FROM THE CIVIL WAR TO THE WAR ON TERROR: THE EVOLUTION AND APPLICATION OF THE STATE SECRETS PRIVILEGE

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I. INTRODUCTION

On a warm July day in 1861, a Union spy named William Lloyd received secret orders from President Lincoln to infiltrate the southern states on a mission to ascertain Confederate troop positions, the plans of major fortifications, and other information which would be of benefit to the United States government.[1] For his services he was to be paid $200 a month, with his findings to be reported directly to the President.[2] One hundred and forty years later in the aftermath of September 11, President Bush would authorize the National Security Agency to conduct warrantless communications surveillance on persons with alleged ties to Al Qaeda and other terrorist organizations.[3] Though the circumstances of these two actions are decidedly different, their clandestine natures both invoke the issue of state secrets and the question of how courts are to proceed when the subject of litigation is a matter of national security. Given the current geopolitical climate and the advancing sophistication of intelligence gathering, an analysis of the state secrets privilege and its practical implications is increasingly relevant.

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[1] Totten v. United States, 92 U.S. 105, 105–06 (1875).

[2] *Id.* at 106.

[3] James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005, at A1.

II. THE BEGINNINGS OF THE STATE SECRETS PRIVILEGE IN AMERICAN LAW

Although it would take some time for the state secrets privilege to develop its current scope and power, the case of *Totten v. United States*[4] marks the first general instance of its use in American jurisprudence.[5] As highlighted before, this case concerned a secret espionage agreement allegedly entered into between President Lincoln and William Lloyd during the Civil War.[6] Upon hearing the matter originally, the Court of Claims found that Lloyd did venture behind enemy lines where he remained for the duration of the war, and that over the course of his stay he transmitted information back to the President as directed under his contract, but that after the war's end he was only reimbursed for expenses.[7] Lloyd subsequently died and Mr. Enoch Totten brought suit on his estate's behalf to recover the compensation allegedly owed under the secret contract.[8]

In affirming the Court of Claims' dismissal of the action, the Supreme Court recognized the power of the President to enter into such contracts, but expressed its concern with the dangers litigation of its contents might bring.[9] Writing for the Court, Justice Field held:

> Our objection is not to the contract, but to the action upon it in the Court of Claims. The service stipulated by the contract was a secret service; the information sought was to be obtained clandestinely, and was to be communicated privately; the employment and the service were to be equally concealed. . . . This condition of the engagement was implied

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[4] 92 U.S. 105 (1875).

[5] Joeseph D. Steinfeld et al., *Recent Developments in the Law of Access—2006*, *in* COMMUNICATIONS LAW 2006, 13, 46 (PLI Pats., Copyrights, Trademarks, and Literary Prop. Course, Handbook Series No. 8653, 2006) WL 881 PLI/Pat 7; *see also* Erin M. Stilpt, Comment, *The Military and State-Secrets Privilege: The Quietly Expanding Power*, 55 CATH. U. L. REV. 831, 834 (2006) ("In 1875, the Supreme Court confronted the state-secrets privilege issue in *Totten* v. *United States*."). This is not to suggest that *Totten* was the first case in American law to ever face the question of secret information. *See* United States v. Burr, 25 F. Cas. 30 (C.C.D.Va. 1807) (No. 14,692d). In the 1807 treason trial of Aaron Burr, for instance, Chief Justice Marshall commented "[t]hat there may be matter, the production of which the court would not require, is certain . . . . What ought to be done under such circumstances presents a delicate question, the discussion of which, it is hoped, will never be rendered necessary in this country." *Id.* at 37.

[6] *Totten*, 92 U.S. at 105.

[7] *Id.* at 106.

[8] *Id.* at 105.

[9] *Id.* at 106–07.

> from the nature of the employment, and is implied in all secret employments of the government in time of war, or upon matters affecting our foreign relations, where a disclosure of the service might compromise or embarrass our government in its public duties, or endanger the person or injure the character of the agent. If upon contracts of such a nature an action against the government could be maintained in the Court of Claims, whenever an agent should deem himself entitled to greater or different compensation than that awarded to him, the whole service in any case, and the manner of its discharge, with the details of dealings with individuals and officers, might be exposed, to the serious detriment of the public.[10]

The Court then ruled that

> [i]t may be stated as a general principle, that public policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential, and respecting which it will not allow the confidence to be violated.[11]

