”<sup>394</sup> But since the government had “lifted the veil of secrecy on the existence of the Surveillance Program,” the “very subject matter of the plaintiffs’ action” was not a state secret.<sup>395</sup> Judge King proved remarkably unwilling “to dismiss this case without first examining all available options and allowing plaintiffs their constitutional right to seek relief in this Court.”<sup>396</sup> The court drew attention to the surrounding network of statutory authorities and secondary instruments used to prevent information from becoming public.<sup>397</sup> While the court denied the plaintiff access to the classified material, it simultaneously shifted the burden to the government to file further affidavits in camera to show that sealed documents would be required for the plaintiff to make a prima facie case.<sup>398</sup> The court opted to monitor discovery closely in order to allow it to move forward, while denying plaintiffs’ request to unseal the record.<sup>399</sup> Although the court sidestepped the FISA question and the attendant constitutional questions,

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<sup>391</sup> *Al-Haramain Islamic Found., Inc. v. Bush*, 451 F. Supp. 2d 1215, 1219-20 (D. Or. 2006).

<sup>392</sup> *Id.* at 1222.

<sup>393</sup> *Id.* at 1224.

<sup>394</sup> *Id.*

<sup>395</sup> *Id.* at 1224-25.

<sup>396</sup> *Id.* at 1227.

<sup>397</sup> *Id.* at 1227-28 (citing National Security Act, 50 U.S.C. § 402 (2006); Intelligence Reform and Terrorism Prevention Act of 2004, 50 U.S.C. § 403-1(i)(1) (2006); Exec. Order No. 12,958, § 1.1(b), 60 Fed. Reg. 19,825 (Apr. 20, 1995), *as amended by* Exec. Order No. 13,292, 3 C.F.R. 196 (2004)).

<sup>398</sup> *Id.* at 1229.

<sup>399</sup> *Id.* at 1232-33.

the underlying legal documents explored the arguments in detail.<sup>400</sup> Throughout the litigation, the specter of state secrets loomed.<sup>401</sup>

The fifty suits discussed above are not the only ones to come out of the NSA's warrantless wiretapping program. One of the most important cases was *ACLU v. National Security Agency*,<sup>402</sup> an earlier case not included in the MDL, in which the Director of National Intelligence, John D. Negroponte, and the NSA's Signals Intelligence Director, Major General Richard J. Quirk, invoked state secrets and related privileges.<sup>403</sup> The executive branch sought a motion to dismiss or, in the alternative, summary judgment.<sup>404</sup> Following examination of classified in camera materials, the lower court rejected the invocation of the state secrets privilege as a bar to the litigation moving forward.<sup>405</sup>

In *Jewel v. National Security Agency*, the Obama Administration requested dismissal based not only on state secrets<sup>406</sup> but also on sove-

<sup>400</sup> See, e.g., Plaintiffs' Reply to Defendants' Opposition to Plaintiffs' Motion for Order Compelling Discovery at 5-17, *Al-Haramain Islamic Found., Inc. v. Bush*, No. 06-0274 (D. Or. July 2006), 2006 WL 1909808 (contending that FISA abrogates the state secrets privilege in foreign electronic surveillance cases); Defendants' Response to the Oregonian's Motion to Intervene and to Unseal Records at 9-17, *Al-Haramain*, No. 06-0274 (D. Or. Apr. 14, 2006), 2006 WL 1465726 (arguing against the unsealing of classified documents).

<sup>401</sup> See, e.g., Memorandum in Support of Defendants' Motion for a Protective Order Barring the Deposition of Barbara C. Hammerle at 4, *Al-Haramain*, No. 06-0274 (D. Or. June 9, 2006), 2006 WL 1716659 ("Defendants are preparing a dispositive motion, based on an assertion of the state secrets privilege, that will demonstrate that this case should not proceed.").

<sup>402</sup> 438 F. Supp. 2d 754 (E.D. Mich. 2006), *overruled by* *ACLU v. Nat'l Sec. Agency*, 493 F.3d 644 (6th Cir. 2007).

<sup>403</sup> See Declaration of John D. Negroponte, Director of National Intelligence at 2, *ACLU*, No. 06-10204 (E.D. Mich. May 27, 2006), 2006 WL 1868157 (asserting the state secrets privilege); Declaration of Major General Richard J. Quirk, Signals Intelligence Director, National Security Agency at 2, *ACLU v. Nat'l Sec. Agency*, No. 06-10204 (E.D. Mich. May 27, 2006), 2006 WL 1868158 (supporting the assertion of the state secrets privilege, as well as a statutory privilege); see also Defendants' Memorandum of Points and Authorities in Support of a Stay Pending Appeal at 11-15, *ACLU*, No. 06-10204 (E.D. Mich. Sept. 1, 2006), 2006 WL 2791162 (referencing depositions).

<sup>404</sup> Memorandum of Points and Authorities in Support of the United States' Assertion of the Military and State Secrets Privilege; Defendants' Motion to Dismiss or, in the Alternative, for Summary Judgment; and Defendants' Motion to Stay Consideration of Plaintiffs' Motion for Summary Judgment at 5, *ACLU*, No. 06-10204 (E.D. Mich. May 26, 2006), 2006 WL 1868156.

<sup>405</sup> See Defendants' Reply in Support of a Stay Pending Appeal at 1, *ACLU*, No. 06-10204 (E.D. Mich. Sept. 22, 2006), 2006 WL 2769326 (explaining the lower court's order).

<sup>406</sup> See *Jewel v. Nat'l Sec. Agency*, No. 06-1791, 2010 WL 235075, at \*4 (N.D. Cal. Jan. 21, 2001) (asserting the state secrets privilege first on April 3, 2009); Government Defendants' Response to Plaintiffs' Supplemental Brief at 3, *Jewel*, No. 08-4373 (N.D.

reign immunity.<sup>407</sup> The government drew on the Freedom of Information Act (FOIA) exemptions and the surrounding classification statutory framework, similar to its position the *Al-Haramain* litigation.<sup>408</sup> The following September, the defendants requested what amounted to an indefinite stay: that is, an order that they “not be required to answer or otherwise respond to plaintiffs’ complaint until there is a final resolution of whether information subject to the state secrets and related statutory privileges is necessary to litigate plaintiffs claims.”<sup>409</sup> The plaintiffs expressed frustration at the length of time it had taken for the case to work its way through the courts: “While the NSA’s program of wholesale warrantless surveillance of millions of Americans has been ongoing for at least eight years, this case, along with multiple others seeking judicial review of the serious underlying legal and constitutional questions, has essentially languished in preliminary procedural challenges.”<sup>410</sup> The plaintiffs had first brought a case against the NSA three and a half years prior. Following congressional action, the plaintiffs brought the current case:

In the over three years that these cases have been pending, despite the ongoing nature of the harms and the accumulation of a mountain of pleadings and boxes of evidence in support of Plaintiffs’ claims, the Government’s strategy of raising and re-raising the same arguments

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Cal. Sept. 4, 2009) [hereinafter Government Response in *Jewel*], 2009 WL 2876653 (maintaining that FISA does not preempt the state secrets privilege); Government Defendants’ Statement in Support of Individual Capacity Defendants’ Motion for Relief from Court Orders at 1, *Jewel*, No. 08-4373 (N.D. Cal. Sept. 3, 2009), 2009 WL 2876652 (stating that defendants are barred from revealing information subject to the state secrets privilege); Government Defendants’ Reply in Support of Motion to Dismiss and for Summary Judgment at 1, *Jewel*, No. 08-4373 (N.D. Cal. June 26, 2009), 2009 WL 1883020 (“As the recently [sic] President made clear, while the state secrets privilege is necessary to protect national security, the United States will not invoke the privilege to prevent disclosure of the violation of a law or embarrassment to the government.” (internal quotation marks omitted)); Plaintiffs’ Opposition to Government Defendants’ Motion to Dismiss and for Summary Judgment at 14-16, *Jewel*, No. 08-4373 (N.D. Cal. June 3, 2009), 2009 WL 1683967 (“For purposes of Plaintiffs’ claims, FISA preempts the common-law state secrets privilege.”).

<sup>407</sup> See *Jewel*, 2010 WL 235075, at \*1 (noting that the various government defendants have argued similarly in stating that Congress has not waived sovereign immunity).

<sup>408</sup> See Government Response in *Jewel*, *supra* note 406, at 3-4 (arguing that FISA does not preempt the state secrets privilege).

<sup>409</sup> Plaintiffs’ Opposition to Individual Capacity Defendants’ Motion for Relief from the Court’s Orders of April 27, 2009, and May 8, 2009, at 1, *Jewel*, No. 08-4373 (N.D. Cal. Aug. 24, 2009) (citations omitted).

<sup>410</sup> *Id.*

based on the state secrets privilege and other governmental privileges has successfully limited forward motion toward the merits.<sup>411</sup>

Defendants argued in reply that information potentially protected by state secrets was required to establish a qualified immunity defense—making them unable to defend themselves adequately until the state secrets questions had been resolved.<sup>412</sup> In January 2010, the court ruled in favor of the NSA.<sup>413</sup>

In each of these cases, the government acted as defendant, invoking the state secrets privilege in the process. It is not just the suits related to the NSA's wiretapping program, though, that have found the government in this position.

### III. LEGAL CHALLENGES BROUGHT AGAINST U.S. OFFICIALS AND AGENCIES

From 2001 to 2009, a range of legal claims against federal officials and agencies prompted executive invocation of the state secrets privilege. Since the early to mid-twentieth century, as treatises and scholarly works recognized, such assertions have been treated as distinct from executive privilege, law enforcement evidentiary privilege, and informer's protection.<sup>414</sup> The claims in cases where the federal gov-

<sup>411</sup> *Id.*

<sup>412</sup> See Individual Capacity Defendants' Reply in Support of Their Motion for Relief from the Court's Orders of April 27, 2009, and May 8, 2009 at 1, *Jewel*, No. 08-4373 (N.D. Cal. Sept. 3, 2009) (arguing that an order for the individual defendants to respond should be stayed until the privilege issues have been decided). The Individual Capacity Defendants included George W. Bush, Richard B. Cheney, David S. Addington, Keith B. Alexander, Michael V. Hayden, John D. McConnell, John D. Negroponte, Michael B. Mukasey, Alberto R. Gonzales, and John D. Ashcroft. *Id.* at 12. The Government Defendants entered a brief in support of the Individual Capacity Defendants' Motion. See Government Defendants' Statement in Support of Individual Capacity Defendants' Motion for Relief from Court Orders, *Jewel*, No. 08-4373 (N.D. Cal. Sept. 3, 2009) (arguing for a stay of the order until privilege issues are decided).

<sup>413</sup> *Jewel v. Nat'l Sec. Agency*, No. 06-01791, 2010 WL 235075 (N.D. Cal. Jan. 21, 2010).

<sup>414</sup> See, e.g., Chesney, *supra* note 6, at 1273-76 (explaining the historical development of the privilege in treatises). The relationship between executive privilege and state secrets, however, continues to be confused in legal documents. See, e.g., Plaintiffs' Reply to Defendant's Invalid Assertion of Executive Privilege to Deny Production of Thousands of Pages of Documents Underlying Treas. Reg. § 1.701-2 at 2, *Jade Trading, LLC v. United States*, 64 Fed. Cl. 85 (2005) (No. 03-2164), 2003 WL 25656604 (referring to the defendant's assertion of "executive privilege" to withhold documents); City of Miami's Response to Plaintiff's Motion to Compel Concerning the MPD FTAA Operational Plan and Motion for Protective Order at 1, *Owaki v. City of Miami*, 491 F. Supp. 2d 1140 (S.D. Fla. 2007) (No. 06-20737) (asserting an "official information privilege"); Plaintiffs' Motion to Strike Defendant's Claims of Privilege Regarding the Tes-

ernment, as the defendant, invokes the state secrets privilege include

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timony of Former Deputy Police Chief Pamela Evans at 2, *Lewis v. City of Detroit*, 234 F.R.D. 157 (E.D. Mich. 2006) (No. 05-70667), 2006 WL 1035838 (noting the assertion of the “executive privilege”).

Notably, the invocation of the “state secrets” privilege has *not* been differentiated into the categories that mark federal law. Instead, the privilege appears to be understood broadly, incorporating such varied material as institutional files, prison records, personnel records, the method of lethal injection, the names of executioners, informer’s identity, and more. *See, e.g.*, *Porter v. Ray*, 461 F.3d 1315, 1324 (11th Cir. 2006) (finding a statutory basis for considering prison records to be state secrets); *Taylor v. Nix*, 451 F. Supp. 2d 1351, 1354 (N.D. Ga. 2006) (denying access to prison records on grounds of state secrets); *Pack v. Beyer*, 157 F.R.D. 226, 233 (D.N.J. 1994) (finding that the state secrets privilege applied to prison documents); *Beckett v. Trice*, No. 08-0029, 1994 WL 319171, at \*3 (Del. Super. Ct. June 6, 1994) (deeming information between witnesses and prosecutor a state secret); Plaintiff’s Request for Reconsideration by the District Court of Magistrate Judge’s Ruling on Plaintiff’s Motion to Compel Production and Further Responses at 3-4, *Jadwin v. County of Kern*, 610 F. Supp. 2d 1129 (E.D. Cal. 2009) (No. 07-00026), 2008 WL 2817302 (arguing that personnel records should be considered a state secret); Motion for Stay of Execution at 37, *Nooner v. Norris*, No. 06-00110 (E.D. Ark. Oct. 22, 2007), 2007 WL 3224262 (noting that the defendant’s lethal injection method was considered a state secret); Plaintiff’s Reply to Defendants’ Brief Filed on May 30, 2007, at 5, *Press-Citizen Co. v. Iowa Bd. of Regents*, No. 07-6443 (D. Iowa June 3, 2007), 2007 WL 6335525 (referring to an informant’s privilege as a state secret); Response to Non-Party Objection and Motion to Quash Subpoena and Motion to Compel Compliance with Subpoena and Notice of Deposition of Representative of the Georgia Department of Corrections Under FRCP Rule 30(b)(6) and Request for an Immediate Order at 11, *Graham v. Rich*, No. 06-0095 (N.D. Ga. Apr. 24, 2006), 2006 WL 1436664 (treating criminal files as a “state secret”); Response to Defendants’ Efforts to Keep Names of Executioners Including *One Who Is a Board Certified Surgeon* Secret from Plaintiffs’ Counsel Even Subject to a Protective Order at 8, *Taylor v. Crawford*, No. 05-4173 (W.D. Mo. Sept. 13, 2005), 2005 WL 6070480 (“If the name of the board-certified surgeon were not a state secret, we would see how long he or she retained that distinction.”); Opposition to Motion to Compel and Request for Sanctions at 6, *Lott v. Greystar Corp.*, No. 01-0312 (E.D. La. Aug. 28, 2001), 2001 WL 34673784 (referring to New Jersey state prisoner files as state secrets).

Even when addressed to criminal matters and executive privilege, such cases may nevertheless rely on *Reynolds*, among other things. *See, e.g.*, *Pack v. Beyer*, 157 F.R.D. 226, 231 (D.N.J. 1994) (citing *Reynolds* for the proposition that “[t]he state secrets privilege protects official information from disclosure if disclosure might otherwise endanger the public interest” (citation omitted)). Like many of the federal cases, they are often unreported. *See, e.g.*, *Brady v. Ocean Farm Ltd. P’ship*, No. 2036-S, 2002 WL 259955 (Del. Ch. Feb. 14, 2002). Perhaps even more extraordinary is the situation in which state governments have invoked the privilege in its national security sense. In *Cedar and Washington Associates*, for instance, the state of New York claimed state secrets as its twenty-fifth defense, arguing that the September 11, 2001, attacks amounted to an act of war. Amended Answer and Counterclaim of Defendants UAL Corporation and United Air Lines, Inc. at 22, *Cedar & Washington Assoc., LLC v. Port Auth. of N.Y. & N.J.*, No. 08-9146 (S.D.N.Y. June 18, 2009), 2009 WL 1897295; *see also* Answer with Affirmative Defenses and Counterclaim of Defendant Host Hotels & Resorts, Inc. at 17, *Cedar & Washington Assoc.*, No. 08-9146 (S.D.N.Y. Jan. 30, 2009), 2009 WL 319560 (asserting the state secrets privilege as a defense).

constitutional violations (such as Fourth and Fifth Amendment claims and violations of international law), environmental cases, employment-related suits (such as wrongful termination and unlawful discrimination), libel, and defamation.

Three characteristics of the suits are of note: First, when the government acts as defendant, the executive branch appears more likely to invoke the state secrets privilege early in the suit than in cases in which the government is an intervenor. One explanation for this may be simply that the government is more aware of the suit moving forward than in situations where a corporation is lobbying the executive to become more involved. It may also be that the type of activities such suits target is more likely to involve clandestine operations. Second, the executive branch does not appear to change its position in a suit once it has invoked the state secrets privilege, even when it does not appear advantageous for the government to hold its course. Third, when positioned as a defendant, the government tends to seek not just suppression of evidence, but dismissal of the case. The proliferation of cases against the government since the September 11, 2001, attacks may thus partially explain why the government appears to be using state secrets differently than before. As Professor Chesney points out, though, the government has previously sought full dismissal.<sup>415</sup>

What appears to be different now, at least judging from the instant research project, is that there are many visible cases alleging extreme and possibly criminal behavior, as well as constitutional violations, in which the government seeks to dismiss the case as part of its own defense. The claims are thus different from the more traditional state secrets cases—that is, those centered on tortious conduct or contractual disputes. Instead, the plaintiffs are alleging constitutional violations and criminal activity. This suggests that a rather different cost is at stake than contemplated, for instance, by the court in *Reynolds*.<sup>416</sup> The claims also arise within a different context: while in torts, for example, privilege plays into litigation in a number of ways (e.g., marital privilege and attorney-client privilege); in cases that reach questions of the separation of powers or constitutional rights,

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<sup>415</sup> See Chesney, *supra* note 6, at 1297-98 (identifying twenty-eight cases decided before September 11, 2001, in which the government sought dismissal of “some or all claims” under the state secrets privilege).

<sup>416</sup> See *United States v. Reynolds*, 345 U.S. 1, 9-12 (1953) (weighing the necessity of the evidence to plaintiffs’ wrongful death claims against the “danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged”).

privileging an entire class of defendants raises a different set of (foundational) costs.

#### A. *Fourth and Fifth Amendment Violations*

Fourth Amendment claims similar to those raised with respect to the NSA's warrantless wiretapping program have previously appeared in a range of lawsuits that challenge federal surveillance.<sup>417</sup> The period from 2001 to 2009 proves no different.<sup>418</sup> In such circumstances, the state secrets privilege invocations may play a role in preventing plaintiffs from establishing standing, essentially acting as a bar to any litigation.

