

National Security Issues in Civil Litigation: A Blueprint for Reform

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Introduction

America's civil litigation system is designed to resolve disputes fairly between parties and to compensate people who have been wronged. When officials or agents of the federal government are sued, open courts hold the government publicly accountable to the rule of law, protecting the basis of the constitutional republic. Opinions are generally published; proceedings are open to the press and the public at large. The assumption underlying the adversarial system is that a just outcome is achieved when each party in the dispute has an equal opportunity to make its best arguments on the legal and factual issues at stake in the full glare of the public eye. This requires that all parties to the litigation have access to evidence and information that may be helpful to resolving the case.

This carefully-constructed system begins to break down when a lawsuit requires the disclosure of secret information that could threaten the security of the nation. Consider the following scenarios:

- A woman sues the federal government alleging that its negligence allowed a military plane to crash, killing her husband. The government responds that the accident report detailing the crash contains details of secret military equipment and missions that, if disclosed, would greatly benefit the nation's enemy, and so it cannot allow the crucial evidence in the case to be introduced.
- A man sues government officials alleging that they have kidnapped and tortured him in a secret, illegal program. The government tells the court that even considering the case would lead to the disclosure of state secrets, putting the nation's security at risk.
- The administrator of an estate sues the federal government alleging that it has violated a secret contract the deceased had to spy for the government several years back. The government responds that the court cannot enforce a secret contract, for to do so would render it non-secret.
- Government officials publicly acknowledge that they have been conducting warrantless electronic surveillance through a new program. A group of citizens sue the government, claiming that this program violates federal laws and the Constitution and asking federal courts to halt the program. The government responds that disclosing how the program works or who has been subject to surveillance under it would allow the nation's enemies to evade surveillance.

Each of these scenarios tracks an actual case filed in America's courts. With little guidance from the Supreme Court, and none from Congress, federal courts have struggled to reconcile the conflicting demands of public justice and national security raised by these and similar cases. If courts dismiss cases or deny parties access to important evidence at the request of the Executive Branch, they may fail to provide redress to parties who have been wronged and uphold the rule of law. If courts discount the national

security implications of publicly disclosing secret evidence, they may place the security of the nation as a whole at risk.

There are two broad doctrines available in civil cases that implicate the nation's security. One is a jurisdictional or justiciability rule—in other words, a rule that forbids the court from considering the case at all. A second approach is an evidentiary privilege, a rule that specifies how certain types of evidence may be used in a lawsuit. In recent years, prompted by the government, some courts have increasingly conflated these two different approaches under the single heading of the “state secrets privilege.” Under current doctrine, the government may assert the “state secrets privilege” to ask that courts dismiss a case, prevent the use of evidence in it, or both. Defined broadly in this way, as both an evidentiary privilege and a justiciability rule, the “state secrets privilege” has become the single mechanism by which courts attempt to navigate the challenge presented by civil lawsuits related to secret national security information.

Because the Executive Branch usually has an interest in the outcome of cases in which it asserts the state secrets privilege, it may be tempted to abuse it to avoid political embarrassment or liability. Without proper rules in place, the Executive Branch can, in effect, choose whether it would like to be held publicly accountable, what evidence it will allow opponents to use against it, and when it would like its actions to be free of judicial scrutiny. In the years since 9/11, as cases involving security issues have become more central to our national debate, the potential for abuse has grown.

Congress should act now to provide federal courts with clear guidance for civil cases in which they must balance the competing demands of open justice and state secrecy. Although the Supreme Court and the Executive Branch also could implement these reforms, both branches have declined the opportunity to do so over many years and under many leaders.¹ The Constitution gives Congress the authority to establish rules of jurisdiction, procedures, and evidence for the courts, and it should do so here.

To protect the privilege, several specific reforms are necessary. Congress should begin by separating the two distinct approaches to this set of cases. It should clarify that the “state secrets privilege” is a rule of evidence and not a rule of justiciability, and it should prevent courts from dismissing cases on the basis of the state secrets privilege until they have had a chance to assess the privilege claim and see other available, non-privileged evidence that might bear on its adjudication. Congress should also provide courts with a set of tools and standards to determine which evidence should not be disclosed in civil proceedings because of the risk of harm to national security. These tools should include procedural rules to minimize the burden on courts; pre-cleared experts, special masters, and attorneys to assist the judge and affected parties with specialized expertise in national security issues; and procedures to create substitute evidence when doing so would not harm national security. Congress should design these procedures so that even if some evidence must be unavailable, the cases can proceed as far toward resolution on the merits as possible, without endangering national security. Alongside this reform of the privilege, Congress should put rules in place so that, even if secret evidence prevents the civil litigation system from dispensing justice in certain cases, other government

institutions can fill in for the courts by providing redress to wronged parties and ensuring government accountability.

The paper proceeds as follows. Part I explains how cases involving state secrets work today in the civil, criminal, and administrative contexts. It then traces the history of how American courts have handled these issues, ending with an examination of some high-profile post-9/11 national security cases. Part II outlines more specific suggestions for reform, presenting the options available to Congress, discussing their costs and benefits, and laying out a roadmap for reform. Finally, Part III relates this discussion to the concept of a national security court and offers some concluding thoughts.

Part I: The State of the State Secrets Privilege Today

Before discussing how Congress should reform procedures for civil litigation involving national security concerns, it will help to provide some background on how American courts have handled this set of issues to date.

Current Practice and the Need for Reform

It is difficult to identify any one, typical state secrets case because the case law is confused, if not contradictory, and because current doctrine gives judges little guidance for how to handle any particular case. The Supreme Court has directly addressed the state secrets privilege only once, in 1953, and that case provides only a few broad brushstrokes for how civil matters involving national security secrets should proceed.

A few procedures have generally been followed. Once a lawsuit has been filed, the Executive Branch—whether it is a defendant in the case or a third party—may formally intervene to assert the state secrets privilege. This requires providing the court with an affidavit from the head of the agency, claiming the privilege and explaining the national security concern. After it intervenes, the government often asks the court to dismiss the case on the basis of the privilege before the defendant responds to the allegations made in the lawsuit and before any evidence is introduced in the case. The government’s motion generally argues that the case cannot proceed because the government cannot confirm or deny the plaintiff’s allegations given the secret nature of the subject matter. Because the state secrets privilege will deny the defendants evidence they need to defend themselves, the government typically contends, allowing the case to proceed will cause unfair prejudice to the defendants.

In some cases, the court grants this motion to dismiss, and the case ends (subject to appeal, of course). Alternatively, the court can allow the case to proceed and consider the government’s assertion of the state secrets privilege as to either particular items of evidence or larger pieces of information at issue in the case. The court can, although often does not, ask to actually see the evidence that the government claims is privileged. If the court does see the evidence, it does so *in camera* and *ex parte*, without the adverse

party having any opportunity to make the case for why the court should not apply the privilege. The court then determines whether the privilege applies, applying any of a number of standards, and finally, if it has not already dismissed the litigation, the case proceeds without the privileged evidence.

There are several reasons to reform this approach to civil cases involving national security issues. First, the uncertainty and inconsistency in current doctrine prevents the government, private parties who assist the government, and individuals harmed by the government from knowing in advance what their legal rights are. Second, the current use of the state secrets privilege does a poor job of protecting litigants from the unfair result of being denied access to relevant evidence, thus weakening the ability of the civil litigation system to deliver justice to harmed parties. Third, abuse of the privilege can allow the Executive Branch to flaunt the rule of law and avoid accountability. Fourth, state secrets have been at the center of legal disputes over high-profile government policies—surveillance, rendition, interrogation—and reforming state secrets cases may be necessary for judges to resolve these substantive legal issues. Fifth, the current combination of heavy executive reliance on and judicial confusion over the state secrets privilege actually places national security at risk as judges lack clear standards with which to evaluate such claims. Over time, if the Executive Branch continues to use the state secrets privilege wantonly to shut down legal scrutiny of its most controversial programs, some federal judge may one day see a privilege claim as the boy who cried wolf and (in the absence of clear procedures to prevent it) allow genuinely important national security secrets to become public.

Laws Governing Secret Information in Court

In contrast to civil cases, detailed laws currently govern the use of secret evidence in criminal cases and other types of legal proceedings. In 1980, Congress passed the Classified Information Procedures Act (CIPA) to provide rules on the introduction of classified information in federal criminal prosecutions.² Congress enacted CIPA largely to deal with “gray-mailing” cases—those in which a defendant in a criminal prosecution, often a government official, threatened to use classified information in his defense and, by so doing, forced the government to dismiss the case against him. CIPA aims to allow the government to prosecute a defendant, even when that prosecution might involve classified information. CIPA thus gives courts special procedures to use in protecting classified information, in allowing the adversarial process to go forward, and in giving courts an opportunity to reach a judgment.³

Some have suggested reforming the state secrets privilege simply by applying CIPA in civil cases as well.⁴ However, differences between civil and criminal cases would make this difficult. In the criminal context, the government is the prosecutor and may always choose to protect information by dismissing the case. In the civil context, the government will often (although not always) be the defendant and so benefit from dismissal of a case. Thus, whereas in a criminal case the government has incentive to introduce evidence it controls to secure a conviction, in a civil case if it is the defendant it has incentive to

prevent disclosure of evidence to avoid subjecting its actions to legal scrutiny. Because of these different contexts, it is not possible simply to apply the existing CIPA statute to civil cases.

Indeed, no comprehensive law regulates the handling of classified information in the civil context. Congress considered codifying the state secrets privilege through a proposed “Military and State Secrets” Rule of Evidence in the 1970s, but ultimately opted against codifying any privileges at all.⁵ Instead, through Rule of Evidence 501, Congress left privileges to “be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.”⁶ Thus Congress, like the Supreme Court, has left judges with little or no guidance on how they should handle state secrets in civil trials.

The Origins of State Secrets Doctrines

The doctrinal history of state secrets in U.S. courts is thin, a fact that has contributed to the tangled state of the law today. The state secrets privilege has a more established pedigree in England as a royal prerogative—a claim by the crown to be able to hold information beyond the reach of the law.⁷ The English example, however, provides little guidance in the United States, where our Constitution recognizes no executive power beyond the law.⁸ The U.S. Supreme Court first recognized a state secrets evidentiary privilege in 1953.⁹ Although the government frequently cites two nineteenth-century cases as a basis for keeping certain evidence and matters out of court, neither offers a clear rule or thorough reasoning.