Totten's lawsuit was dismissed not because it had disclosed confidential information, but because it had the mere *possibility* of doing so.[12]

III. THE PRIVILEGE EVOLVES

Thirty-seven years later, the case of *Firth Sterling Steel Co. v. Bethlehem Steel Co.*[13] signaled the expansion of the privilege to encompass the power of a court to actively preclude certain testimony rather than merely allowing a party claiming the privilege to refrain from answering. After copies of secret drawings of armor-piercing projectiles were used to unlawfully obtain a patent, an infringement action ensued in which the court recognized

> [t]he disposition of the present motion is not, however, to be

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[10] *Id.*

[11] *Id.* at 107. Here the Court went on to list other areas protected by privilege, such as "the confidences of the confessional, or those between husband and wife, or of communications by a client to his counsel for professional advice, or of a patient to his physician for a similar purpose." *Id.* The Court then stated that "[m]uch greater reason exists for the application of the principle to cases of contract for secret services with the government, as the existence of a contract of that kind is itself a fact not to be disclosed." *Id.*

[12] *See id.*

[13] 199 F. 353 (E.D. Pa. 1912).

> based upon the *personal privilege* of the witness through whom it is sought to introduce the drawings in evidence, but upon the ground that *the topic or subject-matter* of the information contained in the drawings is privileged, as constituting secrets of the government in military affairs.[14]

Rather than recognizing the privilege as one based upon personal standing such as "the confidences of the confessional, or those between husband and wife,"[15] *Firth Sterling* held that "the evidence sought to be introduced, which was excluded by the court's former order, must . . . be excluded for reasons of public policy which attach to the contents of the papers."[16]

This exclusion on the basis of policy reasons which attached *to the documents* on account of their subject matter marked a unique shift away from the other historical privileges which generally arose out of some form of personal relationship.[17] After the end of the Second World War, the Supreme Court had another opportunity to address the fundamental nature of the privilege through the landmark case *United States v. Reynolds*.[18] Shortly after takeoff on October 6, 1948, a B-29 bomber testing secret electronic equipment crashed in Waycross, Georgia killing six of its nine crew members and three civilian observers.[19] The widows of the deceased civilians then brought action against the United States under the Tort Claims Act seeking the production of the Air Force's official accident investigation report and the statements of the three surviving crew members.[20]

Upon the plaintiffs' motions to discover the accident report, the government moved to suppress on the grounds that Air Force regulations deemed the material to be privileged against

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[14] *Id.* at 355 (emphasis added).

[15] *See supra* note 11.

[16] *Firth*, 199 F. at 356.

[17] In reaching its decision, the court analogized the situation to *Kessler v. Best*, 121 F. 439 (C.C.S.D.N.Y. 1903), in which a witness claimed that certain documents about which he was being questioned were part of the German consulate's privileged archives. *Firth*, 199 F. at 355. Writing the opinion for *Firth*, Judge Thompson incorporated the language in *Kessler* that

> [t]he 'privilege' was that of the German government, not of the witness, and inasmuch as the witness attended under the compulsion of the subpoena issued out of the [court], and answered under constraint of an apprehension of commitment by the same court, should he refuse, it was assumed to be within the power of this court to strike out any part of the testimony which violated the 'privilege' of the German government.

Firth, 199 F. at 355–56 (quoting *Kessler*, 121 F. at 440).

[18] 345 U.S. 1 (1953).

[19] *Id.* at 2–3.

[20] *Id.* at 3.

disclosure.[21] The district court then sustained the plaintiffs' motions by determining that they presented good cause for production of the report.[22] After the Secretary of the Air Force sent a letter to the court stating that "it has been determined that it would not be in the public interest to furnish this report"[23] the court "ordered the Government to produce the documents in order that [it] might determine whether they contained privileged matter. The Government declined, so the court entered an order . . . that the facts on the issue of negligence would be taken as established in [the] plaintiffs' favor."[24] A hearing was set to determine the appropriate amount of damages, and the court entered a final judgment for the plaintiffs, which was affirmed by the court of appeals.[25]

In reversing the court of appeals and the district court, the Supreme Court recognized the inherent conflict which could arise through the privilege's invocation.[26] Given the "reasonable danger that compulsion of the evidence [would] expose military matters which, in the interest of national security, should not be divulged," however, "the occasion for the privilege [was] appropriate, and the court should not jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence . . . ."[27] The Court then stated:

> On the record before the trial court it appeared that this accident occurred to a military plane which had gone aloft to

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[21] *Id.* at 3–4.