In 2005, for instance, following repeated detentions in less-than-ideal facilities during the course of their travels, the Rahman family, consisting of two parents and two small children, brought suit.<sup>419</sup> The family alleged Fourth and Fifth Amendment violations in connection

<sup>417</sup> See, e.g., *Black v. United States*, 62 F.3d 1115, 1119-20 (8th Cir. 1995) (holding that the plaintiff's Fourth Amendment allegations, even if true, did not prevent the government from asserting the state secrets privilege); *Halkin v. Helms*, 598 F.2d 1, 8-12 (D.C. Cir. 1978) (ordering reconsideration of the state secrets privilege raised to protect intelligence collection); *United States v. Ahmad*, 499 F.2d 851, 854 (3d Cir. 1974) (affirming the state secrets protection in an action involving alleged wiretaps by the government); *Spock v. United States*, 464 F. Supp. 510, 512-18 (S.D.N.Y. 1978) (finding the state secrets privilege validly established in a suit alleging unlawful interception of wire communications); *Paton v. La Prade*, 469 F. Supp. 773, 776-77 (D.N.J. 1978) (analyzing assertions of Fourth Amendment protection against FBI seizure of items in the mail); *Kinoy v. Mitchell* 67 F.R.D. 1, 9 (S.D.N.Y. 1975) (preventing the disclosure of surveillance documents in an action alleging Fourth, Fifth, and Sixth Amendment violations); *Elson v. Bowen*, 436 P.2d 12, 13-14 (Nev. 1967) (finding the government's privilege to withhold evidence from plaintiffs alleging illegal surveillance at hotels to be "subject to the requirement that the government has the duty in seeing that justice is done"). Such cases often allege multiple constitutional violations. See, e.g., *Jabara v. Kelley*, 75 F.R.D. 475, 478 (E.D. Mich. 1977) (noting plaintiff's allegations of First, Fourth, Fifth, Sixth, and Ninth Amendment violations).

<sup>418</sup> See, e.g., *Amidax Trading Grp. v. S.W.I.F.T. SCRL*, 607 F. Supp. 2d 500, 501 (S.D.N.Y. 2009) (dismissing plaintiffs' claim that the Treasury Department unlawfully obtained the plaintiff's financial information by administrative subpoena). The case arose when the Bush Administration allegedly served an administrative subpoena (National Security Letter) on a Belgian banking cooperative, requesting that the company forward private financial data to the United States. *Id.* at 502. The federal defendants raised the potential invocation of the state secrets privilege early in the suit to alert the court to problems of standing that would ensue. *Id.* The court duly took notice of the government's assertion, even as it ruled to dismiss the case for lack of subject matter jurisdiction. *Id.* at 508-09.

<sup>419</sup> Class Action Complaint at 2-3, *Rahman v. Chertoff*, 244 F.R.D. 443 (N.D. Ill. 2007) (No. 05-3761), 2005 WL 1768574. Defendants, in their official capacities, included Michael Chertoff, Secretary of the Department of Homeland Security; Robert C. Bonner, Commissioner of U.S. Customs and Border Protection; and Michael J. Garcia, Assistant Secretary of U.S. Immigration and Customs Enforcement. *Id.* at 1.

with their inclusion in the Terrorist Screening Database (TSDB), administered by the Terrorist Screening Center.<sup>420</sup> Approximately one year later, the plaintiffs moved for class certification.<sup>421</sup> Eight of the named plaintiffs claimed to have been improperly detained or mistreated because either the TSDB incorrectly identified them as posing a serious threat (the “overclassification” claim) or because they were mistaken for someone on the list (the “misidentification” claim).<sup>422</sup> Plaintiffs sought declaratory and injunctive relief in relation to the travel delays to which they had been subjected.<sup>423</sup>

The court initially concluded that a protective order would be appropriate under the law enforcement and investigatory files privilege.<sup>424</sup> However, following a memorandum opinion and order on May 1, 2007,<sup>425</sup> which required defendants to produce a range of documents, in July 2007, the government moved for a ruling that state secrets privilege barred the discovery of some materials.<sup>426</sup> The government claimed as excluded any information tending to confirm or deny whether the plaintiff had ever been placed in the TSDB, FBI files on any plaintiffs who may have been listed in the TSDB, any records in the Terrorist Identities Datamart Environment (TIDE) pertaining to the plaintiffs, and policy and procedure documents containing classified information about terrorist screening practices.<sup>427</sup>

<sup>420</sup> *Rahman v. Chertoff*, No. 05-3761, 2008 WL 4534407, at \*1 (N.D. Ill. Apr. 16, 2008).

<sup>421</sup> Plaintiffs’ Memorandum in Support of Motion for Class Certification at 1, *Rahman*, 244 F.R.D. 443 (No. 05-3761), 2006 WL 5940391; *see also Rahman*, 244 F.R.D. at 452 (adopting the magistrate judge’s Report and Recommendation on class certification, and granting in part and denying in part defendants’ motion to dismiss).

<sup>422</sup> *Rahman*, 2008 WL 4534407, at \*1.

<sup>423</sup> *Rahman v. Chertoff*, No. 05-3761, 2007 WL 2892972, at \*1 (N.D. Ill. Sept. 28, 2007).

<sup>424</sup> *See id.* at \*1 (recounting that the court had initially concluded “the parties had established good cause to protect information relating to the alleged border stops”).

<sup>425</sup> *Rahman*, No. 05-3761 (N.D. Ill. May 1, 2007) (sealed order).

<sup>426</sup> Memorandum of Points and Authorities in Support of Defendants’ Motion for a Protective Order Barring Discovery of Matters Subject to the State Secrets Privilege at 1, *Rahman*, 244 F.R.D. 443 (No. 05-3761), 2007 WL 5336227.

<sup>427</sup> *Id.* at 3. John P. Clark, Deputy Assistant Secretary (Operations) of U.S. Immigration and Customs Enforcement, and William S. Heffelfinger III, Deputy Assistant Commissioner, Office of Field Operations, U.S. Customs and Border Protection, filed affidavits in support of the investigatory law enforcement privilege (not the state secrets privilege). *Rahman*, 2007 WL 2892972, at \*5-6. Alberto R. Gonzales, Attorney General; J. Michael McConnell, Director of National Intelligence; Gale Rossides, Acting Deputy Administrator (TSA); Andrew Colsky, Director of Sensitive Security Information (TSA); and Robert Jacksta, Executive Director (Traveler’s Security and Facilita-

On December 4, 2007, the court heard oral argument on the motion and subsequently considered further written supplements to the record.<sup>428</sup> Strict procedures accompanied court examination of the documents in camera and ex parte: one copy of the classified materials was brought into chambers, read, and returned—along with any notes made on the materials—to a secure location outside the court’s control.<sup>429</sup> Judge Ronald A. Guzmán and Magistrate Judge Sidney I. Schenkier, who were not permitted to discuss the material with their staff, concluded that the government would be required to confirm or deny whether the plaintiffs had ever been listed in the TSDB, but would not be required to provide FBI files or access to the TIDE database (the bank of information on terrorists that was created by the Intelligence Reform and Terrorism Prevention Act of 2004).<sup>430</sup>

Upon the government’s interlocutory appeal from district court, Chief Judge Easterbrook and Circuit Judges Kanne and Tinder heard oral argument on May 13, 2008, and issued their decision June 26, 2008.<sup>431</sup> Before them was neither the district court’s refusal to dismiss the suit (an interlocutory decision and thus not yet reviewable), nor the scope of the state secrets privilege, but rather the court’s decision to certify two nationwide classes (the “Primary Traveler Class” and the “Family Detainee Class”).<sup>432</sup> On these grounds, the circuit court reversed and remanded the case, but not without noting its discomfort at being forced into the national security realm.<sup>433</sup> Judge Easterbrook concluded his opinion:

Plaintiffs are entitled to relief that will redress any discrete wrong done them. That can be accomplished without certifying a class. There is no risk that the defendants can moot the litigation by offering compromises to all named plaintiffs. Defendants have shown no inclination to do so,

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tion) submitted public declarations in support of the state secrets assertion. *Rahman*, 2008 WL 4534407, at \*2 n.4.

<sup>428</sup> Supplemental Brief in Support of Defendants’ Motion for a Protective Order Barring Discovery of State Secrets, Pursuant to the Court’s Order of December 4, 2007, at 1, *Rahman*, No. 05-3761 (N.D. Ill. Jan. 17, 2008), 2008 WL 2810560.

<sup>429</sup> *Rahman*, 2008 WL 4534407, at \*2 n.4.

<sup>430</sup> *Id.* at \*11; see also Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, § 1016, (codified as amended at 6 U.S.C. § 485) (establishing an “information sharing environment” to facilitate “the sharing of terrorism information” by “any methods determined necessary and appropriate”).

<sup>431</sup> *Rahman v. Chertoff*, 530 F.3d 622, 622-23 (7th Cir. 2008).

<sup>432</sup> See *id.* at 625 (indicating that the district court had certified two classes in the case, and that the defendants claimed that plaintiffs’ membership in a given class could, as the classes were defined, change with every court filing).

<sup>433</sup> *Id.* at 627-28.

and the strategy could not work, because other travelers could intervene to carry on. Decisions favorable to particular plaintiffs will have their effect in the normal way: through the force of precedent. *If this seems a modest vision of the judiciary's role, we answer that modesty is the best posture for the branch that knows the least about protecting the nation's security and that lacks the full kit of tools possessed by the legislative and executive branches. Presidents, Cabinet officers, and Members of Congress can be dismissed by the people if they strike an unwise balance between false positives and false negatives, between inconvenience today and mayhem tomorrow; judges are immune from that supervision and must permit those who bear the blame for errors (in either direction) to assume the responsibility for management.*<sup>434</sup>

Speaking on behalf of the court, Judge Easterbrook was reluctant to tread into an area in which he had neither the expertise nor the capacity that those tasked with overseeing national security had.

One of the dangers of Judge Easterbrook's approach is that, in the context of official intelligence operations, state secrets—even where properly invoked—may play a key role in covering up officials' bad behavior. Perhaps the best illustration of this danger is a 1993 case involving a DEA employee, a State Department official, and a CIA agent.<sup>435</sup> That case, *Horn v. Huddle*, has been omitted from most state secrets analyses, in large part because it was sealed. Recently partially unsealed, the case illustrates in detail the potential misuse of state secrets to cover officials' misdeeds. It highlights the deference frequently afforded to the executive branch by the courts, and it reinforces the idea that successive administrations tend to hold the line once the state secrets privilege has been invoked. However, the extent to which *Horn v. Huddle* is sui generis is unclear.

The case began as a *Bivens* action,<sup>436</sup> in which a former DEA agent tried to prove that the CIA illegally spied on him to thwart his mission in Rangoon, Burma.<sup>437</sup> Richard A. Horn, the DEA's country attaché, "had a strained professional relationship with the State Department Chargé d'Affaires, Franklin 'Pancho' Huddle, Jr., arising from the differing policy goals of their agencies."<sup>438</sup> Horn alleged that Huddle

<sup>434</sup> *Id.* (emphasis added).

<sup>435</sup> *In re Sealed Case*, 494 F.3d 139 (D.C. Cir. 2007). Note that *In re Sealed Case* on remand later became *Horn v. Huddle*, 647 F. Supp. 2d 55 (D.D.C. 2009), *vacated*, 699 F. Supp. 2d 236 (D.D.C. 2010).

<sup>436</sup> See *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 391-95 (1971) (finding an implied cause of action for violations by federal officials of the Fourth Amendment freedom from unreasonable search and seizure).

<sup>437</sup> *In re Sealed Case*, 494 F.3d at 141.

<sup>438</sup> *In re Sealed Case*, 494 F.3d at 141; see also *Horn v. Huddle*, No. 94-1756 (D.D.C. July 28, 2004) (order granting motion to dismiss) (identifying the plaintiff as a former

sent his superiors in Washington, D.C., a classified State Department cable transcribing a telephone call Horn had made from his residence in Rangoon on August 12, 1993, to one of his subordinates.<sup>439</sup> During the call, Horn “expressed concern that Huddle was trying to expel him from Burma and that DEA might respond by closing its Burma office.”<sup>440</sup> According to the D.C. Circuit opinion, the cable from Huddle, sent the following day, read, “Horn shows increasing signs of evident strain. Late last night, for example, he telephoned his junior agent to say that ‘I am bringing the whole DEA operation down here.’ ‘You will be leaving with me . . . . We’ll all leave together.’”<sup>441</sup>

The DEA removed Horn from his post, prompting Horn to bring a Fourth Amendment claim against the CIA and the State Department.<sup>442</sup> The case was originally assigned to Judge Harold H. Greene, a Johnson (and then Carter) appointee, one of the principal architects of the Civil Rights Act of 1964, and the presiding judge in the case that resulted in the breakup of AT&T Co.<sup>443</sup> In 1997, Judge Greene allowed most of *In re Sealed Case* to proceed, despite a summary judgment motion filed by the government. In early 2000, however, Greene passed away.<sup>444</sup> The case was then assigned to Judge Royce C. Lamberth, former Chief of the Department of Justice Civil Division and presiding judge of the Foreign Intelligence Surveillance Court until May 18, 2002.<sup>445</sup>

In addition to the wiretapping incident, Horn alleged that the State Department was trying to undermine the DEA in Burma—including turning over a DEA document with the name of informants to the Burmese government without DEA permission.<sup>446</sup> On August

U.S. DEA employee bringing suit for actions occurring while he was stationed in Rangoon, Huddle as a State Department employee and Chief of Mission of the U.S. Embassy in Rangoon, and Arthur Brown as a CIA employee in Burma); *id.* at 2-3 (noting Horn’s contention that Huddle wanted him removed from Burma in retaliation for Horn’s sending reports to congressional members that conflicted with State Department reports prepared by Huddle, and noting the CIA’s unauthorized transfer of DEA documents to the Burmese government); Complaint at 6-10, *Horn v. Huddle*, 647 F. Supp. 2d 55 (D.D.C. 2009) (No. 94-1756) (discussing interagency political issues).

<sup>439</sup> Complaint, *supra* note 438, at 10.

<sup>440</sup> *In re Sealed Case*, 494 F.3d at 145.

<sup>441</sup> *Id.* at 145-46 (citation omitted).

<sup>442</sup> Complaint, *supra* note 438, at 12.

<sup>443</sup> Martin Weil, *Harold Greene, AT&T Case Judge, Dies*, WASH. POST, Jan. 30, 2000, at A01.

<sup>444</sup> *Id.*

<sup>445</sup> *An Interview with Judge Royce C. Lamberth*, THE THIRD BRANCH, June 2002, at 9, 10.

<sup>446</sup> Complaint, *supra* note 438, at 6-7.

15, 2000, Judge Lamberth held that the CIA's Inspector General reports of both incidents were protected under the state secrets privilege.<sup>447</sup> He ascertained four categories of information in the reports that were protected from disclosure:

(1) information that "would threaten to reveal the identities of certain covert CIA officers"; (2) information as to the "location of certain covert CIA installations and activities"; (3) "information as to the organizational structure and functions of the CIA"; and (4) information on "intelligence gathering sources, methods and capabilities, including liaison relationships with foreign governments."<sup>448</sup>

Judge Lamberth invited Horn to demonstrate at an August 21, 2000, hearing how the case could possibly proceed after the privilege had attached.<sup>449</sup> At that hearing, the court invited parties to submit follow-up briefings.<sup>450</sup> Nearly three months later, the government filed a classified motion to dismiss the complaint.<sup>451</sup> Horn did not file an opposition to the motion, but he did file several motions to extend the time allotted to oppose the motion to dismiss.<sup>452</sup> He also requested that the court order investigations and, if found appropriate, provide top-secret clearances to plaintiff and plaintiff's counsel's secretary (plaintiff's counsel had been given top-secret clearance earlier in the case).<sup>453</sup> Judge Lamberth declined: "Having found that the state secrets privilege provides an absolute bar keeping certain information out of the litigation, the Court finds its interest in having the assistance of plaintiff's counsel outweighed by the United States' interest

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<sup>447</sup> See *Horn v. Huddle*, No. 94-1756, at 3 (D.D.C. July 28, 2004) (order granting motion to dismiss) (providing the case's relevant procedural history).

<sup>448</sup> *Id.* at 9 (quoting *Horn v. Albright*, Nos. 96-2120, 94-1756, at 11-12 (D.D.C. Aug. 15, 2000) (order sustaining assertion of state secrets privilege), ECF No. 340); see also *In re Sealed Case*, 494 F.3d 139, 144 (D.C. Cir. 2007) (finding no abuse of discretion in the district court's decision to apply the state secrets privilege to the Inspector General reports).

<sup>449</sup> See *Horn v. Huddle*, No. 94-1756, at 2 (D.D.C. Aug. 15, 2000) (order directing plaintiff to address plan for discovery), ECF No. 342 (asking plaintiff to "explain what non-state secrets evidence he has in support of his remaining claim").

<sup>450</sup> See Transcript of Aug. 21, 2000 Status Hearing at 12, 19, *Horn v. Huddle*, 647 F. Supp. 2d 55 (D.D.C. 2009) (No. 94-1756) (requesting that the parties submit further briefs within thirty days).

<sup>451</sup> United States' Motion to Dismiss Civil Action 94-1756 Based on the State Secrets Privilege, *Horn v. Huddle*, 647 F. Supp. 2d 55 (No. 94-1756).

<sup>452</sup> *Horn v. Huddle*, No. 94-1756, at 3-4 (D.D.C. July 28, 2004) (order granting motion to dismiss).

<sup>453</sup> *Id.* at 3-4.

in national security.”<sup>454</sup> Horn also filed a motion to proceed with discovery under the Classified Information Procedures Act (CIPA).<sup>455</sup>

It took nearly four years for the judge to issue an opinion. On July 28, 2004, the court found three independent grounds for dismissal: (1) the plaintiff could not make out a *prima facie* case absent the protected material;<sup>456</sup> (2) the state secrets privilege deprived defendants of “information required in their defense”;<sup>457</sup> and (3) the subject matter of the plaintiff’s action was a state secret. As to the last ground, the court was particularly concerned that “witnesses with knowledge of secret information may divulge that information during trial because the plaintiffs ‘would have every incentive to probe as close to the core secrets as the trial judge would permit. Such probing in open court would inevitably be revealing.’”<sup>458</sup> Finally, Judge Lamberth added, “the Court cannot and will not adopt CIPA as a mechanism for allowing the case to go forward.”<sup>459</sup>

Horn appealed, and on December 14, 2006, Circuit Judges Rogers, Brown, and Griffith heard the case.<sup>460</sup> The Court of Appeals affirmed the dismissal of the case as to Arthur Brown, the CIA operative, but reversed and remanded the case to district court as to Huddle, stating that Horn should be given the opportunity to “establish a *prima facie* case without using the privileged information.”<sup>461</sup>

In January 2008, the case took an unexpected turn. Department of Justice (DOJ) attorney Paul Freeborne submitted a filing, stating that the basis for the government’s invocation of the privilege in *In re Sealed Case* (that is, the “covert agent” status of CIA agent Arthur

<sup>454</sup> *Id.* at 7-8.

<sup>455</sup> Horn v. Huddle, No. 94-1756, at 8 (D.D.C. Aug. 26, 2009) (order denying government’s proposal); *see also* 18 U.S.C. app. (2006).