In 1807, the United States charged Aaron Burr for treason, making war against the United States, and inciting insurrection. Burr demanded access to certain evidence—letters in the possession of President Jefferson—in order to put on his defense. Chief Justice John Marshall heard the case, and despite some wrangling over whether he should or could compel the president to make the evidence available, was spared a decision because Jefferson voluntarily turned them over.¹⁰ The oft-cited episode provides little doctrinal clarity on a state secrets evidentiary privilege for two reasons. First, it was a criminal prosecution, not a civil case, and as discussed above the two contexts are quite different. Second, in Burr’s case, Marshall never actually needed to reach a decision about the relative authorities of the president and the courts. Indeed, the Burr case was not cited as a precedent for any sort of military or state secrets privilege in the courts until the aforementioned litigation in the 1950s.¹¹

In an 1875 case, *Totten v. United States*, the Supreme Court considered whether a Civil War-era secret espionage contract could be enforced in court after the war. Although the issue of secrecy was never briefed or raised in the lower courts, the Supreme Court held that both parties to the contract “must have understood that the lips of the other were to be forever sealed respecting the relation of either to the matter” and that “[t]he secrecy which such contracts impose precludes any action for their enforcement. The publicity produced by an action would itself be a breach of a contract of that kind, and thus defeat

a recovery.”¹² The Court’s short opinion in the case also included broader language, stating that “as a general principle, that public policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential, and respecting which it will not allow the confidence to be violated.”¹³ Although the Supreme Court has never entirely explained the reasoning behind this holding, at its core the rationale seems to be that a secret espionage contract is by its own terms unenforceable in court, for to have a court enforce it would be to render it non-secret. As one lower court explained it, “one who agrees to conduct covert operations impliedly agrees not to reveal the agreement even if the agreement is breached.”¹⁴ Note that, because the Civil War had long before ended, the Court did not ground its holding in possible harm to national security, but in traditional notions of confidentiality, which can be seen not only in its choice of terminology, but also in the examples it cited—the privileges between spouses and between physicians and patients.¹⁵

Although neither the *Burr* case nor *Totten* referred to a “state secrets privilege” or a “state secrets bar to justiciability,” the Supreme Court cited both cases in *United States v. Reynolds*, the 1953 case in which it first formally announced the existence of the privilege.¹⁶ In that case, a suit brought by the widows of civilian engineers who died in an Air Force plane crash, the Truman Administration sought to prevent introduction of the accident report for the crash. The government argued that disclosing the accident report, even to a federal judge, would reveal the plane’s top secret mission and secret equipment and so compromise secret national security information.

Noting “that this is a time of vigorous preparation for national defense” the Court upheld the use of the privilege in the instant case without requiring the government to make the accident report available to the judge.¹⁷ In so doing, the Court offered only minimal guidance for how the state secrets privilege was to work. The Court stated that (1) the government alone could assert the state secrets privilege; (2) that it could do so only through a formal claim lodged by the head of the department with control over the information; and (3) that the “court itself must determine whether the circumstances are appropriate for the claim of privilege.”¹⁸ On all other aspects of how the privilege should work, the Court was silent. The Court did not clarify what constitutes a state secret, how much deference judges should give the executive branch, or the methods and procedures the court should follow to reach such determinations. It is important to note that the *Reynolds* Court did not suggest that cases in which the state secrets privilege was invoked were not suitable for judicial resolution—just that certain evidence might not be disclosable.

The accident report at issue in *Reynolds* was declassified decades later, and discovered in 2000 by one of the descendants of the victims of the crash. The report, according to the leading scholarly expert on the case, “revealed not only serious negligence by the government, but also contained nothing that could be called state secrets.”¹⁹ That is, the government used the state secrets privilege in *Reynolds* not to protect secret national security information, but instead to conceal its own negligence.

Taken together, the Supreme Court's decisions have offered only limited guidance to lower courts, the Executive Branch, or private parties on how civil litigation involving secret or national information should proceed. *Reynolds* says little about how courts should proceed when the Executive has asserted a state secrets privilege in a case. *Totten* bars the justiciability of suits over secret espionage contracts that might reveal the existence of an individual's covert relationship with the government. But the Supreme Court has never clarified whether *Totten* is limited to this narrow class of secret espionage cases, and some courts have read the cases together to imply that the justiciability and evidentiary rules may be intertwined.²⁰

The State Secrets Privilege Since 9/11

In the years since 9/11, the state secrets privilege has taken on far greater prominence in public debate, and led to much greater anxiety, than in its first decades after *Reynolds*. There are a variety of possible explanations for this. First, some scholars have suggested that the Bush Administration has invoked the privilege more often than prior administrations—although the evidence on this point is inconclusive.²¹ Second, the Bush Administration has arguably invoked the privilege in a qualitatively different manner, advocating in a larger number of cases outright dismissal without considering any evidence.²² Third, whether or not the Bush Administration has invoked the privilege more frequently or more forcefully, it has used it to prohibit legal rulings on entire policies—in particular its rendition, interrogation, and electronic surveillance programs—that critics suggest are illegal, unconstitutional, and widespread.²³

For example, the administration's warrantless domestic wiretapping program, the Terrorist Surveillance Program (TSP), is the subject of numerous ongoing civil suits. Private individuals and civil liberties organizations have brought suit against both the government and private telecommunications companies. To date, one federal district judge has held the TSP to be illegal and unconstitutional, and issued an injunction blocking the program.²⁴ A federal appellate court, however, overturned that ruling, based in part on the state secrets privilege.²⁵ In particular, the court explained, "the plaintiffs do not—and because of the State Secrets Doctrine cannot—produce any evidence that any of their own communications have ever been intercepted by the NSA, under the TSP, or without warrants."²⁶ Because the plaintiffs could not establish that they personally had been subjected to warrantless surveillance, they lacked standing, and the court of appeals dismissed the suit. The Supreme Court declined to grant review.

In a related series of cases, private citizens have sued telecommunications companies for their alleged participation in the warrantless surveillance program. These plaintiffs claim to have evidence that they personally were subjected to warrantless surveillance and so (unlike the plaintiffs in the direct challenge to the government) have standing. In the main class action case, *Hepting v. AT&T*, although the government was not a party to the case, it intervened to ask the district court to dismiss the case on the basis of the state secrets privilege.²⁷ The district judge rejected the government's motion, finding that that the *Totten* justiciability rule did not apply because "plaintiffs made no agreement with the

government and are not bound by any implied covenant of secrecy.”²⁸ The case is now pending before the Ninth Circuit Court of Appeals.²⁹ At the same time, in the context of amendments to the Foreign Intelligence Surveillance Act, Congress has granted a form of retroactive immunity to telecommunications companies for assistance they provided to the administration, and thus attempted to preclude the pending lawsuits.³⁰ The constitutionality of the retroactive immunity is itself now being challenged in court.³¹

The administration has similarly, and thus far successfully, invoked the state secrets privilege to block judicial review of alleged secret torture and rendition. In the most prominent such case, Khalid El-Masri sued CIA director George Tenet and several private companies and individuals who assisted the CIA, alleging that the defendants illegally detained, interrogated, and tortured El-Masri in an extraordinary rendition operation. In particular, El-Masri alleged that while traveling in Macedonia, he was kidnapped, then handed over to CIA agents who flew him to a secret detention facility in Afghanistan where he was held and interrogated.³² El-Masri was subsequently released when the government realized that he was not the terrorist they were looking for (he had a similar name). El-Masri’s story was extensively discussed in the public press.

At the government’s request, however, the trial court dismissed the case on the basis of the state secrets privilege, and the Fourth Circuit upheld the dismissal, reading *Totten* and *Reynolds* broadly to permit dismissing cases having nothing to do with covert espionage contracts. Rather, it held, “a proceeding in which the state secrets privilege is successfully interposed must be dismissed if the circumstances make clear that privileged information will be so central to the litigation that any attempt to proceed will threaten that information’s disclosure.”³³ Concluding that “virtually any conceivable response to El-Masri’s allegations would disclose privileged information,” the Court upheld the dismissal. In so doing, it recognized the harsh penalty this imposed on Mr. El-Masri, who had no judicial forum for his claims no matter how meritorious they were. The Supreme Court declined to review that decision too.

However, it is not clear that the courts are prepared to step aside entirely. In *Arar v. Ashcroft*, a case similar to *El-Masri*, the district court dismissed the claims, “given the national-security and foreign policy considerations at stake.” A Second Circuit panel affirmed the dismissal, but in August 2008, the Second Circuit took the very unusual step of *sua sponte* granting rehearing *en banc*. Oral argument is scheduled for December 9, 2008.

None of this is to say that, in the absence of the state secrets privilege, courts would or should halt the administration’s major security programs. Indeed, it is difficult to predict how federal courts would come out were they to reach the merits of whether these programs are legal, or whether those affected by them are entitled to compensation. The president’s constitutional powers do give him broad latitude acting overseas and during war, and the courts often defer on contentious foreign policy issues. But, because of the broad use of the state secrets privilege, courts have been unable to resolve cases and controversies, to uphold the rule of law, to provide redress to harmed individuals, and to interpret the Constitution and laws of the United States.

Recent Congressional Interest in the Privilege

In light of the high profile that the state secrets privilege has taken on in litigation over major post-9/11 policies, members of both the House and the Senate have introduced bills to reform the state secrets privilege.¹ The Senate bill (S. 2533), introduced by Senators Edward Kennedy, Patrick Leahy, and Arlen Specter, passed through the Judiciary Committee this spring by an 11-to-8 vote. The House version (H.R. 5607) was introduced in March by Representative Jerrold Nadler and others and passed through the House Judiciary Subcommittee on the Constitution, Civil Rights, and Civil Liberties in September by a 6-to-3 vote.³⁴ Action on either bill appears stalled, at least for the remainder of the current Congress.