[22] *Id.* at 4. The plaintiffs based their motions on Rule 34 of the Federal Rules of Civil Procedure, which held in pertinent part that "[u]pon motion of any party showing good cause therefore . . . the court in which an action is pending may (1) order any party to produce and permit the inspection . . . of any designated documents . . . which constitute or contain evidence relating to any of the matters within the scope of the examination." *Id.* at 3 n.3.

[23] *Id.* at 4.

[24] *Id.* at 5.

[25] *Id.* In affirming this decision, the Court of Appeals identified the case's ultimate disposition as "a consequence of the Government's refusal to produce the documents." *Id.* at 5.

[26] Cognizant of the inherent tension the privilege caused with the Executive branch, the Court noted that

> [j]udicial control over the evidence in a case cannot be abdicated to the caprice of executive officers. Yet we will not go so far as to say that the court may automatically require a complete disclosure to the judge before the claim of privilege will be accepted in any case.

Id. at 9–10.

[27] *Id.* at 10. This inquiry into the chance of there being a "reasonable danger" of exposing national security matters would become the foundational basis of future determinations of whether the invocation of the state secrets privilege was appropriate. *See* El-Masri v. United States, 479 F.3d 296, 307 (4th Cir. 2007).

> test secret electronic equipment. Certainly there was a reasonable danger that the accident investigation report would contain references to the secret electronic equipment which was the primary concern of the mission.[28]

Even though the decisions of the lower courts were ultimately overruled, the Court did note that "the trial judge was in no position to decide that the report was privileged until there had been a formal claim of privilege."[29] Once the Secretary of the Air Force had filed its formal claim, though, the "circumstances indicat[ed] a reasonable possibility that military secrets were involved, [and] there was certainly a sufficient showing of privilege to cut off further demand for the documents . . . ."[30] When a plaintiff seeks discovery and use of confidential information as part of his case, "the claim of privilege should not be lightly accepted, but even the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that military secrets are at stake."[31]

In addition to recognizing that the "the privilege against revealing military secrets . . . is well established in the law,"[32] *Reynolds* also refined the privilege's application by formalizing the procedural requirements for its invocation.[33] Even though "[t]he privilege belongs to the Government" and "can neither be claimed nor waived by a private party," there must first still be a "formal claim of privilege, lodged by the head of the department which has control over the matter, after actual personal consideration by that officer."[34] After this formal claim of privilege has been made, "[t]he court itself must determine whether the circumstances are appropriate for the claim of privilege, and yet do so without forcing a disclosure of the very thing the privilege is designed to protect."[35]

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

[29] *Id.*

[30] *Id.* at 10–11.

[31] *Id.* at 10.

[32] *Id.* at 6–7. In coming to this sentiment, the Supreme Court recognized both *Totten* and *Firth* as historical predecessors and early forerunners of the privilege. *Id.* at 7 n.11.

[33] *See id.* at 7–8.

[34] *Id.* (footnotes omitted).

[35] *Id.* at 8 (footnote omitted). With respect to the court's need to determine whether the circumstances for invoking the privilege were appropriate, the Court commented that this "latter requirement is the only one which presents real difficulty" and "[a]s to it, we find it helpful to draw upon judicial experience in dealing with an analogous privilege, the privilege against self-incrimination," since "[t]oo much judicial inquiry into the claim of privilege would force disclosure of the thing the privilege was meant to protect, while a complete abandonment of judicial control would lead to intolerable abuses." *Id.* This process for determining the privilege's propriety, referenced by the Court as presenting "real difficulty,"

> In each case, the showing of necessity which is made [for the plaintiff to have access to the information] will determine how far the court should probe in satisfying itself that the occasion for invoking the privilege is appropriate. . . . [but] [w]here necessity is dubious, a formal claim of privilege, made under the circumstances of this case, will have to prevail.[36]

Seventy-eight years after *Totten*, *Reynolds* had explicitly reaffirmed the existence of the privilege while at the same time had offered courts a more detailed judicial roadmap for how to rule on cases in which the privilege was invoked.[37]

In a precursor to the warrantless surveillance cases which have arisen in the post-9/11 era, the case of *Ellsberg v. Mitchell* next addressed the interposition of the privilege in relation to the wire-tapping of certain individuals involved in the "'Pentagon Papers' criminal prosecution."[38] While reiterating much of the policy language cited in *Reynolds* and *Totten*, *Ellsberg* is notable in its own right for articulating at a more technical level the practical implications of the privilege's invocation:

> The effect of the government's successful invocation of the state secrets privilege, when the government is not itself a party to the suit in question, is well established: "[T]he result

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id., would later be addressed by the Fourth Circuit in *El-Masri v. United States*, 479 F.3d 296 (4th Cir. 2007). *See infra* Part IV.A.