<sup>456</sup> *See* Horn v. Huddle, No. 94-1756, at 8 (D.D.C. July 28, 2004) (order granting motion to dismiss) (stating that *Halkin* found “dismissal appropriate where state secrets prevented plaintiffs from making a *prima facie* case” (citing *Halkin v. Helms*, 690 F.2d 977, 988-89 (D.C. Cir. 1982))).

<sup>457</sup> *See id.* (indicating that *Molerio* mandated that the case “be dismissed because [the] court’s evaluation of state secrets privilege revealed existence of valid defense that defendants could not assert because of privilege” (citing *Molerio v. FBI*, 749 F.2d 815, 825 (D.C. Cir. 1984))). The *Horn* court also cited *Bareford v. General Dynamics Corp.*, 973 F.2d 1138, 1141 (5th Cir. 1992), for further support of the proposition that dismissal is necessary where the state secrets privilege deprives defendants of their defense. *Id.*

<sup>458</sup> Horn v. Huddle, No. 94-1756, at 8-9 (D.D.C. July 28, 2004) (order granting motion to dismiss) (quoting *Bareford*, 973 F.2d at 1141).

<sup>459</sup> *Id.* at 14.

<sup>460</sup> *In re Sealed Case*, 494 F.3d 139, 141 (D.C. Cir. 2007).

<sup>461</sup> *See id.* (affirming that the state secrets provision was properly invoked).

Brown) had been incorrect: “Counsel for the United States recently learned that in 2002, Defendant II’s cover was ‘lifted’ and ‘rolled back’ to his entrance on duty date with the Central Intelligence Agency.”<sup>462</sup> In short, Brown had listed his employment with the CIA during the course of a job search, with the CIA’s knowledge and, presumably, its consent. Horn immediately filed a motion seeking relief from the appellate judgment against him.<sup>463</sup> He further requested that the judge reinstate Brown as a defendant and sanction or hold contempt proceedings against the government attorneys who failed to alert the district court and court of appeals of the change in Brown’s cover status.<sup>464</sup> Horn anchored his claim in Federal Rule of Civil Procedure 60(b)(3), which allows the court to relieve a party from a final judgment for “fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party.”<sup>465</sup> Although it had been more than a year since the appellate court had issued its holding, there was no statute of limitations for fraud on the court (that is, “fraud which is directed to the judicial machinery itself and is not fraud between the parties or fraudulent documents, false statements or perjury”<sup>466</sup>).

CIA Acting General Counsel John Rizzo filed an affidavit in response, stating that he had personally conducted an inquiry into the matter and that the Office of General Counsel (OGC) of the CIA had not been put on notice of the change in Brown’s cover status until 2005.<sup>467</sup> In January of that year, an attorney within the Litigation Division of OGC had been made aware of the circumstances but had cho-

<sup>462</sup> Horn v. Huddle, No. 94-1756, at 2 (D.D.C. Jan. 15, 2009) (order granting motion for relief from judgment) (citing the government’s filing on January 31, 2008).

<sup>463</sup> See *id.* at 1-2 (detailing the procedural history leading up to Horn’s motion).

<sup>464</sup> *Id.*

<sup>465</sup> FED. R. CIV. P. 60(b)(3).

<sup>466</sup> *Baltia Air Lines, Inc. v. Transaction Mgmt., Inc.* 98 F.3d 640, 642 (D.C. Cir. 1996) (quoting *Bulloch v. United States*, 721 F.2d 713, 718 (10th Cir. 1983)); see also *id.* (holding that a Rule 60(c) motion under Rule 60(b)(3) must be made within one year after the judgment was entered). But see FED. R. CIV. P. 60(d)(3) (indicating that the above rules “do not limit a court’s power to . . . set aside a judgment for fraud on the court”). The relevant test was laid out in *Workman v. Bell*, which requires conduct that is (1) performed “on the part of an officer of the court”; (2) directed against the judicial machinery; (3) “intentionally false, willfully blind to the truth, or in . . . reckless disregard for the truth”; (4) a “positive averment or concealment when one is under a duty to disclose”; and (5) deceptive to the court. 227 F.3d 331, 336 (6th Cir. 2000).

<sup>467</sup> See Declaration of John A. Rizzo, Acting General Counsel, Central Intelligence Agency at 2-3, Horn v. Huddle, 647 F. Supp. 2d 55 (No. 94-1756) (explaining why the district court and the court of appeals were not made aware of Brown’s change in cover status).

sen not to inform his supervisors, the district court, or the appellate court.<sup>468</sup> Two more affidavits accompanied Rizzo's filing: the first, by Robert Eatinger, Associate General Counsel of the OGC (saying that he had not been informed of any change in Brown's cover status prior to January 2008),<sup>469</sup> and the second by John Radsan, Assistant General Counsel in CIA's OGC from April 2002 to July 2004 (saying that, while he was generally familiar with the case, he did not recall hearing about a change in Brown's cover status until March 2008).<sup>470</sup>

Accordingly, on January 14, 2009, now-Chief Judge Lamberth entered an opinion censuring the government: the CIA had "lifted" Brown's cover in 2002 and "rolled back" his cover to February 19, 1980 (meaning that Brown could publicly admit that he was employed by the CIA from that date forward).<sup>471</sup> According to the court, the CIA never informed the DOJ, nor was the CIA's OGC aware of the change in cover until 2005.<sup>472</sup> The court held that this may qualify as misrepresentation, but not fraud on the court, because there had been no false submission "directed to the judicial machinery itself."<sup>473</sup> But it was the conduct of one attorney within the CIA's office that had "escalated this case from one of simple misrepresentation to fraud on the court."<sup>474</sup> The OGC advisor to the East Asia Division had deliberately concealed this information from his OGC supervisors and the DOJ.<sup>475</sup> Chief Judge Lamberth reinstated Brown as the defendant, holding that the CIA attorney involved in litigation committed fraud on the court by misleading the Court of Appeals as to the change in Brown's cover status and by failing to notify the court of the change in his cover status upon remand.<sup>476</sup> The judge declined to impose sanctions or to initiate contempt proceedings; instead, he directed the government

<sup>468</sup> *See id.* (recognizing the CIA's duty to provide notice to the DOJ).

<sup>469</sup> Declaration of Robert J. Eatinger at 4, *Horn v. Huddle*, 647 F. Supp. 2d 55 (No. 94-1756).

<sup>470</sup> Declaration of A. John Radsan at 2, *Horn v. Huddle*, 647 F. Supp. 2d 55 (No. 94-1756).

<sup>471</sup> *See Horn v. Huddle*, No. 94-1756, at 4 (D.D.C. Jan. 15, 2009) (order granting motion for relief from judgment) (recognizing Brown's change in cover status).

<sup>472</sup> *Workman v. Bell*, 227 F.3d 331, 336 (6th Cir. 2000).

<sup>473</sup> *See id.* (listing the elements of "fraud upon the court").

<sup>474</sup> *Horn v. Huddle*, No. 94-1756, at 5 (D.D.C. Jan. 15, 2009) (order granting motion for relief from judgment); *see also id.* (stating that the inaccuracy in Brown's cover status had been noted in 2005 by the OGC legal advisor).

<sup>475</sup> *Id.* at 5-6.

<sup>476</sup> *Id.* at 12-13.

to disclose the name of the attorney to the district court's grievance committee for investigation.<sup>477</sup>

Brown reentered the suit and took the offensive. On January 27, 2009, he filed an affidavit with the court, stating that the "Rizzo Declaration makes two assertions that, based on my personal knowledge, are inaccurate."<sup>478</sup> The OGC *had* been informed of the change in his cover status: "I recall notifying, in person, two attorneys in the Office of General Counsel ('OGC') Litigation Division, A. John Radson [sic] and Robert J. Eatinger, about the change in my cover status in 2002, within a few months of the agency's action" (i.e., rolling back his status).<sup>479</sup> Brown further stated that he had no recollection of reviewing the draft motion for summary affirmance submitted to the Court of Appeals with an East Asia Division OGC legal advisor.<sup>480</sup>

The judge observed:

If what Brown says is true, the OGC attorneys intentionally misled this Court even prior to its original 2004 ruling that dismissed the case. His declaration, if true, indicates that the OGC of the CIA was aware of the change in Brown's cover status while the motion to dismiss the case was pending in this Court.<sup>481</sup>

More than one person knowing and hiding the information was substantially different than the "one bad apple" argument the CIA had previously put forward.

If multiple attorneys of the OGC within the CIA were aware of the change in Brown's cover status, and failed to report it to the Court, it would be a material misrepresentation to both this Court and the Court of Appeals. The CIA was well-aware that the assertion of the state secrets privilege as to Brown was a key strategy in getting the case dismissed.<sup>482</sup>

The problem extended to the top of the hierarchy:

The Department of Justice submitted an *ex parte*, classified declaration of CIA Director Tenet on February 5, 2000, in support of its motion to dismiss. In the declaration, Tenet stated that to allow the case to go forward would cause "damage to United States national security" because it would "identify one or more covert CIA employees. Of obvious concern

<sup>477</sup> *Id.* The name the CIA later disclosed was Jeffrey W. Yeates. *Horn v. Huddle*, No. 94-1756, at 2 (D.D.C. Feb. 6, 2009) (order staying any referrals of misconduct).

<sup>478</sup> Declaration of Arthur M. Brown at 1, *Horn v. Huddle*, 647 F. Supp. 2d 55 (D.D.C. 2009) (No. 94-1756).

<sup>479</sup> *Id.* at 1-2.

<sup>480</sup> *Id.* at 2.

<sup>481</sup> *Horn v. Huddle*, No. 94-1756, at 4 (D.D.C. Feb. 6, 2009) (order staying any referrals of misconduct).

<sup>482</sup> *Id.* at 5.

would be the disclosure of Arthur Brown, who remains a covert employee assigned overseas.”<sup>483</sup>

Chief Judge Lamberth went so far as to invite Horn to file a motion with the court “to reconsider and vacate its ruling denying the plaintiff’s motion for sanctions and/or contempt proceedings.”<sup>484</sup> He ordered a stay on the referral of misconduct on the part of the government attorneys, adding far from subtly in a footnote:

If the plaintiff wishes to file a motion, he should also state, that if he believes contempt proceedings are appropriate, whether he believes the proceeding should be civil or criminal in nature. *See International Union v. Bagwell*, 512 U.S. 821, 827-28 (1994) (stating that “a contempt sanction is considered civil if it is remedial, and for the benefit of the complainant. But if it is for criminal contempt the sentence is punitive, to vindicate the authority of the court.”).<sup>485</sup>

The change in administration did little to change the government’s position. In 2009, CIA Director Panetta intervened, invoking the state secrets privilege and requesting a protective order.<sup>486</sup> Lamberth objected to continued executive efforts to keep the case sealed—and to CIA arguments to reclassify some of the material previously declassified.<sup>487</sup> The judge refused Panetta’s request: “After examining the motion for a protective order and supporting declarations, the redactions made by the government, and keeping in mind the twisted history of this case, the Court is not prepared to uphold the government’s renewed assertion of the state secrets privilege without more information from the government.”<sup>488</sup> Pretrial CIPA-like procedures would suffice—an option the D.C. Circuit had left open in 2007.<sup>489</sup>

<sup>483</sup> *Id.* at 5 (quoting Ex Parte Declaration of George J. Tenet ¶ 22, *Horn v. Huddle*, 647 F. Supp. 2d 55 (No. 94-1756)).

<sup>484</sup> *Id.* at 6 (citation omitted).

<sup>485</sup> *Id.* at 6 n.9.

<sup>486</sup> *See* *Horn v. Huddle*, No. 94-1756, at 6-7 (D.D.C. July 16, 2009) (order denying assertion of state secrets privilege) (recounting the government’s reassertion of the state secrets privilege).

<sup>487</sup> *See, e.g.*, Transcript of Status Hearing at 42-45, *Horn v. Huddle*, 647 F. Supp. 2d 55 (D.D.C. 2009) (No. 94-1756) (disputing the government’s position that documents in which classified information had been redacted were still subject to the state secrets privilege).

<sup>488</sup> *Horn v. Huddle*, No. 94-1756, at 3 (D.D.C. July 16, 2009) (order denying assertion of state secrets privilege).

<sup>489</sup> *See id.* at 11-12 (believing that the CIPA-like procedures would best enable the parties to argue whether known information is a state secret); *see also In re Sealed Case*, 494 F.3d 139, 154 (D.C. Cir. 2007) (“[N]othing in this opinion forecloses a determination by the district court that some of the protective measures in CIPA, 18 U.S.C. app.,

The government had lost credibility: “The Court does not give the government a high degree of deference because of its prior misrepresentations regarding the state secrets privilege in this case. Moreover, the plaintiff has made convincing arguments that the government has asserted the state secrets privilege too broadly.”<sup>490</sup> Lamberth suggested that the fact that the CIA conducts surveillance could hardly be considered a state secret; quite apart from information readily available through the Internet, the Spy Museum in Washington, D.C., included a range of eavesdropping equipment historically used by the CIA.<sup>491</sup> Inconsistencies in classified and unclassified government affidavits did not inspire any more confidence in the Executive branch.<sup>492</sup> Chief Judge Lamberth ordered the government “to provide the Court with justifications for all of the redactions to the documents and Inspector General reports that have been filed in this case so that the Court can undertake a meaningful in camera review of the purportedly privileged information.”<sup>493</sup> In the interim, Horn and the defendants were to file motions indicating (1) any relevant information in regard to which they thought or knew that the government intended to invoke state secrets, and (2) explanations or other evidence as to why that information was not a state secret.<sup>494</sup>

Four days after issuing his Memorandum Opinion, Lamberth issued a Memorandum and Order partially unsealing the case: “Although this case has been sealed since its inception to protect sensitive information, it is clear from reading the Court of Appeals’s 2007 public opinion in this case and seeing the unclassified appendix that was filed on appeal that many of the issues are unclassified.”<sup>495</sup> The judge ordered the government to file with the court unclassified versions of every document; the unclassified documents were given a June 9, 2009, date of filing.<sup>496</sup>

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which applies in criminal cases, would be appropriate, as Horn urges, so that this case could proceed.”).

<sup>490</sup> Horn v. Huddle, No. 94-1756, at 8 (D.D.C. July 16, 2009) (order denying assertion of state secrets privilege).

<sup>491</sup> See, e.g., Horn v. Huddle, No. 94-1756, at 2 (D.D.C. Aug. 26, 2009) (order denying government’s proposal) (referencing an eavesdropping device that was “publicly available” since it was present at the Spy Museum).

<sup>492</sup> See *id.* (indicating that the government’s declarations were inconsistent).

<sup>493</sup> Horn v. Huddle, No. 94-1756, at 13 (D.D.C. July 16, 2009) (order denying assertion of state secrets privilege).

<sup>494</sup> *Id.*

<sup>495</sup> Horn v. Huddle, No. 94-1756, at 1 (D.D.C. July 20, 2009) (order to partially unseal case).

<sup>496</sup> *Id.*

Continued efforts by the executive branch to get the judge to reconsider his opinion hit a stone wall.<sup>497</sup> If anything, such attempts appear to have made him angrier:

If the intention of the government's continued obstinance in this case is to demonstrate to the Court that this case is simply impossible and cannot proceed in light of sensitive national security concerns and the interconnectedness of privileged and nonprivileged information, the government should save its theatrics for the Court of Appeals.<sup>498</sup>

It was unlikely, though, that the government would find much support from above: it was the Court of Appeals that had reversed the case in the first place.<sup>499</sup> According to the district court, the executive branch itself was responsible for the court's unwillingness to entertain further invocations of the state secrets privilege:

The government apparently laments the fact that the Court required it to reassert the privilege upon remand following the discovery that the government had committed fraud on the Court and the Court of Appeals. Of course, the government has no one to blame but itself for the Court's reexamination of the assertion of the state secrets privilege. The government committed fraud on the Court and the Court of Appeals by knowingly failing to correct a declaration of Director Tenet . . . [and, further, the government] represented to the Court of Appeals that Brown's identity was covert, in an action that can only be construed as an attempt to dishonestly gain dismissal. . . . The fraud . . . diminished the government's credibility and led the Court to believe that perhaps the government had misrepresented other facts in the litigation.<sup>500</sup>

The judge then went one step further, ordering the government to provide justifications for *every* redaction in the Inspector General reports by September 4, 2009.<sup>501</sup> Additionally, within ten days of the ruling, "the Executive must grant counsel for plaintiff and defendants, who have been favorably adjudicated for access to classified information, security clearances commensurate with the level of information known by their clients."<sup>502</sup> On September 2, 2009, the government moved for an emergency motion for a stay, pending appeal of the

<sup>497</sup> See, e.g., *Horn v. Huddle*, No. 94-1756, at 8 (D.D.C. Aug. 26, 2009) (order denying government's proposal) (noting that the motion filed by the government was inconsistent with the district court's earlier order, "misconstrues or misunderstands what the Court has already done in this case," and "fails to address the Court's fundamental concerns").

<sup>498</sup> *Id.* at 3 n.2.

<sup>499</sup> *Id.*

<sup>500</sup> *Id.* at 4 n.3 (citations omitted).

<sup>501</sup> *Id.* at 18.

<sup>502</sup> *Id.*

Court's August 26, 2009, order.<sup>503</sup> Two days later, Chief Judge Lamberth denied the motion.<sup>504</sup> He noted that "[t]he practical effect of such a stay would . . . bring all proceedings in this already protracted litigation to a halt once again."<sup>505</sup> The judge focused on the already lengthy time period of the case (fifteen years) and noted that further delays, far from amounting to simply a minor delay, "could have major consequences as any further delay now has the real possibility of forever depriving the plaintiff of evidence and testimony which may decide whether he prevails on his claims."<sup>506</sup> In the judge's view, "[t]his case ha[d] already been delayed long enough by the government's failure to disclose information that had long been unclassified."<sup>507</sup> The government appealed the order, winning a stay of proceedings.<sup>508</sup> Appeal was expedited, with briefs due in October 2009.<sup>509</sup>

On November 3, 2009, the parties filed a Settlement Agreement, a Stipulated Dismissal With Prejudice, and a Proposed Court Order to dismiss the case.<sup>510</sup> According to the terms of the Settlement Agreement, within two days of the court entering the order dismissing the case with prejudice, the United States would request that \$3 million be paid to Horn and his attorneys for damages, attorneys' fees, and litigation costs.<sup>511</sup> On March 30, 2010, the court dismissed the case

<sup>503</sup> United States' Emergency Motion for Stay Pending Appeal, *Horn v. Huddle*, 647 F. Supp. 2d 55 (D.D.C. 2009) (No. 94-1756). The motion was made under Federal Rule of Civil Procedure 62(c). See FED. R. CIV. P. 62(c) (indicating that a "court may suspend, modify, restore or grant an injunction" while an appeal to a grant, dissolution, or denial of an injunction is pending). On April 26, 2010, the court entered an order dismissing the appeal. *Horn v. Brown*, Nos. 09-5311, 94-1756 (D.C. Cir. Apr. 26, 2010) (order dismissing case), 2010 WL 2160013, *dismissing* *Horn v. Huddle*, 647 F. Supp. 2d 55 (D.D.C. 2009).