Both bills would fix major concerns with how the privilege operates today—clarifying the law, putting control of the privilege back into the hands of the judiciary, preventing executive abuse of the privilege, and securing justice for litigants without compromising national security. Both versions follow a good deal of the general contours of the proposal we outline below. Where they differ significantly from the suggestions in this paper, or from each other, we note this divergence.²

The administration's response to these congressional initiatives has been emphatic. On March 31, 2008, Attorney General Michael Mukasey sent a letter to the Senate Judiciary Committee threatening a presidential veto of the legislation and concluding that "the legislation raises serious constitutional questions concerning the ability of the Executive Branch to protect national security information under the well-established standards articulated by the Supreme Court in *Reynolds* and would effect a significant departure from decades of well-settled case law, likely resulting in the disclosure of national security information." Mukasey's letter asserts (1) that the state secrets privilege already works well, (2) that existing procedural safeguards already prevent abuse, (3) that taking discretion away from the executive and giving it to the courts endangers national security, and (4) that Congress lacks the constitutional authority to place restrictions on the privilege.³⁵

In his letter to Senator Leahy concerning the administration's views on the Senate bill, Attorney General Mukasey argued that "[t]he Constitution . . . define[s] the law governing the state secrets privilege" and that the Senate bill "would needlessly and improperly interfere with the appropriate constitutional role of both the Judicial and Executive branches in state secrets cases."³⁶ Mukasey found it "highly questionable that

¹ In the interest of full disclosure, we consulted with the Senate Judiciary Committee on their version of the bill.

² One major difference between the bills--unrelated to the actual workings of the privilege--is that while both bills apply to pending cases, the House bill would apply retroactively to some cases which have already been concluded and resolved. . . Thus, if quickly enacted, the House bill could help resolve some of the ongoing issues related to surveillance and renditions described above--but, of course, retroactive application will strengthen opposition to the bill and make it politically more difficult to execute, while also raising questions of fairness.

Congress has the authority to alter the state secrets privilege”³⁷ and in particular argued that requiring the government to make evidence available to courts or to select congressional committees “would infringe upon the Executive’s constitutional authority under Article II to control access to national security information.”³⁸ A DOJ official testified to Congress that “[t]he state secrets privilege is rooted in the constitutional authorities and obligations assigned to the President under Article II” and that “the privilege has a firm foundation in the Constitution.”³⁹ Following this line of argument—which the administration has included in its litigation pleadings—the Fourth Circuit Court of Appeals agreed in the *El-Masri* rendition case that “Although the state secrets privilege was developed at common law, it performs a function of constitutional significance, because it allows the executive branch to protect information whose secrecy is necessary to its military and foreign-affairs responsibilities.”⁴⁰

The Constitutionality of Congressional Reform

The Bush Administration’s (and the Fourth Circuit’s) position has little foundation in either the Constitution’s text or the original understanding of the Founders. Although the Executive certainly has *some* constitutional authority to protect national security information from harmful disclosure, this authority is not exclusive and does not trump the constitutional powers of the legislative and judicial branches.⁴¹ The administration’s view derives, rather, from a pair of Supreme Court cases that are not about the state secrets privilege at all. One case, *United States v. Nixon*, addresses the presidential communications privilege, which is closely related to, but distinct from, the state secrets privilege. Both privileges are forms of executive privilege, and both allow the executive branch to refuse to produce relevant documents in certain circumstances. But the *Nixon* decision distinguishes the presidential communications privilege from the state secrets privilege,⁴² explaining judicial deference in national security matters: “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... He does not place his claim of privilege on the ground they are military or diplomatic secrets. As to these areas of Art. II duties the courts have traditionally shown the utmost deference to Presidential responsibilities.”⁴³ Nowhere does the Court suggest that the president alone controls the meaning, content, and dimension of the state secrets privilege and of the justiciability of federal cases—nor that such control derives from the Constitution. To the contrary, the court “reaffirm[ed] that it is the province and duty of this Court ‘to say what the law is’ with respect to the claim of privilege presented in this case.” Another portion of the opinion explicitly rejects the view that certain suits challenging the President could be non-justiciable.⁴⁴

In addition to *Nixon*, the Bush Administration has relied on *Department of the Navy v. Egan* for the claim that the president’s constitutional authority over national security information is exclusive and trumps the constitutional interests of any other branches.⁴⁵ That case concerned the president’s authority to determine whether individuals were entitled to security clearances to hold Executive Branch positions. The Supreme Court noted that the president is “Commander in Chief of the Army and Navy of the United States” and so has authority to classify and control access to information bearing on

national security and to determine whether an individual is sufficiently trustworthy to occupy a position in the Executive Branch. However, Congress had not passed any legislation in this area, so *Navy v. Egan* speaks only to the president's constitutional authority in the face of congressional inaction, not to Congress's own powers in this area. The Court specifically notes that its conclusion applies to situations in which Congress is silent: "Thus, unless Congress specifically has provided otherwise, courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs."⁴⁶ As one legal scholar concludes, the case "says nothing about presidential power to act contrary to statute. Nor does it mean that Congress has no overlapping authority in the area."⁴⁷

The Executive's claim that it has a constitutional interest in how national security information is protected in judicial proceedings is reasonable and non-controversial. The problem arises when the Executive asserts—as the Bush Administration has—that it has an *exclusive* constitutional interest in this issue. Indeed, the Constitution actually gives Congress and the federal courts explicit authority of their own in this area. For example, Article III explicitly gives the federal courts authority to hear cases and controversies arising under the Constitution and the laws of the United States.

And Congress too has several constitutional powers in this area. In addition to the foreign affairs and war powers the Constitution explicitly gives to Congress, Articles I and III authorize Congress to create jurisdiction—and regulations for procedure and evidence—for the lower federal courts.⁴⁸ As the Supreme Court has held, "Congress retains the ultimate authority to modify or set aside any judicially created rules of evidence and procedure that are not required by the Constitution."⁴⁹ Since the state secrets privilege is an evidentiary privilege not mandated by the Constitution, it is clearly within Congress's constitutional power to create rules, standards, and procedures for how it operates. To the extent that use of the state secrets privilege interferes with the judiciary's ability to resolve cases or controversies under Article III, this sort of legislation is particularly appropriate.

Moreover Congress' power to confer jurisdiction on the federal courts is actually a method of indirect oversight of the Executive Branch; the jurisdictional grant can ensure that the Executive "faithfully executes" the laws passed by Congress; it is a way for Congress to effectively delegate oversight of the execution of its laws.⁵⁰ So too, Congress creates the agencies located within the Executive Branch, and defines their authorities and powers. And, of course, the Constitution permits Congress to enact legislation that is "necessary and proper" to achieve the government's goals.

The Executive's claims to control over the state secrets privilege are no stronger than those of Congress or the courts. To the extent an act of Congress abolishes any notion of a state secrets privilege altogether, or requires the disclosure to the public of evidence that was properly subject to the privilege, it could conceivably create a constitutional question about the Executive's inherent and exclusive authority even in the face of clear Congressional action. But the suggestions in this paper would not come close to this line; nor, for that matter, do the bills pending in the House and Senate.

Part II: Proposal for Reform of the Privilege

Congress should enact such legislation and give federal courts a set of standards, guidelines, and procedures for civil cases in which national security issues are involved. The following suggestions for reform are guided by three overarching goals: protecting the national security of the United States, providing access to justice, and ensuring government legality and accountability. Sensible legislation towards these goals would, in turn, be guided by several principles.

First, there should be a strong state secrets privilege in order to protect important national security information in civil litigation. The openness of our judicial system—which allows civil suits to be filed by individuals and corporations, governments and organizations, foreign and domestic—should not create a loophole through which our enemies can learn the security secrets of the United States and harm the nation. Thus, any reform should be careful to protect against the disclosure of secret information.

Second, the state secrets privilege should provide the maximum level of openness and adversariality possible, consistent with the necessity of protecting sensitive national security information from disclosure. The American legal system is built on a foundation of public, adversarial proceedings that provide equal justice and accountability. Dismissing cases from the very outset is a drastic remedy—it denies justice to parties who believe they have been harmed and prohibits the judiciary from fulfilling its constitutional role in adjudicating disputes and interpreting the laws. Any reform should therefore allow cases to proceed as far as possible toward complete resolution.

Third, a reformed state secrets privilege should prevent the Executive Branch from abusing the privilege to conceal illegal activity. Historically, the government has almost always succeeded in its claims of privilege, often without anyone outside of the Executive Branch ever seeing the allegedly privileged materials.⁵¹ The government has little political or litigation cost to asserting the privilege, and as a result, the government naturally tends to overuse it. Legislative reform should prevent the Executive from using the state secrets privilege to shield its illegal actions or to avoid scrutiny of the legality of its programs.

An Evidentiary Privilege

The state secrets privilege originated as a common law evidentiary privilege, but has metastasized in recent years into a justiciability rule that precludes judicial consideration of a wide variety of national security cases. The post-Civil War *Totten* case, which originated the justiciability rule, stands for the relatively narrow holding that cases concerning a particular subject matter—secret espionage contracts with the government—cannot be enforced in court. Yet, as explained above, some lower courts, at

the government's urging, have viewed not just the *Totten* doctrine but the state secrets privilege itself as a bar to justiciability in some cases.

Congress should clarify that the *Totten* justiciability rule is distinct from the state secrets privilege and that proper application of the privilege is strictly evidentiary. That is, the privilege may be used to prevent secret information from being disclosed as evidence in litigation, but it should not be used to block a lawsuit from proceeding altogether. Litigants should be permitted to make their case with non-privileged evidence, if they can do so. Other jurisdictional and justiciability rules—such as the political question doctrine, sovereign immunity, standing, mootness, and ripeness—may still block cases from being heard in court. But the state secrets privilege should not operate as an additional bar to judicial consideration of certain cases.

Simple reforms to current procedure can ameliorate the concerns raised by the government in support of a more expansive privilege.⁵² One argument advanced for dismissing cases on the basis of the privilege is that the defendant cannot “confirm or deny the key factual premise underlying [p]laintiffs’ entire case” without revealing state secrets.⁵³ Under current rules of civil procedure, the defendant, in answering a complaint, is required to admit or deny allegations, and these responses might disclose important secrets. The Senate version (but not the House version) of the State Secrets Protection Act solves this problem by allowing the government to plead “state secrets” in its answer to a complaint.⁵⁴ Thus, if a plaintiff alleges, say, a secret outer space weapons program, the government can respond to the allegations, point-by-point, by neither confirming the particular alleged factual or legal claims, nor denying them but by instead saying that its response to the point is protected by the state secrets privilege. This tool would allow cases in which the privilege has been invoked to proceed beyond the initial pleadings stage, so that the plaintiff can at least make its case with non-privileged evidence.