[36] *Reynolds*, 345 U.S. at 11. In *Reynolds*, the Air Force offered to produce the surviving crew members—without cost—for the plaintiffs to examine. *Id.* at 5. This caused the requisite showing of necessity to be

> greatly minimized by an available alternative [to the privileged evidence], which might have given respondents the evidence to make out their case without forcing a showdown on the claim of privilege. By their failure to pursue that alternative, respondents have posed the privilege question for decision with the formal claim of privilege set against a dubious showing of necessity.

Id. at 11.

[37] *See id.* at 7–11.

[38] 709 F.2d 51, 52 (D.C. Cir. 1983). The "Pentagon Papers" was the popular name for a 7,000-page historical study of American military policy in Vietnam. GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME 500 (2004). By the time the court heard arguments in *Ellsberg* it was

> well established that the United States, by invoking its state secrets privilege, [might] block discovery in a lawsuit of any information that, if disclosed, would adversely affect national security. Prior to World War Two, the government rarely had occasion to exercise this prerogative, and, consequently, the scope of the privilege remained somewhat in doubt. In recent years, however, the state secrets privilege has been asserted in a growing number of cases, and the resultant bevy of judicial decisions assessing the legitimacy of its invocation has brought its lineaments into reasonably sharp focus.

Ellsberg, 709 F.2d at 56 (footnote omitted).

> is simply that the evidence is unavailable, as though a witness had died, and the case will proceed accordingly, with no consequences save those resulting from the loss of the evidence." Likewise, it is now settled that, when the government is a defendant in a civil suit, its invocation of the privilege results in no alteration of pertinent substantive or procedural rules; the effect is the same, in other words, as if the government were not involved in the controversy.[39]

Practically speaking, then, invocation of the state secrets privilege would not necessarily operate as a categorical bar to litigation, but rather would merely deprive the plaintiff of certain evidence "as though a witness had died" before trial, or—when the government was the defendant—of a particular party to sue.[40]

Beneath this language of technical effect, *Ellsberg* also recognized the separation of powers concern the Supreme Court identified in *Reynolds*: "'[J]udicial control over the evidence in a case cannot be abdicated to the caprice of executive officers.'[41] Thus, to ensure that the state secrets privilege is asserted no more frequently and sweepingly than necessary, it is essential that the courts continue critically to examine instances of its invocation."[42] This "critical examination" of the validity of the government's claim of privilege necessarily required a difficult balance between the litigant's need to present his case and the government's need to protect the integrity of information related to national security. Addressing the technical demands of this balance, the court of appeals wrote:

> Whether (and in what spirit) the trial judge in a particular case should examine the materials sought to be withheld depends upon two critical considerations. First, the more compelling a litigant's showing of need for the information in question, the deeper "the court should probe in satisfying itself that the occasion for invoking the privilege is

[39] *Ellsberg*, 709 F.2d at 64 (alteration in original) (footnote omitted). Respecting that when the government is a defendant in such a suit "the effect is the same, in other words, as if the government were not involved in the controversy," the Court of Appeals noted that "[t]he rationale for this doctrine is that the United States, while waiving its sovereign immunity for many purposes, has never consented to an *increase* in its exposure to liability when it is compelled, for reasons of national security, to refuse to release relevant evidence." *Id.*

[40] "Merely" is a highly relative term in this statement, since the privileged information plaintiffs seek to use is often necessary to prove the most basic elements of their case, or, in some situations, to even establish standing to sue. *See* Al-Haramain Islamic Found., Inc. v. Bush, 507 F.3d 1190, 1205 (9th Cir. 2007).

[41] *Ellsberg*, 709 F.2d at 58 (quoting *Reynolds*, 345 U.S. at 9–10).