<sup>504</sup> *Horn v. Huddle*, No. 94-1756, at 7 (D.D.C. Sept. 4, 2009) (order denying motion for stay).

<sup>505</sup> *Id.* at 1.

<sup>506</sup> *Id.* at 2.

<sup>507</sup> *Id.* at 3.

<sup>508</sup> *Horn v. Huddle*, No. 94-1756, at 1 (D.C. Cir. Sept. 10, 2009) (order granting stay of appeal).

<sup>509</sup> *Id.* at 2.

<sup>510</sup> Plaintiff's Notice of Renewed Request for the Court to Promptly Execute the Order Dismissing This Case with Prejudice So That the Government's Obligation to Pay the Monetary Settlement Amount is Triggered, and Whereby the Court Can Retain Jurisdiction to Issue Orders, Decisions and Rulings Regarding the Other Issues and Motions Pending Before the Court in This Case at 5, *Horn v. Huddle*, 699 F. Supp. 2d 236 (D.D.C. 2010) (No. 94-1756) [hereinafter Plaintiff's Notice of Renewed Request in *Horn*].

<sup>511</sup> Settlement Agreement at 2, *Horn v. Huddle*, 699 F. Supp. 2d 236 (D.D.C. 2010) (No. 94-1756).

with prejudice, vacating the earlier decisions in accordance with the terms of the Settlement Agreement.<sup>512</sup> In his memorandum accompanying the order, Chief Judge Lamberth suggested that the earlier decisions would be vacated. Nonetheless, he also noted:

Since the July and August opinions have already been published in the Federal Supplement, the only consequence of an order vacating them is the possibility that they may be considered somewhat less persuasive when the vacating order appears with the citation. The reasoning is unaltered, to the extent it is deemed persuasive by anyone.<sup>513</sup>

The decision, moreover, gave Lamberth pause. He wrote, “[I]t is not without some misgiving that the Court reaches this decision.”<sup>514</sup> He continued:

Another member of this Court last year approved the settlement of another case (involving the FBI’s investigation of the anthrax mailings in late 2001) which involved payment to an individual plaintiff of almost \$6,000,000 by the United States. It does not appear that any government official was ever held accountable for this huge loss to the taxpayer.

Now this Court is called upon to approve a \$3,000,000 payment to an individual plaintiff by the United States, and again it does not appear that any government officials have been held accountable for this loss to the taxpayer. This is troubling to the Court.<sup>515</sup>

Chief Judge Lamberth found it “encouraging” that Attorney General Eric Holder had circulated a memorandum on “Policies and Procedures Governing Invocation of the State Secrets Privilege”; indeed, he attached a copy of the guidelines as an appendix to the decision.<sup>516</sup> He also formally requested that the United States “advise the Court as to whether it will, in this case, make the referral to the Inspectors General and provide the notifications to the oversight committees of Congress” as required under the guidelines, specifically in regard to the behavior of both State Department and CIA attorneys in relation

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<sup>512</sup> *Horn v. Huddle*, 699 F. Supp. 2d 236, 243 (D.D.C. 2010) (approving stipulated dismissal); see also Plaintiff’s Notice of Renewed Request in *Horn*, *supra* note 510, at 5 (attempting to persuade the court to act upon the plaintiff’s previous request for dismissal); Plaintiff’s Notice of Request for the Court to Promptly Execute the Order Dismissing This Case with Prejudice So That the Government’s Obligation to Pay the Monetary Amount in the Settlement Is Triggered, Regardless of the Other Issues Pending Before the Court on This Case at 2, *Horn v. Huddle*, 699 F. Supp. 2d 236 (D.D.C. 2010) (No. 94-1756) (urging the court to dismiss the case with prejudice so that the plaintiff could begin receiving the settlement payments promised to him).

<sup>513</sup> *Horn v. Huddle*, 699 F. Supp. 2d at 238 (footnote omitted).

<sup>514</sup> *Id.*

<sup>515</sup> *Id.* (citation omitted).

<sup>516</sup> *Id.* at 239.

to the case at hand.<sup>517</sup> If such executive action were taken, then the court would find it appropriate to terminate the actions underway by the court's Grievance Committee.<sup>518</sup>

### B. *Due Process, Torture, and Detention Without Trial*

Precedent, albeit limited, exists for the invocation of the state secrets privilege in the context of cases alleging torture.<sup>519</sup> During the period from 2001 to 2009, there does seem to have been an increase in the number of such instances.<sup>520</sup> Unlike most of the cases discussed thus far, suits against U.S. officials alleging rendition, torture, and indefinite detention have received considerable public and academic attention.<sup>521</sup> Thus, only a brief discussion of these cases is warranted.

One of the most prominent civil suits was brought by Khaled El-Masri, a German citizen of Lebanese descent, who brought an action under *Bivens*,<sup>522</sup> the Alien Tort Statute,<sup>523</sup> and international legal norms, against ten unnamed CIA agents, three private companies, and ten employees.<sup>524</sup> El-Masri alleged that, in 2003, he was detained for more than three weeks in Macedonia and then sent to Afghanistan, where he was subject to torture, as well as cruel, inhuman, and degrading treatment,

<sup>517</sup> *Id.*

<sup>518</sup> *Id.*

<sup>519</sup> *See, e.g.*, *Linder v. Dep't of Def.*, 133 F.3d 17, 25 (D.C. Cir. 1998) (upholding the decision of the court below to grant the state secrets privilege); *Linder v. Nat'l Sec. Agency*, 94 F.3d 693, 698 (D.C. Cir. 1996) (same); *Linder v. Calero-Portocarrero*, 183 F.R.D. 314, 325 (D.D.C. 1998) (finding the state secrets privilege to be properly invoked in a case of alleged torture).

<sup>520</sup> This observation is based upon the author's research of the case law during this period.

<sup>521</sup> *See, e.g.*, Chesney, *supra* note 6, at 1254-63 (detailing "extraordinary rendition" and subsequent litigation related to *El-Masri*); Louis Fisher, *Extraordinary Rendition: The Price of Secrecy*, 57 AM. U. L. REV. 1405, 1406 (2008) ("identif[ying] the legal principles that guide extradition, rendition, and kidnappings," and explaining the changes in those principles after 9/11); Victor Hansen, *Extraordinary Renditions and the State Secrets Privilege: Keeping Focus on the Task at Hand*, 33 N.C. J. INT'L L. & COM. REG. 629, 630 (2008) ("discuss[ing] the use of the state secrets privilege in the context of civil suits brought against the United States government and private contractors working for the federal government"). For a detailed discussion of rendition, see Jane Mayer, *Outsourcing Torture: The Secret History of America's "Extraordinary Rendition" Program*, NEW YORKER, Feb. 14, 2005, at 106.

<sup>522</sup> *See supra* note 436 (explaining *Bivens* actions).

<sup>523</sup> *See* 28 U.S.C. § 1350 (2006) ("The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.")

<sup>524</sup> *El-Masri v. Tenet*, 437 F. Supp. 2d 530, 534-35 (E.D. Va. 2006).

for five months.<sup>525</sup> El-Masri further alleged that he was subsequently flown to and abandoned in Albania, where he then had to make his way back to Germany.<sup>526</sup> In December 2005, he sued in the U.S. District Court for the Eastern District of Virginia.<sup>527</sup>

District Court Judge Ellis granted the government's motion to dismiss on state secrets grounds.<sup>528</sup> State secrets stood as "a privilege of the highest dignity and significance."<sup>529</sup> El-Masri's personal interests, the court held, must give way to the national interest:

In times of war, our country, chiefly through the Executive Branch, must often take exceptional steps to thwart the enemy. Of course, reasonable and patriotic Americans are still free to disagree about the propriety and efficacy of those exceptional steps. But what this decision holds is that these steps are not proper grist for the judicial mill where, as here, state secrets are at the center of the suit and the privilege is validly invoked.<sup>530</sup>

On March 2, 2007, the Court of Appeals for the Fourth Circuit affirmed the ruling below, determining that the privilege applied to the information El-Masri sought, rendering the defendants unable to mount a proper defense.<sup>531</sup> Judge King, writing for the court, emphasized the constitutional underpinnings:

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. *Reynolds* itself suggested that the state secrets doctrine allowed the Court to avoid the constitutional conflict that might have arisen had the judiciary demanded that the Executive disclose highly sensitive military secrets. In *United States v. Nixon*, the [Supreme] Court further articulated the doctrine's constitutional dimension, observing that the state secrets privilege provides exceptionally strong protection because it concerns areas of Art. II duties [in which] the courts have traditionally shown the utmost deference to Presidential responsibilities.<sup>532</sup>

In another case, Syrian-born Canadian citizen Mahar Arar was arrested on September 26, 2002, when he changed planes in New York

<sup>525</sup> *Id.* at 532-33.

<sup>526</sup> *Id.* at 534.

<sup>527</sup> *Id.*

<sup>528</sup> *Id.* at 541.

<sup>529</sup> *Id.* at 536.

<sup>530</sup> *Id.* at 540-41.

<sup>531</sup> *El-Masri v. U.S.*, 479 F.3d 296, 313 (4th Cir. 2007).

<sup>532</sup> *Id.* at 303 (citations omitted) (internal quotation marks omitted).

en route to Canada.<sup>533</sup> After being held incommunicado for thirteen days, he was flown to Washington, D.C., and then finally, Amman, Jordan, whence he was driven to Syria.<sup>534</sup> Arar stated that he was tortured and that he had confessed to a number of crimes before being released without charge in October 2003.<sup>535</sup> On January 22, 2004, Arar brought suit in the Eastern District of New York, alleging violations of the Torture Victim Protection Act<sup>536</sup> and a violation of substantive due process under the Fifth Amendment.<sup>537</sup> Arar sought a declaration on the unconstitutional nature of the acts done to him, as well as compensatory and punitive damages.<sup>538</sup>

On January 18, 2005, the United States invoked state secrets privilege.<sup>539</sup> Affidavits submitted by Secretary of the Department of Homeland Security Tom Ridge and Deputy Attorney General James B. Comey (as the Acting Attorney General) accompanied the invocation.<sup>540</sup> Because he was being sued in his individual capacity, Attorney General Ashcroft recused himself from the consideration of whether to invoke state secrets privilege; thus, consistent with 28 U.S.C. § 508(a), the Deputy Attorney General assumed the authority to do so.<sup>541</sup> The defendants individually also filed motions to dismiss based on state secrets considerations.<sup>542</sup> Although subsequent memoranda focused on

<sup>533</sup> Complaint at 10-11, *Arar v. Ashcroft*, 414 F. Supp. 2d 250 (E.D.N.Y. 2006) (No. 04-0249).

<sup>534</sup> *Id.* at 11-16; *see also* Mayer, *supra* note 521, at 106 (observing that Arar had been flown to Washington, D.C., Portland, Maine, and Rome, Italy, before finally landing in Amman, Jordan).

<sup>535</sup> Complaint, *supra* note 533, at 16-19.

<sup>536</sup> *See* 28 U.S.C. § 1350 note (2006) (providing a private right of action in tort against those who commit torture or extrajudicial killings).

<sup>537</sup> Complaint, *supra* note 533, at 20-24.

<sup>538</sup> *Id.* at 3-4.

<sup>539</sup> Memorandum in Support of the United States' Assertion of State Secrets Privilege, *Arar v. Ashcroft*, 414 F. Supp. 2d 250 (E.D.N.Y. 2006) (No. 04-0249), 2005 WL 2547997.

<sup>540</sup> *Id.* at 3.

<sup>541</sup> *Id.* at 8 n.4; *see also* 28 U.S.C. § 508(a) (2006) (outlining the Deputy Attorney General's duties in the event of the Attorney General's absence).

<sup>542</sup> *See, e.g.*, Notice of Partial Motion to Dismiss the Claims Against Defendant John Ashcroft in His Individual Capacity Encompassed by the Claims of State Secrets Privilege, *Arar v. Ashcroft*, 414 F. Supp. 2d 250 (No. 04-0249) [hereinafter Notice of Partial Motion to Dismiss in *Arar*], 2005 WL 6140592; Notice of Motion of Defendant James Ziglar to Dismiss Complaint Based on State Secrets Privilege, *Arar v. Ashcroft*, 414 F. Supp. 2d 250 (No. 04-0249) [hereinafter Notice of Ziglar], 2005 WL 6140593; Reply Memorandum of Law in Support of the Motion to Dismiss Plaintiff's Claims Against Defendant McElroy in his Individual Capacity, *Arar v. Ashcroft*, 414 F. Supp. 2d 250 (No. 04-0249), 2005 WL 6140582; Reply Memorandum of Law in Support of Defen-

the claim,<sup>543</sup> the district court eventually determined that Arar lacked standing for declaratory relief in relation to his constitutional claims.<sup>544</sup> Judge Trager held that Arar failed to “meet the statutory requirements of the Torture Victim Protection Act.”<sup>545</sup> And while the Immigration and Nationality Act’s jurisdiction-stripping provisions did not foreclose a *Bivens* claim, a remedy under *Bivens* was foreclosed because of national security and foreign policy considerations.<sup>546</sup> These determinations made moot the assertion of state secrets.<sup>547</sup>

### C. *Environmental Regulations*

Like the other areas examined in this Article, the invocation of state secrets privilege in the face of environmental disputes predates the Bush Administration.<sup>548</sup> And similar to the other contexts, here, too, state secrets may fail to appear in the final judicial opinion, yet they nevertheless may play a key role in the evolution of the suit.

dant Larry D. Thompson’s Motion to Dismiss, *Arar v. Ashcroft*, 414 F. Supp. 2d 250 (No. 04-0249), 2005 WL 6140586.

<sup>543</sup> See, e.g., Notice of Partial Motion to Dismiss in *Arar*, *supra* note 542; Reply of United States of America to Plaintiff’s Opposition to United States’ Invocation of the State Secrets Privilege, *Arar v. Ashcroft*, 414 F. Supp. 2d 250 (No. 04-0249); Notice of Ziglar, *supra* note 542.

<sup>544</sup> See *Arar v. Ashcroft*, 414 F. Supp. 2d at 258-59 (holding that Arar failed to show that his claimed “bar to reentry” injury would be “redressed by a favorable decision”).

<sup>545</sup> *Arar v. Ashcroft*, 414 F. Supp. 2d at 266.

<sup>546</sup> See *id.* at 259-60, 280-83 (considering the appropriateness of the remedy, given the lack of “explicit direction” by Congress).

<sup>547</sup> See *id.* at 287 (noting the mootness of consideration of the state secrets privilege, given dismissal of the statutory and constitutional claims); see also *Arar v. Ashcroft*, 585 F.3d 559, 582 (2d Cir. 2009) (en banc) (affirming decision below).

<sup>548</sup> See, e.g., *Kasza v. Browner*, 133 F.3d 1159, 1180-81 (9th Cir. 1998) (Tashima, J., concurring) (noting the majority found “a class of information” created under the Resource Conservation and Recovery Act that may receive state secrets privilege); see also *Hudson River Sloop Clearwater, Inc. v. Dep’t of Navy*, 891 F.2d 414, 421-22 (2d Cir. 1989) (discussing the Navy’s invocation of the privilege to avoid disclosure of the environmental impact of an alleged proposal to deploy nuclear weapons); *Fitzgerald v. Penthouse Int’l, Ltd.*, 776 F.2d 1236, 1242-44 (4th Cir. 1985) (permitting invocation of the state secrets privilege in a challenge of the Navy’s use of dolphins in military operations, submarine warfare, and intelligence gathering); *Frost v. Perry*, 919 F. Supp. 1459, 1464-66 (D. Nev. 1996) (permitting the Air Force to assert privilege to avoid disclosure of environmental data); *Frost v. Perry*, 161 F.R.D. 434, 440 (D. Nev. 1995) (finding that military defendants satisfied requirements for invocation of privilege for claims related to government disposal of hazardous waste); *Doe v. Browner*, 902 F. Supp. 1240, 1248-49 (D. Nev. 1995) (noting that, while the government’s privilege precluded plaintiffs’ discovery of environmental information, the court was permitted to access such information and evaluate plaintiffs’ argument).

One of the most interesting environmental suits to arise over the past eight years follows this pattern precisely. The suit centered on the U.S. Department of the Navy's use of "high-intensity 'active sonar' systems," which complainants alleged "cause the death and injury of whales, porpoises and other marine species."<sup>549</sup> On October 19, 2005, the Natural Resources Defense Council, the International Fund for Animal Welfare, the Cetacean Society International, the League for Coastal Protection, the Ocean Futures Society, and Jean-Michel Cousteau brought suit.<sup>550</sup> The complaint alleged that:

For decades, the Navy has conducted extensive testing and training using active sonar systems without complying with the requirements of United States environmental law. This action challenges the Navy's conduct of certain individual sea exercises and training activities in disregard of the requirements of the National Environmental Policy Act ("NEPA"), the Marine Mammal Protection Act ("MMPA"), and the Endangered Species Act ("ESA").<sup>551</sup>

On February 17, 2006, the government moved to dismiss the suit or, in the alternative, for summary judgment.<sup>552</sup> It was not until March 16, 2007, however, that Secretary of the Navy Donald C. Winter formally invoked state secrets "to avoid complying with the Discovery Order."<sup>553</sup> On April 19, 2007, the court ordered plaintiffs and defendants to meet, discuss the dispute, "and set a schedule for the filing of discovery motions relating to the state secrets privilege."<sup>554</sup> Just over a month later, on May 30, 2007, the litigants filed a Joint Notice of Agreement Resolving Jurisdictional Discovery Dispute over Invocation of the Military and State Secrets Privilege.<sup>555</sup> Over the following months, the Navy provided more than 400,000 pages of documents,

<sup>549</sup> First Amended Complaint for Declaratory and Injunctive Relief at 1, *Natural Res. Def. Council v. England*, No. 05-7513 (C.D. Cal. Jan. 3, 2006), 2006 WL 1525611.

<sup>550</sup> *Id.* at 3-6.

<sup>551</sup> *Id.* at 1 (footnotes omitted) (citations omitted).

<sup>552</sup> Plaintiffs' Memorandum of Points and Authorities in Opposition of Defendants' Motion to Dismiss, or in the Alternative, for Summary Judgment at 8, *Natural Res. Def. Council v. Winter*, No. 05-7513 (C.D. Cal. Apr. 10, 2006), 2006 WL 1525597.

<sup>553</sup> Joint Stipulation Regarding Defendants' Motion to Compel Discovery Responses at 29, *Natural Res. Def. Council v. Winter*, No. 05-7513 (C.D. Cal. June 4, 2008), 2008 WL 2937122. Donald C. Winter replaced Gordon R. England and became the 74th Secretary of the Navy on January 3, 2006. *US Navy Biographies—The Honorable Donald C. Winter*, U.S. NAVY, <http://www.navy.mil/navydata/bios/navybio.asp?bioid=325> (last visited Sept. 15, 2010).

<sup>554</sup> Joint Stipulation Regarding Defendants' Motion to Compel Discovery Responses, *supra* note 553, at 29.