The government's second argument for using the state secrets privilege as a justiciability bar is that the plaintiffs may, without access to privileged materials, lack the needed evidence to establish their claims. This is of course true, but it provides no basis for denying a plaintiff the opportunity to use even non-privileged evidence to make his case. The obvious course of action is not to dismiss the case from the very beginning, but to allow it to move forward with the available evidence. If the plaintiff lacks the evidence to succeed, the court can dismiss for failure to state a claim, the usual procedure when the plaintiff lacks evidence to prove his case. There is no need to dismiss the case at the outset for fear that the court may have to dismiss it later on.

The government's third rationale for non-justiciability on the basis of the privilege is that evidence that must remain secret may deprive a party of a necessary defense. Rather than force a defendant to litigate with his hands tied behind his back, the government argues that such cases simply shouldn't be heard. This understandable concern is not insurmountable, however, and does not require that a case be dismissed before considering any evidence. As explained below, Congress can avoid injustice to a defendant who needs privileged evidence to establish a valid defense by other, less-drastic means.

Finally, some have argued that dismissing cases before discovery conserves judicial resources, eliminating the need for a judge to personally examine large amounts of evidence. Once again, however, Congress has other options; rules allowing special masters, indexing of materials, and document sampling can ease the burden on judges faced with a large volume of potentially secret evidence.

In sum, Congress can prescribe simple paths around these asserted reasons for allowing the state secrets privilege to block consideration of a case entirely. Congress should instead provide courts the tools necessary to allow national security-related cases to move through the litigation process toward final resolution on the merits.

Judicial Determination of Applicability of the Privilege

Congress should also give courts a greater role in determining what evidence is privileged. Under current doctrine, the Executive Branch may assert the privilege, but it is the court that decides whether the privilege applies.⁵⁵ Nonetheless, the Court in *Reynolds* declined to actually review the evidence in question, and its holding accordingly does not require that a judge actually look at the evidence in making the privilege determination.⁵⁶ Following the *Reynolds* decision, some courts today, when presented with a state secrets privilege claim, simply accept the claim based on a government affidavit, abdicating the judicial role to the Executive Branch.⁵⁷

Several problems arise when the court refrains from actually reviewing the assertedly secret evidence. First, as the recent declassification of the documents in the *Reynolds* case demonstrates, the government can exaggerate the nature of the secrets contained in the evidence. Second, it may be that only parts of the assertedly privileged evidence actually contain secrets, and by reviewing the documents the judge can allow non-secret portions of the evidence to be used to resolve the case. In *Reynolds*, for example, certain portions of the accident report could have been redacted and the rest made available as evidence. Third, the assertedly secret evidence may reveal criminal or otherwise illegal activities by government officials. Although evidence of illegal activity may not be grounds for disclosing secrets that could harm the nation's security, as discussed below there are benefits to making judges aware of such information. For these reasons, the Executive must be required to show the assertedly privileged evidence to the judge, and should be penalized by conceding the relevant issue if it chooses not to allow the judge to see the evidence.

The Executive Branch has objected to the security risk of removing classified documents from their secure locations, transporting them to the (comparatively insecure) courthouse, and allowing judges to review them.⁵⁸ The success of federal judges in handling secret evidence in other contexts, however, should assuage this fear: there is no known instance of a federal judge improperly disclosing or failing to secure secret evidence. Nonetheless, Congress should set rules for securing classified materials pending judicial review, for example by borrowing the procedures used in the CIPA context.⁵⁹

When national security requires it, court proceedings to determine whether allegedly secret evidence is privileged should be closed to the public, and open only to the government or persons with appropriate security clearances. Courts should also be required to file all records and opinions related to assertedly privileged evidence under seal, unless making such documents public would not harm national security. Further, all judicial decisions concerning the privilege should be subject to expedited interlocutory appeal. This means that if a careless or rogue judge makes a decision that may endanger national security, the government can quickly appeal that decision to a court of appeals or the Supreme Court.

There are high costs to inadvertently releasing state secrets, and judicial review should take careful consideration of the national security rationale for the government's invocation of the privilege. While some have proposed that judges give no consideration at all to the Executive Branch's security concerns,⁶⁰ others have argued that the Executive Branch is entitled to the utmost deference in its analysis. The House version of the State Secrets Protection Act, for example, takes the first of these extreme positions, requiring that judges make an "independent assessment" and granting no deference to the Executive's determination that evidence contains a state secret.⁶¹ The Senate version, however, sensibly avoids either of these extremes, specifying that the court should give "substantial" weight to the security analysis of Executive Branch officials, who by nature of their position and expertise have a great understanding of these concerns.⁶²

Regardless of the level of deference specified in legislation, judges are likely to continue to show great deference to executive claims of privilege. To assist the judge in reaching a proper resolution in proceedings where the adverse party is not represented, judges should be able to call on specially-cleared experts in national security to assist them in determining whether a given piece of allegedly privileged evidence would, in fact, harm national security if released. Federal judges already have legal authority to appoint independent experts to assess government secrecy claims in other contexts⁶³ and, though they rarely avail themselves of this authority, experience shows courts have used it "with great success."⁶⁴

Although the application of the state secrets privilege to items of evidence does not easily lend itself to adversarial proceedings, it is possible to inject some modicum of adversariality into a state secrets privilege determination. The court should hold a hearing, and attorneys with appropriate security clearances should be permitted to attend to advocate for their client, subject to a court order that they not reveal anything about the proceeding to their clients. It may not always be possible for clients to secure attorneys with the appropriate clearances, in part because individuals who habitually represent perceived enemies of the United States could find it difficult to secure a clearance. The pending House and Senate bills would both respond to this problem by giving judges an increased role in the security clearance process—an approach which has sparked controversy. At this point, it does not seem necessary to address large problems with the security clearance process in order to fix the state secrets privilege, and legislation on this issue would probably best go in a separate bill.⁶⁵ As a simpler and more politically

palatable alternative to taking on the security clearance process, Congress could allow the court to appoint a guardian *ad litem* to represent the interests of an adverse party from a list of preselected attorneys with the requisite clearances.

Congress can give the courts still other tools to assist them with the administrative burden of determining whether the privilege applies to items of evidence. To assist the judge in understanding the evidence and the probable significance of ordering its public disclosure, the government should be required to file a detailed affidavit explaining how release of the evidence might harm the national security of the United States. The government should also create an index of the documents, similar to a so-called “*Vaughn* index” that courts frequently require in Freedom of Information Act litigation.⁶⁶ When the volume of documents is too great, the judge should review a representative sample of the documents or turn the review over to a special master with the appropriate security clearances. In sum, Congress can provide federal judges the tools they might need to independently evaluate privilege claims in a responsible manner.

The Definition of State Secrets

Congress should not only give courts clear procedures for reviewing evidence the government asserts is privileged, it should also give courts a clear standard for determining what evidence is privileged. The *Reynolds* decision defines the state secrets privilege only vaguely, saying that it applies when “there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged.”⁶⁷ Other courts have allowed the use of the privilege when disclosure “could be seen as a threat to the military or diplomatic interests of the nation,”⁶⁸ would be “inimical to the national security,”⁶⁹ would “jeopardize national security”⁷⁰ or would “adversely affect national security.”⁷¹ What, exactly, constitutes a state secret has been left to the eye of the beholder.

To resolve this uncertainty, Congress should establish a clear definition for a state secret, drawn from the current standards for classifying information: any evidence whose public disclosure would be reasonably likely to damage the national defense or foreign relations of the United States. Information is properly classified at the lowest level, “confidential,” if it “reasonably could be expected to cause damage” to “the national defense or foreign relations of the United States.”⁷² Both the House and the Senate versions of the bill define a state secret as information that “would be reasonably likely to cause *significant* harm.” Although the inclusion of the word “significant” may appear at first to be insubstantial, it raises the specter of a court ordering the release of information properly classified at the confidential level, which is in other contexts a crime.⁷³ While Congress’ desire to ensure that the possible harm reaches a certain level of seriousness is understandable, the current classification standards sufficiently guard against classifying information based on potential minor or insignificant harms.

Proper classification should not be the only test, as there is information that is not formally classified that might need to be kept secret (for example, it is conceivable that

information that, due to an oversight or timing, has not yet been formally classified may still meet the standard).⁷⁴ On the other hand, classified information that is already public is, by definition, information whose public release cannot harm the national security of the United States. This is a tricky point, since an unsubstantiated allegation of a secret fact is not the same as public acknowledgement; the *New York Times* may publish a story alleging the existence of classified information, but the existence of that information may not actually be public unless it is confirmed by an executive official. Still, as with Freedom of Information Act cases, information that has been improperly classified (formally classified but actually containing no legitimate state secret) should be releasable, and the judge would make this determination.⁷⁵

This proposed definition of “state secrets” encompasses not only national defense, but also foreign relations. Some observers have suggested that secrets regarding foreign relations should not be included in the state secrets privilege, or that they should be included only if the government shows the harm will be particularly significant.⁷⁶ However, the classification standard makes no distinction between national defense and diplomatic relations, and the distinction could lead to a confusing effort to determine whether a particular document pertained to national defense or to international relations. In any event, the need to protect sensitive diplomatic secrets is, in many situations, just as strong as the need to protect national defense secrets.

In keeping with the idea of a privilege, this definition should be keyed to individual items of evidence. Thus, a judge may decide to deny a plaintiff access to documents or witness testimony about, say, its rendition policy, but she cannot simply dismiss all cases involving rendition. Moreover, the privilege should extend only to those portions of an item of evidence that require classification. If the secret portions of a document can be redacted, then the non-secret portions should not be considered a state secret.⁷⁷

This standard for what is a state secret rejects the notion that evidence which reveals criminal or illegal activity cannot, by definition, be privileged.⁷⁸ Although the government could thus use the privilege to shield illegal activity, this concern should not be addressed through in defining the scope of the privilege. For one thing, it may be that the illegal activity in question is minor (a government agent parked in the wrong spot) and the benefits of revealing this in public are far outweighed by the harm of disclosing the activity (the government agent was on a secret mission). Moreover, in order even to determine whether evidence reveals illegal or criminal activity would often require full, adversarial, judicial proceedings.

The Effect of a Finding of the Privilege

Having clarified that the state secrets privilege should apply to particular items of evidence and not whole cases—and suggested appropriate procedures and standards for determining when the privilege applies—Congress should next establish the consequence of a judicial determination that particular items of evidence are privileged. What should

happen when evidence that is properly subject to the state secrets privilege is essential to the outcome of a case? If the secret evidence cannot be used, an injustice may go unremedied or an illegal government action may continue. However, if the court discloses the evidence, it would reveal state secrets and thus harm national security.

Before making these difficult choices, there is an easy way to mitigate the worst impact of the privilege. Often, it will be possible to craft substitute evidence that will allow the adverse party the same opportunity to litigate the claim without endangering national security. Accordingly, whenever national security considerations permit, the judge should order the government to craft substitute evidence, as it does in military courts martial and under CIPA. This substitute evidence could be in the form of an unclassified summary of the evidence, a redacted version of the document, a government admission of the facts that the privileged information tends to prove, or any similar remedy that would allow the litigation to proceed more fairly without the privileged evidence. It should be the executive branch, not the court, that creates the substitute, both for security reasons and for reasons of judicial economy. If the government refuses to provide this type of plausible substitute as ordered, however, then the court should find against the government on that disputed issue of fact or law.

It will not always be possible, however, to craft substitute evidence without endangering national security. Policymakers have several options for resolving the problem of essential but privileged evidence, none of which is perfect:

- *Victory for the plaintiff*—a privilege finding allows the government to suppress the evidence, but the government or defendant must concede any relevant issues of law or fact
- *Absolute privilege*—a privilege finding causes the evidence to be completely suppressed, and the case proceeds as though the privileged evidence never existed
- *Qualified privilege*—a privilege finding allows the judge to suppress the evidence only if the judge concludes that security harms of disclosing the evidence outweigh the justice interests of the litigants
- *Judicial consideration on the merits*—a privilege finding allows the government to prevent disclosure of the evidence to the non-government parties, but the judge may use the privileged evidence in reaching a judgment on the merits of the case for either party
- *Judicial consideration only for dismissal*—a privilege finding allows the government to prevent disclosure of the evidence, but the judge may consider the privileged evidence for the limited purpose of deciding whether the interests of justice require dismissal of the case

Each of these options has advantages and disadvantages.

Option one, *victory for the plaintiff*, would require the defendant to concede any contested issue in exchange for allowing the government to keep secret the privileged evidence. This approach would likely protect security—after all, the government has the option of protecting any information it desires. But by forcing a loss on the defendant, it creates a system in which plaintiffs can win national security cases without any evidence to support their claims.⁷⁹ This could create the litigation equivalent of blackmail, as plaintiffs threaten to expose government secrets unless the defendant pays them off with a damages award. This is bad enough when the government itself is the defendant, and even more problematic when the defendant is a private party. Forcing the government to choose between national security and its litigation interests seems unjust and would likely subject the public taxpayer to excessive payouts for frivolous lawsuits.

Option two, *the absolute privilege*, would provide that any privileged evidence is simply excised from the proceedings, and the lawsuit continues with publicly available information as though the privileged evidence never existed.⁸⁰ This option does a good job of protecting security and avoids litigation blackmail that would make option one untenable. Unfortunately, non-privileged evidence does not always give litigants a fair opportunity to prove their cases. In particular, there are many cases in which the public evidence shows that the plaintiff should win, but the privileged evidence shows the defendant (whether a government actor or a third party) to have a complete defense. For example, the telecommunications companies that assisted the government in its domestic surveillance program apparently have documents showing that their actions were authorized by the Attorney General and other senior administration officials. Under the absolute privilege, they might not be permitted to use those documents in their defense, and might unfairly have a judgment issued against them. Thus, this option does not always guarantee justice.

In option three, *the qualified privilege*, the finding that an item of evidence meets the standard for the state secrets privilege is not the end of the analysis but the beginning.⁸¹ The judge then has to weigh the government's need for secrecy against the litigants' need for disclosure. If the judge finds that the government's need for secrecy is weak but the litigant's need for the information is very great, the judge may order the government to disclose the secret information. This does a better job than option three of providing justice to litigants, because in some cases the secret evidence could be used. However, because secret evidence would be explicitly revealed in the process, it does a poor job of protecting security. Evidence properly subject to the state secrets privilege should not be revealed through the litigation process. No matter how great a litigant's need for the secret material, no matter how apparently unjust the litigation outcome, and no matter how seemingly trivial the government's need for secrecy might appear in comparison, judges should not be put in the position of openly and explicitly disclosing state secrets.

Option four allows the judge, but not the non-government parties, access to the privileged information in *deciding the case on the merits*.⁸² The judge, having access to the classified information, can determine which party should properly win the lawsuit, and rule accordingly.⁸³ This is the policy adopted in the House bill. Although in some ways appealing, there are several problems with this approach. One problem here is a lack of

adversariality at the merits stage. If secret evidence is the basis for judgment on the merits, a defeated plaintiff is unlikely to accept the judgment, and appeal will be difficult. More troubling, this could result in a court's using the coercive powers of the state to issue a judgment against a defendant who has not seen the evidence used against him. Although this is not as serious as the use of secret evidence in the criminal context, it is contrary to American notions of justice. The effect of a judgment on the merits is significant; civil procedure doctrines allow a judgment to bind not only the parties to that particular case but in other cases raising the same issue. Finally, while this option might seem to provide complete protection against the disclosure of state secrets, the decision could inadvertently reveal significant underlying information. For example, if a plaintiff sues the government alleging he was subject to a secret surveillance program, and the court grants an award after having examined secret information—or an injunction forcing the government to shut down a program—it is fairly clear that the secret information corroborates (or at least does not refute) the plaintiff's story.

Option five would allow the court to dismiss a case based on privileged evidence if doing so was necessary to *prevent a miscarriage of justice*—that is, if the defendant needed the privileged evidence to establish a valid defense.⁸⁴ This is the policy adopted in the Senate bill. This option avoids the disadvantages of many of these other options. First, it avoids the type of injustice that could occur in the scenario discussed above in option two, where a private party has evidence revealing a valid defense but cannot use it because the government asserts it is subject to the privilege. Second, it avoids some of the problems with permitting a judgment on the merits based on privileged evidence. Dismissal of a case does not have the binding effect on the parties involved and others that a judgment on the merits does.³ In this way, this approach reflects the spirit, if not the exact letter, of an evidentiary privilege. Third, this approach does an excellent job of protecting national security. No privileged evidence can be publicly disclosed, and the judge's actions will imply less information than would a judgment on the merits, because it never reveals whether privileged evidence shows a plaintiff's claims to be meritorious.

The downside to this approach is its asymmetry: defendants can benefit from judicial consideration of privileged information, but plaintiffs cannot. When considering dismissal, the judge would be required to consider all available evidence in the case, and so in contrast to the status quo, the plaintiff would still have a chance to make his case. But, this option makes the policy choice that the security of the nation as a whole trumps the interests of justice in the particular case.

Obtaining Justice and Enforcing the Rule of Law When the Privilege Applies

³ There are actually two classes of dismissal – with and without prejudice. When a case is dismissed without prejudice, the plaintiff can bring the case again, should new evidence arise – cases dismissed with prejudice cannot be brought again. Clearly, dismissal makes the most sense if it is without prejudice, so that the aggrieved party can bring a suit if information is declassified in the future. Unfortunately, the Senate version does not specify that any dismissal should be without prejudice.

These proposed reforms of the state secrets evidentiary privilege would go a long way towards allowing the courts to hold government officials accountable for illegal actions and allowing parties who have been wronged to achieve justice. But in some limited cases, in which parties lack access to the evidence they need to make their case, the privilege will result in civil courts being unable to administer justice and enforce the rule of law.

This does not mean that there is nothing to be done when the Executive Branch acts illegally, nor that people and parties cannot be compensated for the harms they have suffered. Rather, through implementing smart and thorough reporting requirements, Congress can ensure that it and other institutions in the government serve the role that civil courts are unable to fulfill because of the state secrets privilege. Thus, Congress should require that the Justice Department report to the Congressional Judiciary and Intelligence committees about its uses of the privilege. These reports should provide sufficient detail on the nature of the cases to allow Congress to understand the security and policy issues at stake, and should include the affidavits the government has provided to the court with an explanation for why the privilege applies to particular pieces of evidence.⁴ This tool is particularly important in light of the Executive Branch's ability, through its classified interpretations of federal statutes and the Constitution, to effectively create its own secret laws.⁸⁵ Congress can then use its own legislative or oversight powers to address any concerns it has. It can also provide compensation to parties who are harmed but (because of the privilege) unable to obtain recourse through civil litigation. A further benefit of strong reporting requirements is that Congress can stay abreast of how its state secret reforms have been implemented, putting it in a position to make amendments as needed.

In addition, Congress should create a mechanism for judges who, after reviewing validly privileged evidence, have concerns that government officials may be involved in criminal or otherwise illegal acts to refer these concerns to Justice Department investigators for review. While some have suggested that if secret evidence contains evidence of a crime, then the privilege should not apply, this rule is unworkable for the reasons explained above. A better alternative would be for courts to have the option to order the Attorney General to hand the evidence over to the Justice Department's Inspector General for investigation and possible recommendations for prosecution.⁸⁶ Although the Inspector General works under the Attorney General, his is traditionally a more independent role, and he often functions as the conscience of the Justice Department. Neither the Senate bill nor the House bill contains such a provision.

The Justiciability Question in National Security Cases

⁴ The House bill may go too far on this point, requiring the Executive to disclose items of evidence to any member of certain committees who requests to see them. . . This is likely to prompt strong political and constitutional objection from the Executive, and may lead to a serious burden on the Executive through fishing expeditions by single members of Congress that outweighs the oversight benefit.

There still remains the question of whether some cases are simply inappropriate for judicial resolution because of the risk of disclosure of secret evidence. Under current Supreme Court law, one group of cases—concerning secret espionage contracts—are considered non-justiciable, in part because of concerns about disclosing secret national security information.