<sup>555</sup> *Id.*

the contours of which were shaped by the state secrets discussions.<sup>556</sup> The parties settled on December 26, 2008, without the court ruling on whether the state secrets privilege applied.<sup>557</sup>

#### D. *Employment Suits*

Employment-related suits in which state secrets plays a role also are not a novel phenomenon.<sup>558</sup> The period from 2001 to 2009 evidences a continuation of this phenomenon. Some of these suits center on racial or religious discrimination or defamation.<sup>559</sup> For the most part, the government prevails.

Defamation suits in which state secrets arise have a long history.<sup>560</sup> The 1999 investigation of Dr. Wen Ho Lee, a U.S. Department of Energy scientist accused of mishandling sensitive nuclear weapons

<sup>556</sup> *Id.* at 30.

<sup>557</sup> Stipulation of Dismissal with Prejudice Pursuant to F. R. Civ. P. 41 (a) (1) (A) (ii), Natural Res. Def. Council v. Winter, No. 05-7513 (C.D. Cal. Dec. 26, 2008).

<sup>558</sup> *See, e.g.*, Weston v. Lockheed Missiles & Space Co., 881 F.2d 814, 815 (9th Cir. 1989) (holding that the state secrets privilege was an independent ground for dismissal of a sexual orientation discrimination case); Molerio v. FBI, 749 F.2d 815, 825 (D.C. Cir. 1984) (finding that the state secrets privilege properly precluded disclosure of the reason for which a prospective employee was denied employment); Tilden v. Tenet, 140 F. Supp. 2d 623, 626 (E.D. Va. 2000) (finding that the state secrets privilege was “properly invoked” by the CIA Director in a case of sex discrimination).

<sup>559</sup> *See, e.g.*, Sterling v. Tenet, 416 F.3d 338, 343-44, 348 (4th Cir. 2005) (considering the CIA’s invocation of state secrets privilege to prevent disclosure of employment details, in a case involving an African American ex-CIA operative’s racial discrimination claim).

<sup>560</sup> In 1880, for instance, action was brought against the superintendent of the Naval Academy upon the resignation of a professor. *Maurice v. Worden*, 54 Md. 233, 254-58 (1880). In 1893, a New York court held that absolute immunity applies to words spoken by “military officers in reports or statements to their superiors and all acts of state.” *Hemmens v. Nelson*, 34 N.E. 342, 344 (N.Y. 1893). By the early twentieth century, “[t]he rule [of privilege from disclosure] ha[d] been applied . . . in actions against officials for defamatory reports and other communications, thereby conferring immunity by refusing the means of proof.” Van Vechten Veeder, *Absolute Immunity in Defamation: Legislative and Executive Proceedings*, 10 COLUM. L. REV. 131, 145 (1910). During the Cold War, this type of action became particularly salient: “In the real world,” one legal scholar explained, “intelligence agents often strike not with guns but with words—allegations that destroy reputations, families, careers.” Comment, *Spying and Slandering: An Absolute Privilege for the CIA Agent?*, 67 COLUM. L. REV. 752, 752 (1967). Cases like *Heine v. Raus* thus raised the question of whether actions for defamation within the national security realm would gain ground. *See Heine v. Raus*, 261 F. Supp. 570, 570-71 (D. Md. 1966) (examining a claim of slander against the CIA in which the defendant asserted “absolute privilege”); *see also Fitzgerald v. Penthouse Int’l, Ltd.*, 776 F.2d 1236, 1242, 1244 (4th Cir. 1985) (outlining elements of the defamation claim about espionage and concluding that the subject matter of the suit was a state secret).

documents, gave rise to yet another legal action alleging slander.<sup>561</sup> In this particular instance, Notra Trulock, III, a former Department of Energy official, sued Lee and two other federal officials for statements they made suggesting that racial bias motivated Trulock's role in the investigation of Lee.<sup>562</sup> In May 2001, the government "filed a statement of interest and sought a protective order against discovery of classified documents."<sup>563</sup> The government subsequently intervened in the case, and CIA Director George Tenet invoked the state secrets privilege.<sup>564</sup> In March 2002, the district court ratified the protective order and granted the motion to dismiss.<sup>565</sup> In June 2003, the appeals court affirmed the dismissal of the suit on state secrets grounds.<sup>566</sup>

With judicial relief precluded, plaintiffs at times try to engage Congress to redress their grievances. However, these efforts rarely produce the sought-after relief. On October 14, 1998, for instance, David Aaron Tenenbaum, an employee of the United States Army Tank-Automotive Armaments Command (TACOM), and his wife, Madeline Gail Tenenbaum, sued the United States for ethnic and religious discrimination.<sup>567</sup> Tenenbaum alleged that, as a result of his relationship with the Israeli liaison officer to TACOM, he had been subjected to more stringent scrutiny than normal during his efforts to obtain a higher security classification.<sup>568</sup> Tenenbaum brought a *Bivens* claim for Fourth Amendment violations, a common law conspiracy claim for unlawful investigation, and claims for false attribution of confessions, defamation, gross negligence, and loss of consortium.<sup>569</sup> In June 2001, Lieutenant General Keith Alexander, Director of the National Security Agency, invoked the state secrets privilege, stating that any further progress of the suit would endanger national securi-

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<sup>561</sup> See *Trulock v. Lee*, 66 F. App'x 472, 473 (4th Cir. 2003) (discussing two actions in which Trulock accused federal officials of racially motivated defamation in the Eastern District of Virginia).

<sup>562</sup> *Id.*

<sup>563</sup> *Id.* at 475.

<sup>564</sup> Brief for the Intervenor United States of America at 13-15, *Trulock*, 66 F. App'x 472 (Nos. 02-1476, 02-1477), 2002 WL 32737348, at \*13-15.

<sup>565</sup> *Trulock*, 66 F. App'x at 475.

<sup>566</sup> *Id.* at 478.

<sup>567</sup> *Tenenbaum v. Ashcroft*, No. 09-10612, 2009 WL 2222933, at \*1-2 (E.D. Mich. July 23, 2009).

<sup>568</sup> *Tenenbaum v. Simonini*, No. 98-74473, at 2-3 (E.D. Mich. Sept. 30, 2002) (order denying plaintiff's motion to strike and granting defendants' motion for summary judgment).

<sup>569</sup> *Id.* at 8-11.

ty.<sup>570</sup> Just over one year later, the district court dismissed the suit—a judgment upheld by the Sixth Circuit on May 19, 2004.<sup>571</sup>

Tenenbaum, denied a judicial forum, pursued a political solution: on March 14, 2006, Senator Carl Levin wrote on Tenenbaum’s behalf to the Department of Defense, requesting an investigation into the allegations.<sup>572</sup> The Department of Defense investigated, and in a July 13, 2008, report, it found that Tenenbaum’s race and ethnicity had indeed “contributed to the unusual and unwelcome scrutiny.”<sup>573</sup> The plaintiffs initiated a second case against the same defendants in the first suit, and as well as against former Attorney General John Ashcroft, former Deputy Secretary of Defense Paul Wolfowitz, and former Army Litigation Division Chief and General Counsel Uldric Fiore.<sup>574</sup> Tenenbaum alleged a false invocation of state secrets doctrine, depriving him of his right of access to the courts.<sup>575</sup> The court, however, found the case barred by the procedural hurdle of *res judicata*.<sup>576</sup>

Outside of discrimination and defamation, loss of employment following whistleblower activity also gives rise to the defendant’s invocation of state secrets.<sup>577</sup> One such case, which lends further insight

<sup>570</sup> Tenenbaum v. Simonini, No. 09-10612 (E.D. Mich. filed Oct. 14, 1998) (listing a “Declaration of Keith B. Alexander” as filed on June 21, 2001, on the docket, but under seal and unavailable on PACER).

<sup>571</sup> The opinion stated:

Having reviewed the materials Defendants produced under seal, we agree with the district court that the state secrets doctrine applies because a reasonable danger exists that disclosing the information in court proceedings would harm national security interests, or would impair national defense capabilities, disclose intelligence-gathering methods or capabilities, or disrupt diplomatic relations with foreign governments.

We further conclude that Defendants cannot defend their conduct with respect to Tenenbaum without revealing the privileged information. Because the state secrets doctrine thus deprives Defendants of a valid defense to the Tenenbaums’ claims, we find that the district court properly dismissed the claims.

Tenenbaum v. Simonini, 372 F.3d 776, 777 (6th Cir. 2004) (citation omitted), *cert. denied*, 543 U.S. 1000 (2004).

<sup>572</sup> Tenenbaum v. Ashcroft, No. 09-10612, 2009 WL 2222933, at \*2 (E.D. Mich. July 23, 2009).

<sup>573</sup> *Id.* (internal quotation marks omitted).

<sup>574</sup> *Id.*

<sup>575</sup> *Id.*

<sup>576</sup> *Id.* at \*9.

<sup>577</sup> For example, in 1994, Reynolds Electrical and Engineering Company (REECO) employed Forrest Darby as an electrician. Verified Complaint at 2-3, *Darby v. U.S. Dep’t of the Air Force*, No. 00-0661 (D. Nev. May 19, 2000), 2000 WL 34598769. Concerned about the safety procedures in place at the Tonopah Test Range, Darby and twelve coworkers met with U.S. Congressman James Bilbray in March of that year. *Id.*

into the public and parallel dimensions of the privilege, involved Sibel Edmonds, originally from Turkey, who moved to the United States in 1988.<sup>578</sup> In September 2001, Edmonds became a translator for the FBI.<sup>579</sup> She later alleged that one of her colleagues, Melek Can Dickerson leaked information to subjects of FBI investigations.<sup>580</sup> Edmonds reported that Dickerson told her not to translate certain documents on grounds that they did not contain any new information, thus distorting the information available and hurting the investigation.<sup>581</sup> Edmonds further stated that her signature was forged on some documents, but that when she objected, Dickerson responded by overtly threatening her.<sup>582</sup> Efforts to draw attention to Dickerson's

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Soon thereafter, REECO's Project Manager informed Darby that if he had spoken to the congressman, Darby could be terminated. *Id.* at 3. Darby claimed that Bilbray took steps to prevent this from happening, but that in November 1997, the U.S. Air Force "deaccessed" Darby from his assigned work location, even though he had a top-secret Q clearance. *Id.* This action caused his termination since he effectively could not work. *Id.* On May 19, 2000, Darby brought suit, claiming the termination was in retaliation. *Id.* The government asserted state secrets as its first defense. Answer to Amended Complaint at 2, *Darby*, No. 00-0661 (D. Nev. Oct. 26, 2001), 2001 WL 34878033. The government's motion for summary judgment suggested that the information sought related to at least one of the following: military plans, weapons, and operations; vulnerabilities or capabilities of systems or plans; intelligence sources and methods; scientific, technological, or economic matters; and foreign government information. Defendants' Assertion of the Military and State Secrets Privilege, and Defendants' Motion to Dismiss, and for Summary Judgment, *Darby*, No. 00-0661 (D. Nev. Aug. 31, 2001), 2001 WL 34877013; *see also* Defendants' Reply Memorandum in Support of Their Assertion of the Military and State Secrets Privilege, in Support of Their Motion to Dismiss and for Summary Judgment, and in Opposition to Plaintiff's Cross-Motion for Summary Judgment and Rule 56(f) Discovery at 7, *Darby*, No. 00-0661 (D. Nev. Nov. 16, 2001), 2001 WL 34877016 (noting the government had properly asserted a claim of privilege). On March 4, 2002, the court granted summary judgment and dismissal on state secrets grounds. *See* Plaintiff's F.R.C.P. Rule 59(e) Motion for Reconsideration at 1, No. 00-0661 (D. Nev. Mar. 13, 2002), 2002 WL 32976565 (responding to the court's summary judgment order).

For continued discussion of state secrets in the context of the suit see, for instance, Plaintiff's Motion for Reconsideration F.R.C.P. Rule 59(e) Reply Memorandum at 1-2, *Darby*, No. 00-0661 (D. Nev. Apr. 15, 2002), 2002 WL 32976567; *see also* Defendants' Response to Plaintiff's Motion for Reconsideration, *Darby*, No. 00-0661 (D. Nev. Apr. 5, 2002), 2002 WL 32976566; Plaintiff's F.R.C.P. Rule 59(e) Motion for Reconsideration at 5-7, *Darby*, No. 00-0661 (D. Nev. Mar. 13, 2002), 2002 WL 32976565.

<sup>578</sup> Complaint at 2, *Edmonds v. United States*, 436 F. Supp. 2d 28 (D.D.C. 2006) (No. 05-00540), 2005 WL 919242.

<sup>579</sup> *Id.* at 3.

<sup>580</sup> *Id.* at 4-5.

<sup>581</sup> *Id.*

<sup>582</sup> *Id.*

behavior inside the FBI allegedly failed.<sup>583</sup> In March 2002, the FBI dismissed Edmonds from her post.<sup>584</sup>

As in *Sterling v. Tenet*, the plaintiff in *Edmonds v. United States* sought congressional assistance in mounting a political response. On June 19, 2002, Senators Patrick Leahy and Charles Grassley requested that the FBI's Office of Inspector General investigate Edmonds's allegations—a request repeated on July 9, 2004.<sup>585</sup>

In the interim, Edmonds brought suit in the District Court for the District of Columbia, claiming violations of the Privacy Act,<sup>586</sup> Administrative Procedure Act,<sup>587</sup> and the First and Fifth Amendments.<sup>588</sup> She sought damages, reinstatement to her job, and an order prohibiting retaliation against her or her family.<sup>589</sup> On October 18, 2002, Ashcroft invoked state secrets and moved to dismiss the case.<sup>590</sup>

The parallel effect noted in the NSA wiretapping cases emerged here, as well: Ashcroft's effort to restrict Edmonds extended to a second case working its way through the court. In *Burnett v. Al Baraka Investment & Development Corp.*, survivors of 9/11, who had filed suit against Saudi Arabia and some Saudi corporations, sought to depose Edmonds.<sup>591</sup> In April 2004, Ashcroft intervened, once again invoking state secrets.<sup>592</sup> The following month, Ashcroft allegedly retroactively classified all Senate Judiciary Committee materials related to Ed-

<sup>583</sup> *Id.*

<sup>584</sup> *Id.* at 10-11. For further discussion of this case, see also Rapa, *supra* note 6, at 233-35, 262-71.

<sup>585</sup> Letter from Patrick Leahy and Charles Grassley, U.S. Senators, to John Ashcroft, U.S. Attorney Gen., Robert S. Mueller, III, FBI Director, and Glen A. Fine, Inspector Gen. (July 9, 2004), available at [http://www.justacitizen.com/articles\\_documents/Leahy\\_Grassley\\_Letter\\_to\\_Ashcroft\\_7-9-04.pdf](http://www.justacitizen.com/articles_documents/Leahy_Grassley_Letter_to_Ashcroft_7-9-04.pdf).

<sup>586</sup> 5 U.S.C. § 552a (2006).

<sup>587</sup> 5 U.S.C. §§ 551-552, 701-706.

<sup>588</sup> Complaint for Declaratory and Injunctive Relief and Damage at 2-3, *Edmonds v. U.S. Dep't of Justice*, 323 F. Supp. 2d 65 (D.D.C. 2004) (No. 02-01448), 2002 WL 32969560; see also U.S. CONST. amend. I, V.

<sup>589</sup> *Id.* at 19. Edmonds simultaneously filed suit against the FBI under the Freedom of Information Act, 5 U.S.C. § 552. *Edmonds v. FBI*, 272 F. Supp. 2d 35, 42 (D.D.C. 2003).

<sup>590</sup> *Edmonds*, 323 F. Supp. 2d at 73.

<sup>591</sup> See Statement of Interest of the United States of America in Support of Emergency Motion to Quash Deposition of Sibel Edmonds, or For Protective Order at 1-7, *Burnett v. Al Baraka Inv. & Dev. Corp.*, 323 F. Supp. 2d 82 (D.D.C. 2004) (No. 03-9849) (explaining and opposing the plaintiffs' subpoena demands).

<sup>592</sup> *Burnett*, 323 F. Supp. 2d at 82. Ashcroft successfully asserted state secrets more broadly in the case as well with respect to information that, if revealed, might jeopardize U.S. national security or foreign policy interests. *Id.* at 83.

monds' case, including information on Senators Leahy and Grassley's websites.<sup>593</sup> The DOJ reportedly backed off when the Project on Government Oversight filed suit.<sup>594</sup>

Edmonds challenged the executive branch's invocation of state secrets, saying that Ashcroft had not personally considered the information that was privileged and that he had failed to be specific.<sup>595</sup> The court rejected this argument.<sup>596</sup> Having examined the documents in camera, the court concluded that Edmonds could not build a prima facie case without the information properly covered by state secrets.<sup>597</sup> The court recognized that such a step was extreme: "[D]ismissal of a suit, and the consequent denial of a forum without giving the plaintiff her day in court . . . is indeed draconian. Denial of the forum provided under the Constitution for the resolution of disputes is a drastic remedy that has rarely been invoked."<sup>598</sup> But on the same day, the court permitted use of only nine of the thirty-one proposed questions in *Burnett*.<sup>599</sup>

Importantly, it was not the actual information sought that was of concern, or even the potential construction of a mosaic based on specific documents—arguments that have previously been considered in the course of legal scholarship on state secrets. Instead, the court in *Burnett* grounded its decision on the potential that further information would emerge in the course of *cross-examination* that would threaten national security.<sup>600</sup> This line of reasoning—essentially a floodgates argument—is distinguishable from both the instant suppression of evidence during discovery (on the grounds that it would

<sup>593</sup> Press Release, Project on Gov't Oversight, Justice Department Caves In: Allows Publication of Retroactively Classified Information; Lawsuit Challenged Classification of Public Information (Feb. 22, 2005), available at <http://www.pogo.org/pogo-files/alerts/government-secrecy/gso-oc-20050222.html>.

<sup>594</sup> Complaint for Declaratory and Injunctive Relief at 2, Project on Gov't Oversight v. Ashcroft, No. 04-01032 (D.D.C. June 23, 2004); see also Sibel Edmonds, *Gagged, But Not Dead*, JUST A CITIZEN (May 14, 2005), [http://www.justacitizen.com/articles\\_documents/May14-05-Gagged%20but%20not%20Dead.htm](http://www.justacitizen.com/articles_documents/May14-05-Gagged%20but%20not%20Dead.htm) (last visited Sept. 15, 2010) (discussing removal of documents from the senators' websites).

<sup>595</sup> Edmonds v. U.S. Dep't of Justice, 323 F. Supp. 2d 65, 73 (D.D.C. 2004).

<sup>596</sup> *Id.* at 75-76; see also *Kasza v. Browner*, 133 F.3d 1159, 1165-66 (9th Cir. 1998) (discussing the plaintiff's argument that the entire regulatory matter of a Resource Conservation and Recovery Act enforcement cannot be a state secret and challenging the application of state secrets on a rolling basis).

<sup>597</sup> *Edmonds*, 323 F. Supp. 2d at 78-79.

<sup>598</sup> *Id.* at 81 (citations omitted) (internal quotation marks omitted).

<sup>599</sup> See *Burnett v. Al Baraka Inv. & Dev. Corp.*, 323 F. Supp. 2d 65, 84 (D.D.C. 2004) (prohibiting asking certain questions of an official during deposition).