The Court recently considered the breadth and viability of this doctrine. In 2005, in *Tenet v. Doe*, it reaffirmed and applied the rule from the 1875 *Totten* case, holding that foreign citizens could not bring suit to enforce a secret espionage contract with the CIA. The *Tenet* Court explained that, even with a state secrets evidentiary privilege in place, the justiciability bar to this type of cases remained. As the Court reasoned, “[t]he state secrets privilege and the more frequent use of *in camera* judicial proceedings simply cannot provide the absolute protection we found necessary in enunciating the *Totten* rule. The possibility that a suit may proceed and an espionage relationship may be revealed, if the state secrets privilege is found not to apply, is unacceptable.”⁸⁷ In a concurring opinion, two Justices noted that Congress could choose to “modify the federal common-law rule announced in *Totten*” if it wished to replace the justiciability rule through the more narrowly tailored use of the evidentiary privilege.⁸⁸ But the Court itself declined to do so.⁸⁹

As these Justices indicate, Congress has a variety of options for deciding which cases the courts may hear. On one hand, Congress could overrule *Totten* and stipulate that all cases are justiciable, and that the state secrets evidentiary privilege is sufficient to protect secrets from disclosure. On the other hand, the Constitution gives Congress power to set the jurisdiction of the federal courts to make some types of cases or rights non-justiciable in court. Congress could therefore expand the *Totten* justiciability doctrine to hold that a broader class of cases—not just espionage contracts—cannot be heard in court. Congress might, for example, decide that any case alleging the existence of a secret intelligence program, or a secret weapon design, simply cannot be heard in federal court.

In some sense, even the most stringent application of the state secrets privilege will still allow some tiny amount of information to leak out. For example, in order for the executive to claim the privilege, it must necessarily imply that secret documents exist on that topic.⁹⁰ The mere holding of hearings and consideration of evidence by the court likewise suggest that such evidence does exist. If the court dismisses the case based on its conclusion that privileged evidence establishes a valid defense, then outside observers could conclude that the secret documents are of the sort that provide a legal defense to the claim; if the court refuses to dismiss based on the privilege, then outside observers could conclude that the documents do not provide a defense. Generally, the information that leaks through the process will be innocuous and suggest little about the underlying documents. However, in some rare cases, the small amount of information that bleeds through is itself a secret, and it may be appropriate to foreclose all judicial inquiry through a justiciability rule.⁹¹

Nonetheless, a justiciability rule should be a tool of last resort. As one federal appellate court put it, “[d]enial of the forum provided under the Constitution for the resolution of

disputes . . . is a drastic remedy.”⁹² Civil courts are the best institution available for upholding the rule of law, and providing redress to harmed parties. Although Congress could turn itself or its committees into a quasi-court that provides compensation to harmed parties and looks for illegal actions, it has neither the mission, nor the resources, nor the expertise to do so.⁹³ Moreover, the political constraints on members of Congress—in contrast to those on Article III judges with federal tenure—may render Congress unwilling to make the difficult and unpopular decisions that justice may require. Federal judges are experts at weighing evidence in a case, interpreting the meaning of laws, and adjudicating disputes, and the Constitution assigns the federal courts precisely these functions and goals.

For these reasons, Congress should leave as many cases as possible justiciable in federal courts. After clarifying that the state secrets privilege *per se* may not be used to dismiss cases, Congress should wait to see how the privilege gets used, and then decide whether to eliminate, expand, or define the *Totten* justiciability rule. Once it is clear how the evidentiary privilege will be handled, it will be easier to determine those cases in which a justiciability rule is needed to protect national security.

Part II: Conclusions

For the reasons explained above, Congress can and should act decisively to create a set of tools, standards, and procedures for federal courts to use in dealing with secret information in civil trials. Congress should pass a law clarifying that the state secrets privilege applies to items of evidence, not entire lawsuits; providing that courts, not the executive, should determine whether the privilege attaches to evidence, while giving substantial weight to the advice of national security experts; defining the standard for what is subject to the privilege and what is not; and addressing how cases can best proceed when the state secrets privilege does apply to relevant information in the case.

This set of reforms will protect national security, allow courts to administer justice, and ensure accountability to the rule of law. Congress should stay informed about how these procedures are being implemented through the use of strong reporting requirements and make adjustments as needed. In particular, Congress over time may wish to reconsider which class of cases, if any, are fundamentally ill-suited to judicial resolution and so may not be brought in federal court.

These reforms are designed for the traditional system of generalist federal courts. However, given that several scholars and commentators have proposed creating a new national security court,⁹⁴ it is worth noting that these proposals could be implemented equally well by a specialized court. Were Congress to create a special federal court tasked with hearing preventive detention cases, or certain criminal prosecutions, it could also have within its jurisdiction civil lawsuits implicating state and military secrets, or perhaps just the determination of whether the privilege applies. The tools and procedures in this paper—for example the use of special masters, or guardians *ad litem* with security

clearances—would work especially well in a specialized court that could develop a particular expertise in the area.

In civil litigation, as with other subject matters over which it might have jurisdiction, the creation of a national security court is far less important than the specific rules, standards, and procedures that the court uses. That is to say, whether civil cases with national security implications are heard in traditional federal courts or a new specialized court, Congress, the Executive, and judges will face the same tradeoffs and policy decisions. Although a specialized national security court that applied the procedures and standards described above would be effective, it is a mistake to replace the adversarial system in state secrets cases with a system modeled on the Foreign Intelligence Surveillance Court that is only open to one party.⁹⁵ While the FISC's one-sided proceedings may be sufficient for foreign intelligence wiretaps, it would not allow individual litigants to make their cases, or provide a sufficient check on illegal government activity.⁹⁶

While the policy suggestions discussed above would be appropriate in a specialized national security court, the traditional federal courts are perfectly capable of handling these cases and are well-suited to implementing these policies. Accordingly, whether or not Congress wishes to create a national security court in the long run, it should act now to provide guidance for civil cases involving national security secrets. Then the federal courts can perform their important jobs of providing justice and ensuring accountability to the rule of law, confident that they are taking appropriate measures to protect the nation's security.

NOTES

¹ In fact, the Supreme Court recently declined to grant review of two recent cases asking it to reconsider the privilege. . . El-Masri v. Tenet, 437 F. Supp. 2d 530 (E.D. Va. 2006), aff'd 479 F.3d 296 (4th Cir. 2007), cert. denied, 128 S. Ct. 373 (2007); ACLU v. NSA, 493 F.3d 644 (6th Cir. 2007), cert. denied, 128 S. Ct. 1334 (2008);

² See 18 U.S.C. app. 3 §§ 1-16 (2006).

³ In particular, CIPA creates a procedure for a court to hold pretrial conferences to handle discovery issues related to classified information (section 2); it allows a court to issue protective orders to protect against the disclosure of classified information (section 3); it permits a court, after itself reviewing the relevant evidence, to allow the government to admit contested facts or provide substitute or redacted versions of classified evidence, if disclosing the evidence would “cause identifiable damage to the national security of the United States” and the replacement “will provide the defendant with substantially the same ability to make his defense as would disclosure of the specific classified information” (section 6). . . CIPA provides that if the government refuses to disclose relevant classified evidence to a defendant, or prevents a defendant from using classified evidence in his defense, the court must exclude the evidence, dismiss the indictment, or find against the government on the issue (section 6). . . CIPA also provides for interlocutory appeal of decisions related to classified information (section 7); requires creating secure procedures for court handling and storage of classified evidence (sections 8, 9); and requires reports to Congress on the use of CIPA (section 13).

⁴ Staff Study, H. Perm. Select Comm. On Intelligence, 104th Cong., *IC21: The Intelligence Community in the 21st Century*, http://www.fas.org/irp/congress/1996_rpt/ic21/ic21013.htm

⁵ This would have been Rule 509. . . See, e.g., Revised Draft of Proposed Rules of Evidence for the United States Courts and Magistrates, 51 F.R.D. 315, 375 (1971); Proposed Rules of Evidence: Hearings Before the Special Subcomm. on Reform of Federal Criminal Laws of the H. Comm. on the Judiciary, 93d Cong. 180-1 (1973).

⁶ Fed. R. Evid 501; see also LOUIS FISHER, IN THE NAME OF NATIONAL SECURITY: UNCHECKED PRESIDENTIAL POWER AND THE REYNOLDS CASE, 140-5 (2006); Robert M. Chesney, *State Secrets and the Limits of National Security Litigation*, 75 GEO. WASH. L. REV. 1249, 1292 n.251 (2007).

⁷ William G. Weaver & Danielle Escontrias, *Origins of the State Secrets Privilege*, 14 (Feb. 10, 2008), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1079364&rec=1&srcabs=1132905.

⁸ *Id.* at 40.

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

¹⁰ See *United States v. Burr*, 25 F. Cas. 30 (C.C.D. Va. 1807) (No. 14,692) (Marshall, Circuit J.); *United States v. Burr*, 25 F. Cas. 187, 192-93 (C.C.D. Va. 1807) (No. 14,694); see also LOUIS FISHER, IN THE NAME OF NATIONAL SECURITY: UNCHECKED PRESIDENTIAL POWER AND THE REYNOLDS CASE, ch. 7 (2006); Weaver & Escontrias at 48; Chesney at 1272.

¹¹ Weaver & Escontrias at 51-2.

¹² *Totten v. United States*, 92 U.S. 105, 106 (1875).

¹³ *Id.* at 106.

¹⁴ *Hepting v. AT&T Corporation*, 439 F. Supp. 2d 974 at 991 (N.D. Cal. 2006).

¹⁵ *Id.*; See also Weaver & Escontrias at 56 (“It is unlikely that the *Totten* Court meant to announce a general power of the president to withhold documents from courts in such a short, unbriefed opinion”). But see Chesney at 1277 (“[T]he security issue played a critical but unspoken role in . . . the Supreme Court’s 1875 decision in *Totten v. United States*.”).

¹⁶ See generally *United States v. Reynolds*, 345 U.S. 1 (1953).

¹⁷ *Id.* at 10.

¹⁸ *Id.* at 7-8.

¹⁹ LOUIS FISHER, IN THE NAME OF NATIONAL SECURITY: UNCHECKED PRESIDENTIAL POWER AND THE REYNOLDS CASE, ix, 165-69 (2006).