<sup>600</sup> *Id.* at 83.

be dangerous when released in the public domain), as well as from the potential connection between seemingly disparate pieces of information. It also gives rise to due process considerations.

Under pressure from Congress, the Office of the Inspector General (OIG) published the final report on *Edmonds* in July 2004, which Ashcroft had classified.<sup>601</sup> An unclassified version was made public in January 2005.<sup>602</sup> The Inspector General found that “Edmonds’ assertions regarding the coworker, when viewed as a whole, raised substantial questions and were supported by various pieces of evidence.”<sup>603</sup> In the OIG’s opinion, the FBI had not been able to demonstrate by clear and convincing evidence that Edmonds would have been terminated without her allegations, and the FBI’s investigation of her claims had been inadequate.<sup>604</sup>

While the report did not obtain relief for Edmonds, it did have some administrative effect, suggesting that perhaps a congressional role in state secrets instances is not to be dismissed out of hand. The report recommended new translation procedures within the bureau.<sup>605</sup> It also highlighted the precarious position of attempted whistleblowers and contributed to support for the bill for the Executive Branch Reform Act of 2006, which would limit the application of state secrets in such suits.<sup>606</sup>

Nevertheless, the report did not bring immediate legal relief to Edmonds. To the contrary, the courts continued to protect the government’s invocation of the state secrets privilege, going even beyond the executive’s wishes. For example, although the government had already agreed to public argument on appeal, the day before the argument, the Court of Appeals for the D.C. Circuit announced that the press would be barred from the courtroom.<sup>607</sup> In May 2005, in a one-sentence opinion, the appellate court affirmed the lower court’s

<sup>601</sup> Edmonds, *supra* note 594.

<sup>602</sup> OFFICE OF OVERSIGHT & REVIEW, OFFICE OF THE INSPECTOR GEN., U.S. DEP’T OF JUSTICE, A REVIEW OF THE FBI’S ACTIONS IN CONNECTION WITH ALLEGATIONS RAISED BY CONTRACT LINGUIST SIBEL EDMONDS: UNCLASSIFIED SUMMARY (2005), available at <http://www.usdoj.gov/oig/special/0501/final.pdf>.

<sup>603</sup> *Id.* at 11.

<sup>604</sup> *Id.* at 30, 34.

<sup>605</sup> *Id.* at 32-34.

<sup>606</sup> Executive Branch Reform Act of 2006, H.R. 5112, 109th Cong.

<sup>607</sup> Edmonds v. U.S. Dep’t of Justice, No. 04-5286 (D.C. Cir. Apr. 21, 2005) (order denying motions to open oral argument).

ruling.<sup>608</sup> Six months later, the Supreme Court denied Edmonds' writ of certiorari.<sup>609</sup>

At the most general level, cases that center on espionage contracts receive short shrift in court.<sup>610</sup> In 2005, for example, the wife and children of a former covert-status CIA agent sued the CIA for termination of employment.<sup>611</sup> Allegedly denied medical insurance, the former agent and his family left the country to seek medical care. The family stated that they could not leave the country where they were located, that they were afraid of detection, and that the former agent could not obtain the appropriate psychiatric counseling he needed because of nondisclosure requirements.<sup>612</sup> The plaintiffs sought injunctive and declaratory relief, as well as monetary damages, claiming violations of the Administrative Procedure Act,<sup>613</sup> the Privacy Act,<sup>614</sup> and the Federal Tort Claims Act,<sup>615</sup> as well as the First, Fifth, and Eighth Amendments.<sup>616</sup> In response, Porter Goss, Director of the CIA, invoked the state secrets privilege.<sup>617</sup> The government, acknowledging the breadth of material covered by its state secrets invocation and motion to dismiss, argued that plaintiffs should not be allowed access to secure facilities to prepare their arguments.<sup>618</sup> In its unreported decision, the Southern District of

<sup>608</sup> Edmonds v. U.S. Dep't of Justice, 161 F. App'x 6, 6 (D.C. Cir. 2005), *aff'g* 323 F. Supp. 2d 65 (D.D.C. 2004).

<sup>609</sup> Edmonds v. Dep't of Justice, 546 U.S. 1031 (2005), *denying cert. to Edmonds*, 161 F. App'x 6; *see also* Edmonds v. United States, 563 F. Supp. 2d 196 (D.D.C. 2008) (relating to a subsequent suit in which Edmonds sought relief under the Federal Tort Claims Act, 28 U.S.C. §§ 2671–2680 (2006), for her alleged loss of personal property when she was fired).

<sup>610</sup> For a brief overview of similar cases, see *Tenet v. Doe*, 544 U.S. 1, 9–11 (2005). *See also* Doe v. Tenet, 329 F.3d 1135, 1150–55 (9th Cir. 2003) (refusing to dismiss a breach of contract claim by former CIA spies), *rev'd*, 544 U.S. 1 (2005); Monarch Assurance P.L.C. v. United States, 244 F.3d 1356, 1364–65 (Fed. Cir. 2001) (affirming a lower court's approval of the invocation of state secrets privilege and vacating on other grounds); Monarch Assurance P.L.C. v. United States, 36 Fed. Cl. 324, 329 (1996) (denying discovery to plaintiffs based on the CIA's invocation of the state secrets privilege), *aff'd in part, vacated in part*, 244 F.3d 1356 (Fed. Cir. 2001).

<sup>611</sup> Doe v. CIA, No. 05-7939, 2007 WL 30099, at \*1 (S.D.N.Y. Jan. 4, 2007).

<sup>612</sup> *Id.*

<sup>613</sup> 5 U.S.C. § 701–706 (2006).

<sup>614</sup> 5 U.S.C. § 552(a).

<sup>615</sup> 28 U.S.C. § 1346(b).

<sup>616</sup> Doe v. CIA, 2007 WL 30099, at \*1.

<sup>617</sup> *Id.* at \*2.

<sup>618</sup> Reply Memorandum of Law in Further Support of the Government's Assertion of the State Secrets Privilege and Motion to Dismiss This Action, Doe v. CIA, No. 05-7939, at 15–17 (S.D.N.Y. Aug. 4, 2006), 2006 WL 2588099.

New York dismissed the case on state secrets grounds.<sup>619</sup> The Court of Appeals upheld the decision.<sup>620</sup> Judge Sack wrote, “The plaintiffs have no right to use material that is alleged by the government to contain state secrets in order to participate in the district court’s review of the *bona fides* of the government’s allegation.”<sup>621</sup>

### E. *State Secrets as a Tactical Advantage*

At times, the executive merely threatens the potential application of state secrets without formally invoking the privilege. For example, in *Stevens v. United States*, a civil suit brought in the context of the anthrax investigations, the government requested a stay to “provide a reasonable opportunity for the United States to review the national security information implicated by Plaintiff’s allegations and to decide what must be protected by the state secrets privilege.”<sup>622</sup> In *Stillman v. Department of Defense*, the CIA argued throughout nine months of briefing that more time was needed to determine whether the state secrets privilege applied.<sup>623</sup> The Agency followed a similar course in *Lee v. CIA*, a First Amendment case centered on the public release of a screenplay.<sup>624</sup> In none of these cases did the government invoke the privilege.<sup>625</sup>

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<sup>619</sup> Doe v. CIA, 2007 WL 30099, at \*3.

<sup>620</sup> Doe v. CIA, 576 F.3d 95, 108 (2d Cir. 2009).

<sup>621</sup> *Id.* at 97.

<sup>622</sup> Defendant United States of America’s Reply Memorandum in Support of Its Motion to Stay Proceedings at 10, *Stevens v. United States*, No. 03-81110 (S.D. Fla. Mar. 5, 2004), 2004 WL 3705982; *see also* Defendant United States of America’s Memorandum of Law in Support of Its Motion to Stay Proceedings app. at 1-9, *Stevens v. United States*, No. 03-81110 (S.D. Fla. Jan. 26, 2004) (declaration of Richard L. Lambert), 2004 WL 3705981 (submitting an FBI declaration in support of the stay to consider the implications with regard to bioterrorism).

<sup>623</sup> *See Stillman v. Dep’t of Def.*, No. 01-1342, at 3 (D.D.C. June 10, 2002) (recounting how Stillman “engaged in ongoing negotiations with defendants over the classification determination” from October 2000 until June 2001).

<sup>624</sup> *See Reply to Defendant’s Opposition to Plaintiff’s Ex-Parte Motion for Expedited Proceedings* at 5 n.5, *Lee v. CIA*, No. 03-0206 (D.D.C. Mar. 26, 2003), 2003 WL 24251637 (noting that the CIA never acted on its threat to invoke state secrets).

<sup>625</sup> The pattern here is not that state secrets is couched as an affirmative defense (and thus subject to some modicum of reasonableness), but rather that the doctrine is merely mentioned as possible grounds for a formal stay of proceedings. In the *Stevens* case, the United States did, however, enter a motion for a protective order under Federal Rule of Civil Procedure 26(c), which the court granted on December 14, 2009. *Stevens v. United States*, No. 03-81110 (S.D. Fla. Dec. 14, 2009) (order granting motion for protective order).

The threatened use of state secrets is not a new phenomenon.<sup>626</sup> It takes time for executive agencies to ascertain whether the privilege ought to apply. It may not be immediately clear, at the outset, whether the state secrets privilege is implicated. Classified material is, moreover, compartmentalized and difficult to evaluate. Plaintiffs also should have early warning that the subsequent suit may be stalled because of the presence of classified information.

At the same time, the advantages that may accompany even the threatened applicability of state secrets should not be discounted. Similar to the contractors discussed in Part I of this Article,<sup>627</sup> the consequent delays in litigation may make it difficult for plaintiffs with access to limited resources to stay the course. They may be reluctant to proceed where little may ultimately come of their efforts—particularly where precedent may exist for the dismissal of similar cases. A latent conservatism may thereby attach to the proceedings.

When the state secrets privilege is actually invoked and upheld, even where suits are not dismissed, it may have a profound effect on motions and related responses, attorneys' correspondence with their clients, and the manner in which discovery unfolds. Such considerations extend beyond counsel being unable to ascertain exactly what information is secret, forcing them to make assumptions on issues central to their clients' defense.<sup>628</sup>

Consider *Sterling v. Tenet*, a state secrets case argued before the Southern District of New York, the Eastern District of Virginia, and the Fourth Circuit.<sup>629</sup> Attorney for the plaintiff, Mark Zaid, drafted an opposition brief to the CIA's invocation of the privilege, arguing that the information was not classified and, therefore, was inappropriate

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<sup>626</sup> See, e.g., Defendant's Motion for Protective Order at 3, Nat'l Westminster Bank, PLC v. United States, 44 Fed. Cl. 120 (1999) (No. 95-0758), 1996 WL 34427440 (asserting that information that would be responsive to the plaintiff's requests might be privileged and that evaluating such information is burdensome).

<sup>627</sup> See *supra* Part I (suggesting that the affirmative defense of state secrets draws out litigation and may scare off litigants when the outcome of a multiyear court battle is uncertain).

<sup>628</sup> See, e.g., Complaint, Edmonds v. United States, 436 F. Supp. 2d 28 (D.D.C. 2005) (No. 05-00540), 2005 WL 919242.

<sup>629</sup> *Sterling v. Tenet*, 416 F.3d 338, 343-44 (4th Cir. 2005); see also Memorandum of Law in Support of Defendants' Motion to Dismiss the Complaint for Improper Venue or in the Alternative to Transfer Venue at 14-17, *Sterling v. Tenet*, 01-8073 (S.D.N.Y. Apr. 18, 2002) (arguing that the state secrets privilege compels either dismissal for improper venue or transfer to the Eastern District of Virginia for reasons of national security).

for state secrets designation.<sup>630</sup> The Southern District agreed with Zaid and denied the CIA's motion; however, the CIA subsequently classified Zaid's brief and accused him of having violated his secrecy agreement for having created a classified document on his work computer.<sup>631</sup> Thus, Zaid no longer had access even to his own arguments for the balance of the litigation. The CIA reportedly confiscated the judicial opinion, which had been faxed to Zaid's office.<sup>632</sup> Zaid stated that eight months later, he received a heavily redacted document in its place.<sup>633</sup> Zaid's alleged violation of the secrecy agreement apparently became appended to his clearance file, with the possibility of being used in the future for an adverse determination.<sup>634</sup>

According to Zaid, at the heart of the CIA's position was the concern that he had been granted a limited security approval and had subsequently signed a secrecy agreement, but then had not used secure facilities to write the legal document.<sup>635</sup> The secrecy agreement explained: "[Y]ou may only review, create, store, and/or otherwise work with or handle classified information in an Agency secure area."<sup>636</sup> The CIA would provide "paper and pens/pencils, stand-alone information processing equipment (e.g., a personal computer), and storage facilities," and "[o]nly Agency-provided equipment and facilities may be used to create documents containing classified information."<sup>637</sup> The document emphasized: "You may neither create classified documents

<sup>630</sup> E-mail from Mark Zaid, esq., to author (Jan. 6, 2010, 14:04 EST) (on file with author).

<sup>631</sup> *Id.*; see also Telephone Interview with Mark Zaid, Managing Partner, Mark S. Zaid., P.C. (Jan. 12, 2010).

<sup>632</sup> Telephone Interview with Mark Zaid, *supra* note 631.

<sup>633</sup> *Id.*

<sup>634</sup> E-mail from Mark Zaid, *supra* note 630, attachment ("Secrecy/Non-Disclosure Agreement") (on file with author).

<sup>635</sup> Telephone Interview with Mark Zaid, *supra* note 631. Marilyn A. Dorn, Information Review Officer for the National Clandestine Service of the CIA, described the procedure and scope of a limited security approval:

A limited security approval is not a security clearance. Rather, a limited security approval is based on a CIA determination that the attorney has a need-to-know some limited classified information, has had a favorable eligibility determination based upon a background investigation that is more limited in scope than the background investigation required for a security clearance, and has signed a non-disclosure agreement specific to his or her representation of an individual employee.

Declaration of Marilyn A. Dorn at 4, *Doe v. CIA*, No. 05-7939 (S.D.N.Y. Aug. 4, 2006).

<sup>636</sup> E-mail from Mark Zaid, *supra* note 630, attachment at 2 ("Security Guidance for Representatives") (on file with author).

<sup>637</sup> *Id.*

at your office, nor may you reconstruct classified documents from redacted, unclassified documents stored at your office.”<sup>638</sup>

What happens, though, when the CIA denies access to its facilities? How, then, is an attorney supposed to mount his or her case? In the recent Second Circuit decision in *Doe v. CIA*, the agency refused to allow Zaid to use its facilities to submit a classified opposition to its state secrets motion.<sup>639</sup> “The limited security approval,” the CIA argued, “does not authorize Mr. Zaid to have access to classified documents, draft classified documents, or file classified information with the Court, nor does it entitle him to use CIA facilities to communicate classified information or create classified documents.”<sup>640</sup> The district court did not require the CIA to provide access to classified facilities:

Plaintiffs’ arguments that denial of an opportunity for them to present classified information currently in their possession to the Court, and that the Government’s classification determinations and procedures have denied them meaningful access to the courts, were answered by the Supreme Court in *Reynolds*: “even the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that . . . secrets are at stake.”<sup>641</sup>

In essence, the district court’s ruling prevented plaintiff’s counsel from responding to the CIA’s arguments without violating the secrecy agreement.<sup>642</sup>

<sup>638</sup> *Id.*

<sup>639</sup> 576 F.3d 95, 99-100 (2d Cir. 2009).

<sup>640</sup> Declaration of Marilyn A. Dorn, *supra* note 635, at 5. Joseph H. Holthaus provided the following statement:

In sum, this process does not provide counsel with a “security clearance,” but provides counsel with a “security approval” for a specific case involving a specific client and grants that counsel access to a limited amount of classified information relating solely to the client’s identity and the client’s affiliation with the CIA, if an appropriate Agency official has first determined he has a need-to-know. This process does not provide a blanket approval to view classified SECRET information.

Declaration of Joseph H. Holthaus at 5, *Lee v. CIA*, No. 03-00206 (D.D.C. Mar. 17, 2003).

<sup>641</sup> *Doe v. CIA*, No. 05-7939, 2007 WL 30099, at \*3 (S.D.N.Y. Jan. 4, 2007) (quoting *United States v. Reynolds*, 345 U.S. 1, 11 (1953)).

<sup>642</sup> E-mail from Mark Zaid, *supra* note 630. The same attorney now faces a similar issue in *Peter B. v. CIA*, 620 F. Supp. 2d 58 (D.D.C. 2009), which is not yet a state secrets case but may well become one. When Zaid requested use of secure facilities, the CIA responded:

The Security Guidance for Representatives is a generic document which covers a variety of different legal matters involving the Agency and our personnel. The provision of an office-like area for discussions with your client and a

Even where access to facilities is granted, as a purely practical matter, it may be difficult to integrate classified and unclassified information into legal documents. The CIA, for instance, directs attorneys who have obtained clearances:

Do not bring into Agency buildings items capable of storing or otherwise recording classified information, such as personal computers, tape recorders, or data storage media, and items capable of transmitting such information, such as telephones, modems, or facsimile equipment. . . . If you need to transfer unclassified information from your office's information processing equipment other than Agency-provided information processing equipment, please contact your designated Agency security officer to make arrangements.<sup>643</sup>

There are important reasons for these precautions. For instance, the agency has a vested interest in protecting classified materials, especially those that pertain to its employees. There is a risk that individuals may take information out of the building and use it in an inappropriate manner, threatening the well-being—and possibly the lives—of those who work there.

At the same time, such provisions burden opposing counsel. Attorneys may be reluctant to bring in too much information: “Depending upon the items and the manner in which they are used, if brought into Agency facilities, these items may have to remain under Agency control.”<sup>644</sup> An obvious associated question thus arises in relation to attorney-client privilege: to what extent is the privilege affected by these measures? The security agreement states, “[a]ppropriate arrangements will be made to ensure that attorney-client privilege is preserved during the Agency's review of documents for classification purposes.”<sup>645</sup> Exactly how this is to be done, however, is not clear.

The presence of state secrets also may play a role in eliminating or shaping the manner in which depositions are performed—even years into a suit and on a broad range of evidence. One breach of contract case that came to fruition during the Bush Administration immediately

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stand-alone computer applies to those cases in which classified information is integral to the proceeding. It is my understanding that, given the protection of your client's identity (by calling him Peter B.) other pertinent case facts are (or can be re-worded to be) unclassified. Furthermore, CIA will not provide nor allow the use of classified information in a civil proceeding.

E-mail from Mark Zaid, *supra* note 630 (quoting the CIA's response to his request).

<sup>643</sup> E-mail from Mark Zaid, *supra* note 630, attachment at 3 (“Security Guidance for Representatives”).