²⁰ See, e.g., *Al-Haramain Islamic Found., Inc. v. Bush*, 507 F.3d 1190 (9th Cir. 2007).

²¹ Compare William G. Weaver & Robert M. Pallitto, *State Secrets and Executive Power*, 120 POL. SCI. Q. 85, 108-32 (2005) (finding increased assertion of the privilege in recent years); and Amanda Frost, *The State Secrets Privilege and Separation of Powers*, 75 FORDHAM L. REV. 1931 (2007) (same); and Carrie Newton Lyons, *The State Secrets Privilege: Expanding Its Scope Through Government Misuse*, 11 LEWIS

& CLARK L. REV. 99 (2007) (same), with Chesney, *supra* note 12, 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.”). . . All commentators acknowledge the limitations on this sort of analysis given how many state secrets opinions may be unpublished or otherwise not publicly available.

²² *But see* Chesney, *supra* note 12, at 1307.

²³ *See* Frost, *supra* note 26, at 1939 (“[T]he Bush Administration’s recent assertion of the privilege differs from past practice in that it is seeking blanket dismissal of every case challenging the constitutionality of specific, ongoing government programs.”)

²⁴ *ACLU v. NSA*, 438 F. Supp. 2d 754, 782 (E.D. Mich. 2006).

²⁵ *ACLU v. NSA*, 493 F.3d 644 (6th Cir. 2007), cert. denied Feb. 19, 2008.

²⁶ *Id.* at 653.

²⁷ *See* Government Motion to Dismiss at 17-18 & n.8, *Hepting v. AT&T*, 439 F. Supp. 2d at 985, available at <http://www.eff.org/files/filenode/att/GovMotiontoDismiss.pdf>; *see also* Government Statement of Interest, *Hepting v. AT&T*, available at http://www.eff.org/files/filenode/att/USA_statement_of_interest.pdf.

²⁸ *In re Baycol Products Litigation* 495 F. Supp. 2d 977, 991-2 (D. Minn. 2007)

²⁹ The Ninth Circuit, in April 2007, broke off one case, *Al-Haramain Islamic Foundation, Inc. v. Bush*, 507 F.3d 1190, 1200 (9th Cir. 2007), because the government had inadvertently sent the plaintiff a document notifying it that its communications were subject to surveillance. . . The Ninth Circuit reached a decision in that case, holding that even though the government had disclosed this document, it remained protected by the state secrets privilege.

³⁰ The FISA Amendments Act of 2008, H.R. 6304, § 201.

³¹ *In Re National Security Agency Telecommunications Records Litigation* (N.D. Cal.).

³² *See generally* *El-Masri v. U.S.* 479 F.3d 296 (4th Cir. 2007)

³³ *Id.* at 308.

³⁴ *See generally* The State Secrets Protection Act of 2008, S. 2533, 110th Cong; The State Secrets Protection Act of 2008, H.R. 5607, 110th Cong.

³⁵ Letter from Michael Mukasey, Att’y Gen, U. S. to Sen. Patrick Leahy (March 31, 2008) at 1 (on file with the Federation of American Scientists: www.fas.org/sgp/jud/statesec/ag033108.pdf)

³⁶ Letter of March 31, 2008 at 1.

³⁷ Letter at 2.

³⁸ Letter at 4.

³⁹ Testimony Examining the State Secrets Privilege: Protecting National Security While Preserving Accountability, Hearing before the S. Comm on the Judiciary, 110th Cong. at I (Feb. 13, 2008) (statement of Carl J. Nichols), available at: http://judiciary.senate.gov/testimony.cfm?id=3091&wit_id=6952

⁴⁰ *El-Masri v. U.S.* 479 F.3d 300 at 303 (4th Cir. 2007).

⁴¹ Neil Kinkopf, *The State Secrets Problem: Can Congress Fix It?*, 80 TEMP. L. REV. 489 (2007) (contending that the proper framework is not the unitary executive theory but the *Youngstown* case).

⁴² 26A CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., *Federal Practice and Procedure* § 5673 (West 2008) (noting that “the better view is that it is limited to ‘executive communications,’ though that still leaves much room for argument. Some think the privilege is limited to communications between the president and his ‘advisors.’ Even this is not very precise.”)

⁴³ *U.S. v. Nixon* 418 U.S. 683, 710 (1974).

⁴⁴ *Nixon* at 692-3. . . Elsewhere, moreover, the *Nixon* Court rejected the very premise of the Bush Administration’s view that it alone could control the privilege: “In the performance of assigned constitutional duties each branch of the government must initially interpret the Constitution, and the interpretation of its powers by any branch is due great respect from the others. The President’s counsel, as we have noted, reads the Constitution as providing an absolute privilege of confidentiality for all Presidential communications. Many decisions of this Court, however, have unequivocally reaffirmed the holding of *Marbury v. Madison*, that ‘[it] is emphatically the province and duty of the judicial department to say what the law is.’” *Id.*

⁴⁵ *Dep’t of the Navy v. Egan*, 484 U.S. 518, 527 (1988) (“[A]uthority to protect [national security] information falls on the President as head of the Executive Branch and as Commander in Chief”).

⁴⁶ *Id.* at 530.

⁴⁷ Kinkopf, *supra* note 42, at 498.

⁴⁸ U.S. Const. art. III, § 2, cl. 2 (expressly granting Congress the power to enact “Regulations” concerning the jurisdiction of Federal courts).

⁴⁹ *Dickerson v. United States*, 530 U.S. 428, 437 (2000); *see also* *Sibbach v. Wilson & Co.*, 312 U.S. 1, 9-10 (1941) (“Congress has undoubted power to regulate the practice and procedure of federal courts, and may exercise that power by delegating to this or other federal courts authority to make rules not inconsistent with the statutes or Constitution of the United States.”).

⁵⁰ *See* Frost, *supra* note 26.

⁵¹ As one scholarly study observes, “In practical terms the state secrets privilege never fails; in no one case has a court ordered the disclosure of classified material to the public or to a public forum, even if the reasons for classifying the material are quite dubious.” Weaver & Escontrias, *supra* note 13 at 6.

⁵² The government has generally advanced three reasons why the state secrets privilege itself acts as a justiciability rule and requires dismissal of cases: “(1) the very subject matter of this case is a state secret; (2) plaintiffs cannot make a prima facie case for their claims without classified evidence and (3) the privilege effectively deprives AT&T of information necessary to raise valid defenses.” 439 F. Supp. 2d at 985.

⁵³ *Hepting v. AT&T Corp.* 439 F. Supp. 2d at 985 (N.D. Cal. 2006); *see also* Memorandum of Points and Authorities in Support of the Motion by Intervenor United States to Dismiss or, in the Alternative, for Summary Judgment at 11-12, *El-Masri*, 437 F. Supp. 2d 530 (No. 01417) (“[T]he plaintiff’s claim in this case plainly seeks to place at issue alleged clandestine foreign intelligence activity that may neither be confirmed nor denied in the broader national interest . . .”).

⁵⁴ *See* S. 2544, § 4053 (Procedures for answering a complaint).

⁵⁵ *Id.* at 8 (“The court itself must determine whether the circumstances are appropriate for the claim of privilege, and yet do so without forcing a disclosure of the very thing the privilege is designed to protect.”); *id.* at 10-11 (“Judicial control over the evidence in a case cannot be abdicated to the caprice of executive officers.”).

⁵⁶ “[W]e will not go so far as to say that the court may automatically require a complete disclosure to the judge before the claim of privilege will be accepted in any case. It may be possible to satisfy the court, from all the circumstances of the case, that there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged. When this is the case, the occasion for the privilege is appropriate, and the court should not jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence, even by the judge alone, in chambers.” *Id.* at 11. . . Some judges have balanced the needs of the litigants against the apparent need for secrecy in determining whether to review the evidence. . . *E.g.*, *N.S.N. Int’l Indus. v. E.I. Dupont de Nemours & Co.*, 140 F.R.D. 275 (S.D.N.Y. 1991) (“When a litigant must lose if the claim is upheld and the government’s assertions are dubious in view of the nature of the information requested and the circumstances surrounding the case, careful in camera examination of the material is not only appropriate but obligatory. . . When the litigant requesting the information had made only a trivial showing of need for it and circumstances of the case point to a significant risk of serious harm if the information is disclosed, the trial judge should evaluate (and uphold) the privilege claim solely on the basis of the government’s public representations, without an in camera examination of the documents.”).

⁵⁷ *See, e.g.*, *Nejad v. United States*, 724 F. Supp. 753 (C.D. Cal. 1989) (dismissing case based on “the Executive’s claim that disclosure of [AEGIS] technology on the public record could be harmful to the national security” without examining the relevant documents); *Northrop Corp. v. McDonnell Douglas Corp.*, 243 U.S. App. D.C. 19 (D.C. Cir. 1984) (“Although an in camera inspection might have been appropriate, we cannot say that the trial court erred when it decided the balance tipped in favor of the government, and quashed the subpoena without conducting an in camera review of the documents.”).

⁵⁸ The Committee on Communications and Media Law Of the Association of the Bar of the City of New York, *The Press and the Public’s First Amendment Right of Access to Terrorism on Trial: A Position Paper*, at 50 (THE PRESS AND THE PUBLIC’S FIRST AMENDMENT RIGHT OF ACCESS TO TERRORISM ON TRIAL: A POSITION PAPER (noting that the Executive’s primary justification for holding closed trials of terrorism suspects is “protection of classified and national security information.”), *available at*: <http://www.nycbar.org/Publications/reports/reportsbycom.php?com=95>

⁵⁹ *See* CIPA § 9.

⁶⁰ Mukasey, *supra* note 41 at 5-6.

⁶¹ H.R. 5607 § 6(c).

⁶² S. 2533, § 4045(e)(3).

⁶³ See Meredith Fuchs & G. Gregg Webb, *Greasing the Wheels of Justice: Independent Experts in National Security Cases*, AM. BAR ASS'N NAT'L SECURITY L. REP., Nov. 2006, at 1, 3-5.