<sup>644</sup> *Id.*

<sup>645</sup> *Id.* at 2 (emphasis omitted).

comes to mind. An Air Force contractor working on a missile system sued the United States for breach of contract and demanded millions in remuneration.<sup>646</sup> In May 2006, the executive branch invoked the state secrets privilege.<sup>647</sup> Although the parties tried to come to an agreement on their own in regard to the questions that could be posed to Darleen Druyun, the Air Force's Principal Deputy Assistant Secretary for Air Force Acquisitions and Management, their failure to do so led to a court opinion heavily laden with state secrets considerations.<sup>648</sup>

Other, less visible advantages may accrue in state secrets cases, tilting the scale towards the government. The privilege's invocation, for example, may give the state access to opposing counsel's confidential files. The clearest example comes from the *eTrepid* line of cases, which began on January 19, 2006, when eTrepid filed a complaint in a California state court against Dennis Montgomery, claiming that he had taken trade secrets with him when he left the company.<sup>649</sup> In March 2006, the case was removed to federal district court in Nevada.<sup>650</sup> On January 31, 2006, Montgomery filed a parallel action, alleging copyright infringement and related claims against eTrepid, Warren Trepp, and the U.S. Department of Defense.<sup>651</sup> In both cases, the district court granted plaintiffs' lead counsel, Michael James Flynn, pro hac vice applications on the grounds that he was licensed in Massachusetts but residing in California.<sup>652</sup> Director of National Intelligence John Negroponte invoked military and state secrets privilege.<sup>653</sup> The Nevada district court issued sealed search warrants for Montgomery's home and storage units.<sup>654</sup> When Flynn filed a motion with the court to unseal the search warrants, the government challenged Flynn's representation of Montgomery in the search warrant proceeding, saying that Flynn had only been admitted pro hac vice for civil proceedings.<sup>655</sup>

<sup>646</sup> See *Northrop Grumman Corp. v. United States*, 63 Fed. Cl. 38, 38-40 (2004) (describing the facts of the dispute).

<sup>647</sup> Notice of Filing Classified, In Camera, Ex Parte Declaration, *Northrop Grumman Corp. v. United States*, No. 96-0760 (Fed. Cl. May 12, 2006).

<sup>648</sup> See, e.g., *Northrop Grumman Corp. v. United States*, 75 Fed. Cl. 761, 766-67 (2007) (deferring to the Department of Defense's position in denying plaintiff's request to use classified documents to depose Druyun).

<sup>649</sup> *Montgomery v. eTrepid Tech., LLC*, No. 06-0056, 2009 WL 910739, at \*1 (D. Nev. Mar. 31, 2009).

<sup>650</sup> *Id.*

<sup>651</sup> *Id.* at \*3.

<sup>652</sup> *Id.* at \*2.

<sup>653</sup> *Id.* at \*4.

<sup>654</sup> *Id.* at \*3.

<sup>655</sup> *Id.* at \*4.

The government, however, did not stop with procedural considerations. It also challenged the validity of Flynn's pro hac vice application, saying that Flynn regularly practiced law in California.<sup>656</sup> Flynn retorted that he was being challenged because he was successful in getting the warrant partially unsealed and because the case was linked to political corruption (also at issue in the case was the alleged transfer of money to the state governor to secure a Department of Defense contract).<sup>657</sup>

On July 9, 2007, Flynn and his cocounsel, Carla DiMare, moved to withdraw as counsel.<sup>658</sup> The government responded that because the state secrets privilege had already been invoked, withdrawal of counsel was not routine; therefore, the government would impose conditions regarding documents in their client's file.<sup>659</sup> The plaintiff's new attorneys evinced concern that under the guise of state secrets, the government was gaining access to privileged attorney-client materials that would substantially affect their case.<sup>660</sup> Unlike many jurisdictions (including California), Nevada law allows attorneys to file a retaining lien over client files until outstanding fees or bonds have been paid.<sup>661</sup> On August 21, 2007, Flynn filed a motion for attorneys' fees; eight days later, the district court issued a protective order, which Negroponte's declaration invoking the state secrets privilege had supported.<sup>662</sup> Because of the invocation, Nevada retained control of the client files.<sup>663</sup> Efforts to get the files through other means outside of Nevada met with legal sanctions against the new attorneys.<sup>664</sup>

In sum, the use of the state secrets privilege may tip the scale towards the government throughout the litigation. Because the scholarly analysis of state secrets, however, has largely focused on final judicial opinions, the type and number of suits in which the state secrets doctrine has arisen, and the manner in which state secrets has influenced these suits, have gone largely unexplored.

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<sup>656</sup> *Id.*

<sup>657</sup> See Motion to Dismiss/Stay Pursuant to CCP §§ 410.30(a), 418.10(a)(2) (Forum Non Conveniens) at 3-4, *Montgomery v. Flynn*, No. BC-375335 (Cal. Super. Ct. Oct. 29, 2007), 2007 WL 4680291 (explaining Nevada's special interest in hearing the case, since it involved allegations of political corruption against its governor).

<sup>658</sup> *eTrepid*, 2009 WL 910739, at \*6.

<sup>659</sup> *Id.*

<sup>660</sup> *Id.*

<sup>661</sup> *Id.* at \*7.

<sup>662</sup> *Id.* at \*9.

<sup>663</sup> *Id.* at \*19-20.

<sup>664</sup> *Id.* at \*34-35.

In each of the foregoing cases, the executive branch found itself in the position of defendant to a civil action, and either threatened to invoke or actually invoked the state secrets privilege. But what about when the state finds itself in the position of prosecutor? Notwithstanding Judge Learned Hand's admonition in *United States v. Andolschek*,<sup>665</sup> between 2001 and 2009 the executive branch benefitted from the state secrets doctrine in the criminal context as well.

#### IV. CRIMINAL PROSECUTION

The Sixth Amendment guarantees that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor.”<sup>666</sup> This right extends to documentary as well as oral evidence.<sup>667</sup> Thus, although the executive branch has the authority to suppress documents, even when the documents would contribute to settling controversies between third persons, the suppression of the same in criminal prosecutions, “founded upon those very dealings to which the documents relate, and whose criminality they will, or may, tend to exculpate” presents a different matter.<sup>668</sup> In *United States v. Andolschek*, Judge Learned Hand explained:

So far as they directly touch the criminal dealings, the prosecution necessarily ends any confidential character the documents may possess; it must be conducted in the open, and will lay bare their subject matter. The government must choose; either it must leave the transactions in the obscurity from which a trial will draw them, or it must expose them fully. Nor does it seem to us possible to draw any line between documents whose contents bears [sic] directly upon the criminal transactions, and those which may be only indirectly relevant. Not only would such a distinction be extremely difficult to apply in practice, but the same reasons which forbid suppression in one case forbid it in the other, though not, perhaps, quite so imperatively.<sup>669</sup>

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<sup>665</sup> See *United States v. Andolschek*, 142 F.2d 503, 506 (2d Cir. 1944) (“While we must accept it as lawful for a department of the government to suppress documents, . . . we cannot agree that this should include their suppression in a criminal prosecution . . .”).

<sup>666</sup> U.S. CONST. amend. VI.

<sup>667</sup> See *United States v. Burr*, 25 F. Cas. 187, 191 (C.C.D. Va. 1807) (stating that it is sufficient to request documents that may be material); see also *Wilson v. United States*, 221 U.S. 361, 372 (1911) (“The right to resort to means competent to compel the production of written, as well as oral, testimony seems essential to . . . common law.” (citation omitted)).

<sup>668</sup> *Andolschek*, 142 F.2d at 506.

<sup>669</sup> *Id.* Indeed, such sentiments reach back to the founding of the Republic. In *United States v. Burr*, Chief Justice Marshall, sitting as Circuit Justice in the trial of for-

Two years later, the court in *United States v. Beekman* echoed this sentiment, stating that “when the government institutes criminal proceedings in which evidence, otherwise privileged under a statute or regulation, becomes importantly relevant, it abandons the privilege.”<sup>670</sup> Subsequent cases reinforced the executive’s duty either to produce the relevant information or to suffer dismissal.<sup>671</sup> The *Reynolds* court distinguished the civil suit before it ruled precisely on these grounds:

The rationale of the criminal cases is that, since the Government which prosecutes an accused also has the duty to see that justice is done, it is unconscionable to allow it to undertake prosecution and then invoke its governmental privileges to deprive the accused of anything which might be material to his defense.<sup>672</sup>

With the exception of *Reynolds*, each of these cases dealt with official information or informer’s privilege. Throughout the twentieth

mer Vice President Aaron Burr, who was charged with treason and high misdemeanor, addressed a defense motion for the court to order a subpoena duces tecum to compel production of a letter in the custody of President Thomas Jefferson. *Burr*, 25 F. Cas. at 187-88. Granting the motion, Justice Marshall observed

it is a very serious thing, if such letter should contain any information material to the defence, to withhold from the accused the power of making use of it. . . . The only ground laid for the court to act upon is the affidavit of the accused; and from that the court is induced to order that the paper be produced. . . .

*Id.* at 192.

<sup>670</sup> *United States v. Beekman*, 155 F.2d 580, 584 (2d Cir. 1946); *see also* *United States v. Krulewitch*, 145 F.2d 76, 78-79 (2d Cir. 1944) (discussing when privilege to suppress communications is abandoned).

<sup>671</sup> *See, e.g.*, *Roviaro v. United States*, 353 U.S. 53, 55 (1957) (counting as reversible error the lower court’s refusal to require the government to reveal an informer’s identity where it would have been relevant and helpful to the accused); *Christoffel v. United States*, 200 F.2d 734, 738 (D.C. Cir. 1952) (“If such evidence is under the control of a department of government charged with the administration of those laws for whose violation the accused has been indicted, and its production is refused, or it is excluded, the courts . . . have held a conviction will not be permitted without the evidence.” (citation omitted)), *rev’d on other grounds*, 345 U.S. 947 (1953); *United States v. Grayson*, 166 F.2d 863, 870 (2d Cir. 1948) (reiterating that when the evidence in question is under the control of the agency in charge of enforcing the allegedly broken law, the agency must produce the evidence in order to prosecute the charge successfully); *United States v. Schneiderman*, 106 F. Supp. 731, 738 (S.D. Cal. 1952) (saying the government must decide if public policy against disclosure is strong enough to warrant not prosecuting the defendant, but if it prosecutes, it must disclose relevant documents). *But see* *Palermo v. United States*, 360 U.S. 343, 352-56 (1959) (discussing circumstances in which the government should disclose evidence and concluding a prior statement used against the defendant need not be disclosed).

<sup>672</sup> *United States v. Reynolds*, 345 U.S. 1, 12 (1953).

century, the courts refrained from ever directly holding that the state secrets privilege could not be invoked in criminal prosecution.<sup>673</sup> Moreover, where the possible evidentiary value of a document to the defense was “clearly negligible,” the courts openly stated that national security concerns could trump the accused’s defense.<sup>674</sup> Perhaps not surprisingly, this scenario appeared to be particularly common in times of war.

For instance, one of the first reported cases to raise the state secrets privilege in the criminal realm, *United States v. Haugen*, centered on a World War II subcontractor who had agreed to furnish meals to workers at a plutonium plant.<sup>675</sup> In the context of the prosecution for forging meal tickets, the court recognized that “[t]he right of the Army to refuse to disclose confidential information, the secrecy of which it deems necessary to national defense, is indisputable.”<sup>676</sup> Twenty years later, Professor Zagel explained that “[t]he judicial temper is sympathetic to claims of privilege based on national security during wartime, and *Haugen* was explicitly grounded on the existing state of war.”<sup>677</sup>

Outside of wartime, though, questions related to secrecy continued to plague the status of state secrets in criminal law. In 1952, for instance, addressing reports by a prosecution witness to the FBI, a court held that the defendant was entitled to official information as a matter of right.<sup>678</sup> In *United States v. Coplon*, the court acknowledged that the executive possessed a privilege against disclosing state secrets, but that this privilege could not prevent a defendant from accessing evidence to which she had a constitutional right.<sup>679</sup> In a later prosecution for espionage, the government dropped its case to avoid revealing its informer apparatus.<sup>680</sup> By the mid-1960s, Professor Zagel observed that

<sup>673</sup> Zagel, *supra* note 9, at 904.

<sup>674</sup> *Schneiderman*, 106 F. Supp. at 736 (citing *Scher v. United States*, 305 U.S. 251 (1938) (holding that an informer’s identity can be withheld from the defense when its evidentiary value is negligible)); *cf.* *Zimmerman v. Poindexter*, 74 F. Supp. 933, 936 (D. Haw. 1947) (denying that national security is an overriding policy consideration great enough to justify withholding information from a defendant).

<sup>675</sup> *See United States v. Haugen*, 58 F. Supp. 436, 437-38 (E.D. Wash. 1944) (discussing the issue of the Army’s disclosure of state secrets).

<sup>676</sup> *Id.* at 438 (citations omitted).

<sup>677</sup> Zagel, *supra* note 9, at 904.

<sup>678</sup> *See Schneiderman*, 106 F. Supp. at 738 (holding that any government privilege to withhold reports from inspection have been waived).

<sup>679</sup> *See United States v. Coplon*, 185 F.2d 629, 638 (2d Cir. 1950) (“[T]he refusal to allow the defense to see [the evidence] was . . . a denial of their constitutional right . . .”).

<sup>680</sup> *See David Anderson, U.S. Drops Trial of 2 in Spy Case; Cites ‘Security,’* N.Y. TIMES, Oct. 3, 1964, at 1 (noting that the government dropped the case because “the price of

“[c]onsidering these cases, it is impossible to state with precision the current status of the state secrets privilege in criminal prosecutions.”<sup>681</sup>

The lack of clarity in the law and the possibility that individuals accused of crime could turn around and require classified information for their defense (thus forcing the government either to reveal the information or to drop the prosecution), provided the impetus for the creation of the Classified Information Procedures Act (CIPA).<sup>682</sup>

conviction may have been too high”). Through the mid-twentieth century, the most common criminal cases where state secrets arose came under prosecutions for violation of the Espionage Act. See Zagel, *supra*, note 9, at 905 (“Most criminal cases involving state secret claims arise under espionage laws . . . .”); Note, *Secret Documents in Criminal Prosecutions*, 47 COLUM. L. REV. 1356, 1357 (1947) (“In the past[,] prosecution has usually been brought under the Espionage Act of 1917.”); see also generally Espionage Act of 1917, Pub. L. No. 65-24, 40 Stat. 217 (repealed 1948).

<sup>681</sup> Zagel, *supra* note 9, at 904.

<sup>682</sup> See Pub. L. No. 96-456, 94 Stat. 2025 (1980) (codified as amended at 18 U.S.C. app. (2006)). For the history that motivated CIPA, see S. REP. NO. 96-823, at 1-3 (1980). See also *United States v. Fernandez*, 887 F.2d 465, 466 (4th Cir. 1989) (explaining that Congress enacted CIPA in 1980 to address what to do when a criminal defendant threatens to reveal classified information); *United States v. Sarkissian*, 841 F.2d 959, 965 (9th Cir. 1988) (“Congress passed CIPA to prevent . . . ‘graymail,’ where defendants pressed for the release of classified information to force the government to drop prosecution.”); *United States v. Pringle*, 751 F.2d 419, 427 (1st Cir. 1984) (noting CIPA was enacted to respond to “graymail”); Matthew N. Kaplan, *Who Will Guard the Guardians? Independent Counsel, State Secrets, and Judicial Review*, 18 NOVA L. REV. 1787, 1814 (1993) (discussing graymailing); Richard P. Salgado, *Government Secrets, Fair Trials, and the Classified Information Procedures Act*, 98 YALE L. J. 427 (1988) (elaborating on the complications of balancing secrecy with defendants’ rights under CIPA). For examples of such graymail attempts, see SUBCOMM. ON SECRECY AND DISCLOSURE, S. SELECT COMM. ON INTELLIGENCE, 95TH CONG., REP. ON NATIONAL SECURITY SECRETS AND THE ADMINISTRATION OF JUSTICE 12-16 (Comm. Print 1978), discussing cases of graymailing in various government institutions, and Classified Information Procedures Act, 126 Cong. Rec. S28,811 (daily ed. Oct. 1, 1980) (statement of Rep. Biden). See also *United States v. Wilson*, 732 F.2d 404, 412 (5th Cir. 1984) (holding the district court did not err in quashing overly broad subpoenas which the government viewed as a harassment tactic); *United States v. Wilson*, 721 F.2d 967, 975-76 (4th Cir. 1983) (declining to find that the “exclusion of classified information . . . deprived the appellant of a fair opportunity to mount his defense”); *United States v. Smith*, 592 F. Supp. 424 (E.D. Va. 1984), *vacated and remanded*, 780 F.2d 1102 (4th Cir. 1985) (en banc) (holding the district court erred in failing to consider the government’s privilege when ordering disclosure of classified information); *United States v. Wilson*, 586 F. Supp. 1011, 1013-17 (S.D.N.Y. 1983) (discussing CIPA in relation to Wilson’s case and holding that he could testify that he worked in the intelligence community but could not testify about the covert operations); *United States v. Irish People, Inc.*, 502 F. Supp. 63, 67 (D.D.C. 1980) (upholding request to produce classified information for defense), *rev’d on other grounds*, 684 F.2d 928 (D.C. Cir. 1982); H.R. REP. NO. 96-831, pt. 1 at 8-10 (1980) (discussing cases in which the choice had to be made between disclosure of confidential information or dismissal of the case); Anthony Marro, *Helms, Ex-CIA Chief, Pleads No Contest to 2 Misdemeanors*, N.Y. TIMES, Nov. 1, 1977, at 1 (regarding the case of Richard Helms, a former director of the CIA, in which the Department of Justice accepted his

This statute, introduced in 1980, establishes procedures for handling classified information in criminal prosecutions.<sup>683</sup> It seeks to “protect[] and restrict[] the discovery of classified information in a way that does not impair the defendant’s right to a fair trial.”<sup>684</sup> Section 4 of CIPA establishes special procedures for discovery:

The [district] court, upon a sufficient showing, may authorize the United States to delete specified items of classified information from documents to be made available to the defendant through discovery under the Federal Rules of Criminal Procedure, to substitute a summary of the information for such classified documents, or to substitute a statement admitting relevant facts that the classified information would tend to prove. The court may permit the United States to make a request for such authorization in the form of a written statement to be inspected by the court alone.<sup>685</sup>

In 1998, in *United States v. Klimavicius-Viloria*, the Ninth Circuit interpreted CIPA section 4 as a requirement for the government to first invoke state secrets.<sup>686</sup> Assistant Attorney General David S. Kris and Assistant U.S. Attorney J. Douglas Wilson speculate that the possible premise underlying the Circuit’s decision is that the government is not allowed to withhold otherwise discoverable documents absent the invocation of a privilege:

In other words, CIPA, standing alone, does not provide sufficient authorization to allow the government to delete specified items of classified information from documents to be made available to the defendant through discovery under the Federal Rules of Criminal Procedure, to substitute a summary of the information for such classified documents, or to substitute a statement admitting relevant facts that the classified information may tend to prove.<sup>687</sup>

Kris and Wilson, sharply critical of the decision, wrote, “No other court has accepted the Ninth Circuit’s view, and there is little to

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plea of *nolo contendere* to two misdemeanor counts for failing to provide full testimony to the Senate, because of concern about disclosure of classified information).