⁶⁴ Meredith Fuchs, *Judging Secrets: The Role Courts Should Play in Preventing Unnecessary Secrecy*, 58 ADMIN. L. REV. 131, 174 (2006); see also *Ellsberg v. Mitchell*, 709 F.2d 51, 64 (D.C. Cir. 1983) (encouraging “procedural innovation” in addressing state secrets issues); *Al- Haramain Islamic Found. v. Bush*, 451 F. Supp. 2d 1215, 1233 (D. Ore. 2006) (suggesting the appointment of a national security expert as a special master to assist in assessing the effects of disclosure); Robert P. Deyling, *Judicial Deference and De Novo Review in Litigation over National Security Information Under the Freedom of Information Act*, 37 VILL. L. REV. 67, 105-11 (1992) (evaluating employing special masters in FOIA national security cases).

⁶⁵ See Mukasey, *supra* note 41 at 4 (expressing concern about addressing security clearances in state secrets legislation); H.R. 5607, § 5(e) (requiring timely security clearance processing and other measures); S. 2533 § 4052(c) (similar).

⁶⁶ See *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973).

⁶⁷ 345 U.S. 1, 10 (1953).

⁶⁸ See, e.g., *Halkin v. Helms*, 223 U.S. App. D.C. 254 (D.C. Cir. 1982). . .

⁶⁹ See, e.g., *In re Sealed Case*, 494 F.3d 139, 142 (D.C. Cir. 2007); *In re United States*, 872 F.2d 472, 474 (D.C. Cir. 1989).

⁷⁰ See, e.g., *Zuckerbraun v. General Dynamics Corp.*, 935 F.2d 544, 546-7 (2d Cir. 1991).

⁷¹ See, e.g., *Ellsberg v. Mitchell*, 709 F.2d 51, 56 (D.C. Cir. 1983).

⁷² Executive Order 13292.

⁷³ Note that our proposed definition does not explicitly say that all properly classified materials should qualify for the privilege, but instead defines a “state secret” in terms of current classification standards. . . Since the executive branch controls the definitions of the various classification levels, it is conceivable that explicitly tying the state secrets privilege to the standard in an Executive Order could lead to abuse. . .

⁷⁴ In some circumstances, the absence of classified information is itself information that should be considered a state secret. . . For instance, the government may want to conceal that investigations into an assassination have discovered nothing about who is responsible. . . In such cases, or simply to confuse foreign enemies, the government should be permitted to file a state secrets affidavit explaining to the judge that it would like to invoke the state secrets privilege, even though the government may have no responsive documents. . .

⁷⁵ Courts generally defer to Executive Branch expertise in assessing whether documents are properly classified for the purposes of FOIA exemption 1. . . *But see Weatherhead v. United States*, No. 95-519, slip op. at 5-6 (E.D. Wash. Mar. 29, 1996), reconsideration granted in pertinent part (E.D. Wash. Sept. 9, 1996) (upholding classification upon in camera inspection), rev'd, 157 F.3d 735 (9th Cir. 1998), vacated & case remanded for dismissal, 528 U.S. 1042 (1999).

⁷⁶ See, e.g., “American Bar Association Resolution on the State Secrets Privilege,” Revised Report 116A (2007), available at <http://www.fas.org/sgp/jud/statesec/aba081307.pdf>.

⁷⁷ According to the “mosaic theory” of evidence, many individual seemingly innocuous pieces of information, when taken together, may in some situations reveal a secret. . . The danger posed by a particular piece of information cannot always be evaluated without reference to other secret information, and the privilege should therefore extend to materials that, taken together, pose a risk to national security. . . Our proposed definition of state secrets requires that the government make the case for each piece of evidence that it is so inextricably linked to secret information, that its revelation would harm national security.

⁷⁸ See, e.g., *Black v. Sheraton Corp. of America*, 371 F. Supp. 97, 102 (D.D.C. 1974) (“Any evidence which concerns the government’s illegal acts are not privileged.”)

⁷⁹ In some ways, this is the model Congress enacted for criminal trials in CIPA, where the government sometimes must choose between dropping the indictment and sharing classified evidence with the defendant. . . The contexts are different, though, and what is an appropriate tradeoff when the government wishes to convict a person of a crime may not be appropriate in the civil context.

⁸⁰ This is the approach taken, for example, in *Monarch Assur. P.L.C. v. United States*, 36 Fed. Cl. 324 (1996). . . See also *Jabara v. Kelley*, 75 F.R.D. 475 (E.D. Mich., 1977) (“The consequences of upholding a claim of privilege based upon military or state secrets are grave since the privilege absolutely protects against disclosure.”)

⁸¹ This is the approach taken with other executive privileges, such as “claims of privilege that have been asserted to protect from disclosure the identity of governmental informers, information pertaining to ongoing criminal investigations, administrative reports and opinions that reflect policy as distinguished from factual information, and matters of tactical intelligence involving current investigatory techniques.” *Jabara v. Kelley*, 75 F.R.D. 475, 481 (E.D. Mich. 1977).

⁸² See, e.g., *Bareford v. General Dynamics Corp.*, 973 F.2d 1138 (“[I]f the privilege deprives the defendant of information that would otherwise give the defendant a valid defense to the claim, then the court may grant summary judgment to the defendant.”); *In re United States*, 872 F.2d 472, 476 (D.C. Cir.), cert. denied sub nom. *United States v. Albertson*, 493 U.S. 960 (1989); *Molerio v. Federal Bureau of Investigation*, 749 F.2d 815, 825 (D.C. Cir. 1984).

⁸³ In either this option, or in option one, the court may decide to alter the rules to influence the outcome, rather than decide the outcome directly. . . For instance, the court may shift the burden of proof, or establish a rebuttable presumption that favors the aggrieved party. . . See, e.g., *Halkin v. Helms*, 223 U.S. App. D.C. 254 (“The question then becomes whether the case . . . should proceed under rules that have been changed to accommodate the loss of the otherwise relevant evidence. Such changes could compensate the party ‘deprived’ of his evidence by, for example, altering the burden of persuasion upon particular issues, or by supplying otherwise lost proofs through the device of presumptions or presumptive inferences.”)

⁸⁴ This is the approach taken, for example, in *Molerio v. FBI*, 242 U.S. App. D.C. 137, 749 F.2d 815, 825 (D.C. Cir. 1984) (stating that if the state secrets privilege so hampers the defendant in establishing a valid defense that the trier of fact is likely to reach an erroneous conclusion, dismissal is appropriate).

⁸⁵ See *Secret Law and the Threat to Democratic and Accountable Government*, Hearing Before Senate Judiciary Committee Subcommittee on the Constitution, Civil Rights and Property Rights (Apr. 30, 2008); see also Justin Florence, *Secret Laws, Secret Courts, Secret Constitution*, ACS BLOG (May 14, 2008), available at <http://www.acsblog.org/guest-bloggers-secret-laws-secret-courts-secret-constitution.html>.

⁸⁶ “The Office of the Inspector General (OIG) consists of an immediate office, which is comprised of the Inspector General, the Deputy Inspector General, and the Office of the General Counsel and five major components, each of which is headed by an Assistant Inspector General. The five OIG components are: the Audit Division, which conducts, reports on and tracks the resolution of financial and performance audits of organizations, programs and functions within the Department; the Investigations Division, which investigates alleged violations of fraud, abuse and integrity laws that govern DOJ employees, operations, grantees and contractors; the Evaluation and Inspections Division, which provides the Inspector General with an alternative mechanism to traditional audit and investigative disciplines to assess Department of Justice (Department) programs and activities; the Oversight and Review Division (O&R), which investigates sensitive allegations involving Department employees, often at the request of the Attorney General, senior Department managers, or Congress; and the Management and Planning Division, which provides the Inspector General with advice on administrative and fiscal policy and assist OIG components by providing services in the areas of planning, budget, finance, quality assurance, personnel, training, procurement, automated data processing, computer network communications and general support.” Available at: <http://www.usdoj.gov/oig/offices/organization.htm>.

⁸⁷ *Tenet v. Doe*, 544 U.S. 1, 11 (2005).

⁸⁸ *Id.* at 11 (Stevens, J. concurring).

⁸⁹ The *Tenet* Court likewise distinguished a 1988 case, *Webster v. Doe*, in which the Court permitted judicial review of a CIA employee’s constitutional discrimination claim. . . As the Court explained in *Tenet*, “there is an obvious difference, for purposes of *Totten*, between a suit brought by an acknowledged (though covert) employee of the CIA and one filed by an alleged former spy. . . Only in the latter scenario is *Totten*’s core concern implicated: preventing the existence of the plaintiff’s relationship with the government from being revealed.” *Tenet*, 544 U.S. at 10 (discussing *Webster v. Doe*, 486 U.S. 592 (1988)).

⁹⁰ The government may be able to dampen this effect, in part, by filing spurious state secrets privilege claims. . . The absence of information on a topic may also be a state secret, and so properly privileged.

⁹¹ We note that even were Congress to pass legislation clearly overturning the *Totten* justiciability doctrine in all circumstances, the government could still prevent the disclosure of state secrets through the (more

expensive) option of settling cases at an early stage. . . To avoid revealing information through which cases it settles, the government could always over-settle. . . Our suggestions are designed to protect national security, even at the occasional expense of justice, and this will often leave private parties who have been harmed by the government without redress. . . We believe that these sacrifices are merited in order to protect the security of the whole. . . Likewise, if the government chooses to settle a range of cases, including some that are meritless, in order to avoid disclosing information, this too is for the benefit of the whole. . .

⁹² *In re United States*, 872 F.2d 472, 477 (D.C. Cir. 1989) (internal citations and quotation marks omitted).

⁹³ Note also that any public admission by Congress that the United States should compensate a particular person would also tend to confirm any allegations in the same way as a judicial holding.

⁹⁴ See, e.g., Jack L. Goldsmith & Neal Katyal, *The Terrorists' Court*, N.Y. TIMES (July 11, 2007), available at:

<http://www.nytimes.com/2007/07/11/opinion/11katyal.html?scp=1&sq=the%20terrorists'%20court&st=cse>

⁹⁵ See Chesney, *supra* note 12, at 1313.

⁹⁶ See D. A. Jeremy Telman, *Our Very Privileged Executive: Why The Judiciary Can (And Should) Fix The State Secrets Privilege*, 80 TEMP. L. REV. 499, 509-10 (2007).