<sup>683</sup> “Classified information” is defined by the statute as “information or material that has been determined by the United States Government pursuant to an Executive order, statute, or regulation, to require protection against unauthorized disclosure for reasons of national security.” 18 U.S.C. app. § 1(a) (2006).

<sup>684</sup> *United States v. O’Hara*, 301 F.3d 563, 568 (7th Cir. 2002).

<sup>685</sup> 18 U.S.C. app. § 4.

<sup>686</sup> *See United States v. Klimavicius-Viloria*, 144 F.3d 1249, 1261 (9th Cir. 1998) (“In order to show that material is classified, the government must make a formal claim of state secret privilege.”).

<sup>687</sup> DAVID S. KRIS & J. DOUGLAS WILSON, NATIONAL SECURITY INVESTIGATIONS AND PROSECUTIONS § 24:8 (2007) (internal quotation marks omitted).

commend it.”<sup>688</sup> In contrast to the utmost deference required in state secrets cases, CIPA requires that the government make a sufficient showing that classified information cannot be disclosed.<sup>689</sup> Unlike state secrets, where only the director of an agency can invoke the privilege, CIPA allows any prosecutor to request section 4 procedures.<sup>690</sup> And where the privilege presents an absolute bar, CIPA contemplates a balance between the defendant’s right to mount a defense and the government’s right to secrecy.<sup>691</sup>

Kris and Wilson say:

The absolute protection provided by the state secrets privilege is also in tension with the defendant’s right under *Brady v. Maryland* to information necessary to obtain a fair trial. Applying the state secrets privilege to criminal cases would create the very problem that Congress sought to address by enacting CIPA: forcing the government to decide between producing to the defendant sensitive classified information in discovery or invoking the privilege and preventing all disclosure of classified information . . . .<sup>692</sup>

Between 2001 and 2009, a number of cases arose that pushed on the relationship between CIPA and state secrets. On August 5, 2004, for instance, the FBI arrested Yassin Aref and Mohammed Hossain in a sting operation centered on the sale of surface-to-air missile launchers to terrorist organizations.<sup>693</sup> The thirty-count indictment charged, inter alia, conspiracy, attempt to commit money laundering, and material support to a designated terrorist organization.<sup>694</sup> The case, *United States v. Aref*, which involved top-secret code-word filings, affirmed the state secrets privilege’s applicability to CIPA cases in the criminal context. The court explained: “It is important to understand that CIPA section 4 *presupposes* a governmental privilege against disclosing classified information. It does not itself *create* a privilege. Although Rule 16(d)(1) authorizes district courts to restrict discovery of evidence in the interest of national security, it leaves the relevant privi-

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<sup>688</sup> *Id.* (footnote omitted).

<sup>689</sup> *See id.* (citing *United States v. Nixon*, 418 U.S. 683, 710 (1974)). Note, however, that the quotation referenced in *Nixon* is dicta.

<sup>690</sup> *Id.*

<sup>691</sup> *Id.*

<sup>692</sup> *Id.*

<sup>693</sup> Brendan Lyons, *Suspects Raise Domestic Spy Issue*, TIMES UNION (Albany), Jan. 5, 2006, at A1, available at <http://albarchive.merlinone.net/mweb/wmsql.wm.request?oneimage&imageid=6376980>.

<sup>694</sup> *United States v. Aref*, 533 F.3d 72, 76 (2d Cir. 2008).

lege undefined.”<sup>695</sup> The court stated that “[t]he most likely source for the protection of classified information” was the common law state secrets privilege.<sup>696</sup> This meant that the “classified information at issue in CIPA cases fits comfortably within the state-secrets privilege.”<sup>697</sup> The court flatly disagreed with the House of Representatives Select Committee on Intelligence, which had reported in its treatment of CIPA that state secrets did not apply to the criminal realm.<sup>698</sup> “That statement,” the court wrote, “simply sweeps too broadly.”<sup>699</sup> On the contrary, consistent with *Klimavicius-Viloria*, the court held the state secrets privilege applied:

Reynolds, Andolschek, and Coplon make clear that the privilege can be overcome when the evidence at issue is material to the defense. This standard is consistent with *Roviaro v. United States*, where the Supreme Court held in a criminal case that the Government’s privilege to withhold the identity of a confidential informant “must give way” when the information “is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause.” Indeed, we have interpreted “relevant and helpful” under *Roviaro* to mean “material to the defense.” We have also noted that the government-informant privilege at issue in *Roviaro* and the state-secrets privilege are part of “the same doctrine.”<sup>700</sup>

Consistent with other circuits, the court thus “adopt[ed] the *Roviaro* standard for determining when the Government’s privilege must give way in a CIPA case.”<sup>701</sup> In this case, the court assumed that the

<sup>695</sup> *Id.* at 78 (citations omitted); see also H.R. REP. NO. 96-831, pt. 1, at 27 (1980) (noting that CIPA “is not intended to affect the discovery rights of a defendant”).

<sup>696</sup> *Aref*, 533 F.3d at 78 (citing *Zuckerbraun v. Gen. Dynamics Corp.*, 935 F.2d 544, 546 (2d Cir. 1991)).

<sup>697</sup> *Id.* at 79.

<sup>698</sup> See H.R. REP. NO. 96-831, pt. 1, at 15 n.12 (1980) (“[T]he common law state secrets privilege is not applicable in the criminal arena.”).

<sup>699</sup> *Aref*, 533 F.3d at 79.

<sup>700</sup> *Id.* (citations omitted) (quoting *Roviaro v. United States*, 353 U.S. 53, 60-61 (1957), *United States v. Saa*, 859 F.2d 1067, 1073 (2d Cir. 1988), and *United States v. Coplon*, 185 F.2d 629, 638 (2d Cir. 1950)).

<sup>701</sup> *Id.* at 79-80; see also *United States v. Klimavicius-Viloria*, 144 F.3d 1249, 1261 (9th Cir. 1998) (stating that information must be disclosed if it would materially alter the result of the proceeding); *United States v. Varca*, 896 F.2d 900, 905 (5th Cir. 1990) (holding that a declassified summary of evidence was sufficient because none of the redacted material would have helped the defendant’s case); *United States v. Yunis*, 867 F.2d 617, 623 (D.C. Cir. 1989) (noting that a defendant is entitled to information helpful to his defense); *United States v. Smith*, 780 F.2d 1102, 1107-10 (4th Cir. 1985) (en banc) (balancing the interests of the public against those of the defendant); *United States v. Pringle*, 751 F.2d 419, 427-28 (1st Cir. 1984) (concluding that protective orders were appropriate because the information in question was neither relevant to the case nor “helpful to the defense”).

classified information was discoverable, and it “agree[d] with the district court that the Government had established a reasonable danger that its disclosure would jeopardize national security.”<sup>702</sup> The undisclosed information, however, was not material to the defense.<sup>703</sup>

Extraordinarily, the court did not require that the head of the department with control over the information formally invoke the privilege: “We have previously excused the Government’s failure to comply with this formality where involvement of the department head would have been ‘of little or no benefit’ because disclosure of classified information was prohibited by law.”<sup>704</sup> The court warned: “Based on our holding today, however, we trust that this issue will not arise in future CIPA cases.”<sup>705</sup>

Another case, against attorney Lynn Stewart, *United States v. Stewart*, arose from charges related to unauthorized contact with and behavior relating to Shiekh Omar Ahmad Ali Abdel Rahman, who was serving a life sentence for “seditious conspiracy, solicitation of murder, solicitation of an attack on American military installations, conspiracy to murder, and a conspiracy to bomb.”<sup>706</sup> The Second Circuit, in deciding this case, followed the court’s reasoning in *Aref*: “CIPA,” the court wrote, “does not itself create a government privilege against the disclosure of classified information; it presupposes one.”<sup>707</sup> *Roviaro* provided guidance on the application of state secrets to the criminal realm.<sup>708</sup>

Once again, the executive branch had not actually invoked the state secrets privilege—nor did it need to do so:

We note, as we did in *Aref*, which postdated the district court’s order here, the absence of a formal public “claim of privilege[] lodged by the head of the department which has control over the matter, after actual personal consideration by that officer.” As in *Aref*, we conclude that in the pre-*Aref* context, such a flaw “is not necessarily fatal,” and that “[i]t would ‘be of little or no benefit’ for us to remand for the purpose of hav-

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<sup>702</sup> *Aref*, 533 F.3d at 80.

<sup>703</sup> See *id.* at 80-81 (finding that the district court did not deny any material evidence to the defendant).

<sup>704</sup> *Id.* at 80.

<sup>705</sup> *Id.*

<sup>706</sup> *United States v. Stewart*, 590 F.3d 93, 98 (2d Cir. 2009). Rahman had been subject to “Special Administrative Measures” restricting his communications. *Id.*

<sup>707</sup> *Id.* at 130.

<sup>708</sup> *Id.* at 131.

ing the department head agree that disclosure of the classified information would pose a risk to national security here.”<sup>709</sup>

The court stated: “[T]he absence of the formal claim is not a trivial matter. We do not demean it. . . . We expect . . . we will not need to address [these omissions in the future] as the government is now well-informed of this obligation.”<sup>710</sup> Other courts are beginning to follow *Aref* in the conduct of criminal trials.<sup>711</sup>

Both *Aref* and *Stewart* center on activity linked to more traditional areas of national defense. But criminal cases from 2001 to 2009, dealing with a variety of industries, similarly implicated state secrets. In 2005, for example, the Securities and Exchange Commission brought charges against former officers of Qwest Communications International for securities fraud.<sup>712</sup> “[T]he company ha[d] classified contracts with U.S. intelligence agencies.”<sup>713</sup> Four defendants requested discovery of classified information related to U.S. intelligence, and one of the defendants who already had classified information in his possession wanted to use it in his defense to demonstrate that, far from misleading shareholders, the company had based its estimates on expected classified government contracts.<sup>714</sup> They claimed that the NSA had “withheld the promised contracts as punishment after Qwest declined to help the NSA with a [sic] unspecified project that Nacchio believed was illegal.”<sup>715</sup> Redacted versions of Nacchio’s argument, released in October 2007, suggest that the NSA had asked Qwest “to monitor and data-mine traffic on its own domestic network” in February 2001 (seven months prior to the September 11th attacks), and that, after the attacks, the NSA had requested access to call-record databases.<sup>716</sup> On November 19, 2007, J. Michael McCon-

<sup>709</sup> *Id.* at 132 (alterations in original) (citations omitted) (quoting *Aref*, 533 F.3d at 80).

<sup>710</sup> *Id.*

<sup>711</sup> *See, e.g.*, *United States v. Hamama*, No. 08-20314, 2010 WL 330375, at \*3 (E.D. Mich. Jan. 21, 2010) (noting that “[t]he Second Circuit’s analysis [in *Aref*] is instructive”).

<sup>712</sup> *SEC v. Nacchio*, 614 F. Supp. 2d 1164, 1166-67 (D. Colo. 2009).

<sup>713</sup> Declaration and Formal Claim of State Secrets and Statutory Privileges by J. Michael McConnell, Director of National Intelligence, *Nacchio*, 614 F. Supp. 2d 1164 (No. 05-0480).

<sup>714</sup> *Nacchio*, 614 F. Supp. 2d at 1167.

<sup>715</sup> Ryan Singel, *Feds Invoke Secrets Privilege to Limit Qwest CEO Defenses in Civil Suit*, WIRED (Nov. 21, 2007, 9:42 AM), <http://www.wired.com/threatlevel/2007/11/feds-invoke-sec>.

<sup>716</sup> *Id.*

nell, Director of National Intelligence, invoked state secrets.<sup>717</sup> “On May 1, 2008, the Court extended the State Secrets Protective Order,” stating that it would remain in place until lifted by the court.<sup>718</sup>

It may be that where the government wants to invoke the protections of CIPA in order to protect classified information, it is necessarily making a claim that the classified information is privileged from use in litigation—that is, that the state secrets privilege applies. But this fact does not mean that the privilege can then trump the criminal defendant’s constitutional rights to gain access to information relevant to the defense. Here CIPA and state secrets depart: while the latter might be said to overcome a civil litigant’s discovery interests, CIPA does not then trump a defendant’s right to mount a defense. In other words, CIPA does not side with state secrets; rather, it instructs the judge to impose a sanction, which may include dismissal of the charges. Perhaps the salient point, if the Ninth Circuit’s position is accurate, is that CIPA cases need to hold the government to the *Reynolds* formalities—a position that does not appear to reflect the current practice.

## V. THE LONG SHADOW

The cases addressed in this Article represent some, but not all, of the state secrets cases to emerge from 2001 through 2009.<sup>719</sup> Collectively, they present a formidable challenge to analyses that narrowly base their conclusions about state secrets on published judicial opinions specifically ruling on the privilege. They suggest that the shadow of state secrets is much longer than previously realized—indeed, that the state secrets doctrine has expanded well beyond the framing of *Reynolds* to become a powerful litigation tool for both private and public actors. A number of insights from this more careful exposition present themselves.

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<sup>717</sup> Robert S. Woodruff’s Motion for a Protective Order Staying His Deposition Until the Disposition of His Motion to Dismiss at 2, *Nacchio*, 614 F. Supp. 2d 1164 (No. 05-0480) [hereinafter Woodruff’s Motion for Protective Order]; see also The United States’ Consolidated Reply in Support of its Motion for Entry of Protective Order at 2, *Nacchio*, 614 F. Supp. 2d 1164 (No. 05-0480) (discussing McConnell’s assertion of privilege).

<sup>718</sup> Woodruff’s Motion for Protective Order, *supra* note 717, at 2.

<sup>719</sup> See, e.g., Defendants’ Answer Brief at 16, *Al-Turki v. FBI Document Custodian*, No. 06-1076 (D. Colo. Oct. 26, 2007), 2007 WL 3195129 (asserting state secrets privilege over classified documents and information being submitted ex parte, in camera); Defendants’ Motion for Summary Judgment and Brief in Support Thereof at 30-33, *Abdel-Hafiz v. Fox Entm’t Group, Inc.*, No. 096-204518-04 (Tex. Dist. Apr. 5, 2008), 2008 WL 5687221 (listing materials that the Justice Department refused to produce).

The executive branch appears to have a fairly conservative approach to intervening in third party disputes, particularly when class action torts, conduct of war, or foreign state secrets cases present themselves. In contrast, the executive seems more likely to become involved when breach of contract, trade secrets, or patent disputes are at issue. Such suits take many years to unfold, and once the executive branch invokes state secrets, subsequent administrations hold the line. The range of technologies, disputes, and types of activities being challenged appears to be steadily expanding. However, considering that the War on Terror is still in its early stages, and that such cases may span decades, exactly how most of these suits will evolve is unknown. What is remarkable is that, notwithstanding *Reynolds*, corporations in the first instance are citing state secrets as an affirmative defense. Even where the government does not intervene in commercial disputes, corporate entities gain a significant tactical advantage by raising its specter. This gives rise to concern about the emergence of a new form of graymail, as well as the impact of the mere reference to state secrets in the course of litigation.

The telecommunications cases related to the NSA's warrantless wiretapping program stand apart from the general third-party cases. Here the government has acted variously as plaintiff, intervenor, and defendant. Although none of the forty-six cases dismissed under the MDL turned on the invocation of state secrets, the privilege played a key role throughout. The executive's decision to invoke state secrets in this set of cases rested on a closely held executive branch jurisprudence—suggesting that this body of opinions may be relevant to understanding operation of the privilege. This set of suits also reveals a parallel effect: when invoked in one case, courts may treat similarly positioned cases as though the state secrets privilege has been asserted, even in the absence of a formal invocation thereof. The telecommunication suits also bring to the fore the major battles between the branches that mark invocations of the privilege.

In suits alleging such varied legal claims as Fourth and Fifth Amendment violations, the abrogation of international law, environmental degradation, wrongful termination, unlawful discrimination, defamation, and breach of contract, the executive invoked the state secrets privilege as part of its own defense. These cases suggest that, at times, the privilege is used not just to protect national security interests, but to hide officials' bad behavior. A different type of cost presents itself in allowing state secrets privilege to apply in cases claiming constitutional violations, as opposed to civil suits between private

parties. As in third-party disputes and the telecommunications realm, once the executive branch invokes the state secrets privilege, it holds its course—even when it does not seem in its best interests to do so. Perhaps this should not come as a surprise: even where cases are not dismissed, the advantage of invoking the privilege goes well beyond simply suppressing a document, influencing motions, protecting attorney-client communications, and controlling discovery. In at least one case, the privilege provided the government with opposing counsel's client files once the attorney tried to withdraw from the case.

The final set of cases considered in this Article focused on the criminal context. Despite historical concern about prosecutorial use of state secrets, a number of courts have upheld the state secrets privilege in criminal cases, suggesting that the common law privilege precedes CIPA section 4 procedures. The circuits, however, do not appear to be in agreement on this point, and commentators have been quick to criticize courts who have taken this line. What is remarkable here is that, in at least two cases, the executive branch did not even have to invoke the state secrets privilege—as required by *Reynolds*. Instead, the court, issuing a mild admonition, simply assumed that it had been asserted and, therefore, applied.

Failure to appreciate the extent to which state secrets doctrine now permeates substantive law sidesteps the difficult question of whether the law is what it appears to be. Few people realize by reading tort law that private contractors who possess state secrets are exempted from their duties to behave nonnegligently. *Pari passu*, employment law, patent law, contract law, environmental law, and criminal law—in these and other areas, private and public actors can bypass the values and goals that animate the law. Evidence from the 2001 to 2009 period suggests that this is done with some regularity, and that the exercise of associated power distorts the course of litigation.

Judging by the number of lawsuits that emerged from 2001 to 2009, the use of the state secrets privilege is not going to subside.<sup>720</sup> If anything, new issues, such as the emergence of graymail, will present themselves. Neither the DOJ guidelines, which lack an enforcement mechanism and are narrowly limited to the DOJ's exercise of the state secrets privilege (i.e., not the invocation of the same by the DoD, the

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<sup>720</sup> Indeed, new state secrets cases continue to arise. *See, e.g.*, Opposition to Plaintiff's Motion for Preliminary Injunction and Memorandum in Support of Defendants' Motion to Dismiss, *Al-Aulaqi v. Obama*, No. 10-1469 (D.D.C. Sept. 25, 2010); Complaint for Declaratory and Injunctive Relief, *Al-Aulaqi v. Obama*, No. 10-1469 (D.D.C. Aug. 30, 2010).

CIA, or the State Department), nor the statutes currently before Congress have grasped the extent to which the state secrets privilege operates. The reason is because these “solutions” are built on only a partial understanding of the problem—one based narrowly on published judicial opinions ruling on the invocation of the privilege.

By looking more carefully, however, at the range of cases in which state secrets plays a role, a different picture emerges. At a minimum, the evidence shows that the doctrine is engaged more often and in different ways than have previously been presumed. This suggests that it warrants more attention from the legislative branch in its oversight function, from the courts in their Article III capacity, and from the executive branch in its decision to invoke the privilege. The structures and procedures that would best meet the concerns raised in this Article, while safeguarding the purpose for which the doctrine was created, remain a subject for future work.