[42] *Id.*

> appropriate." Second, the more plausible and substantial the government's allegations of danger to national security, in the context of all the circumstances surrounding the case, the more deferential should be the judge's inquiry into the foundations and scope of the claim. Neither of these two factors can affect the judge's response, however, if he is "ultimately satisfied" that disclosure of the material *would* damage national security.[43]

Applied to the circumstances of a particular case, this delicate balancing between two seemingly antagonistic policy objectives requires a court to make something of a credibility judgment of a party's argument before a case can even proceed. "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."[44] However,

> [w]hen the litigant requesting the information has made only a trivial showing of need for it and the 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.[45]

IV. THE PRIVILEGE ENTERS THE WAR ON TERROR

What had begun as a "general principle" used to protect secrets from the Civil War had evolved over the course of a century into a highly formalized doctrine.[46] While "[n]o competing public or private interest [could] be advanced to compel disclosure of information found to be protected by a claim of privilege" once that privilege had been properly invoked,[47] courts now had the responsibility to ensure that "the privilege . . . not be used to shield any material not strictly necessary to prevent injury to national

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[43] *Id.* at 58–59 (footnotes omitted).

[44] *Id.* at 59 n.37 (citations omitted). An *in camera* examination or inspection is one in which the trial judge privately considers the evidence presented. BLACK'S LAW DICTIONARY 775 (8th ed. 2004).

[45] *Ellsberg*, 709 F.2d at 59 n.38 (citing *Reynolds*, 345 U.S. at 10).

[46] *Id.* at 65 n.60 (quoting Totten v. United States, 92 U.S. 105, 107 (1875)).

[47] *Id.* at 57.

security,"[48] and, if necessary, to conduct *in camera* reviews of highly classified information in order to make that determination.[49]

Against this backdrop of slightly esoteric judicial precedent, the world watched in horror as the events of September 11, 2001 unfolded. Al Qaeda was quickly identified as the organization behind the attacks, and a global War on Terror was declared.[50] As airline passengers and government agencies began to adapt to life in a post-9/11 world, courts also found themselves faced with the challenge of hearing new cases raising the issue of the state secrets privilege. Two of the cases to be discussed herein—*El-Masri v. United States*[51] and *Al-Haramain Islamic Foundation, Inc. v. Bush*[52]—focus specifically on the invocation of the privilege in the context of the War on Terror,[53] while *Tenet v. Doe*[54] addresses the broader proposition of the state secrets privilege's current standing in American law. [55]

A. El-Masri v. United States

While traveling in Macedonia on December 31, 2003, Khaled El-Masri, a German citizen of Lebanese descent, was allegedly detained by local law enforcement for twenty-three days before being handed over to CIA operatives who flew him to a clandestine facility in Afghanistan.[56] During this time he was allegedly beaten, blindfolded, confined in a small and unsanitary prison cell, and "consistently prevented from communicating with anyone outside the detention facility."[57] On May 28, 2004 after nearly six months in the custody of various governments, he was transported to a remote area of Albania where he was released to local authorities for transit to Germany.[58]

On December 6, 2005, El-Masri filed suit in the United States District Court for the Eastern District of Virginia[59] alleging that his

[48] *Id.*

[49] *Id.* at 69.

[50] Elaine Tyler May, *Echoes of the Cold War: The Aftermath of September 11 at Home*, *in* SEPTEMBER 11 IN HISTORY: A WATERSHED MOMENT? 35, 40 (Mary L. Dudziak ed., 2003).

[51] 479 F.3d 296 (4th Cir. 2007).

[52] 507 F.3d 1190 (9th Cir. 2007).

[53] *Id.* at 1192–93; *El-Masri*, 479 F.3d at 299–300.

[54] 544 U.S. 1 (2005).

[55] *Id.* at 9–11.

[56] *El-Masri*, 479 F.3d at 300.

[57] *Id.*

[58] *Id.*

[59] *Id.*

detention was

> carried out pursuant to an unlawful policy and practice devised and implemented by defendant Tenet [(then-Director of the CIA)] known as 'extraordinary rendition': the clandestine abduction and detention outside the United States of persons suspected of involvement in terrorist activities, and their subsequent interrogation using methods impermissible under U.S. and international laws.[60]

In addition to suing Director Tenet, El-Masri also brought suit against a variety of private corporations accused of providing the CIA with aircraft and crew for his transportation to Afghanistan since they either knew or should have known that he "'would be subjected to prolonged arbitrary detention, torture and cruel, inhuman, or degrading treatment in violation of federal and international laws during his transport to Afghanistan and while he was detained and interrogated there.'"[61] Shortly thereafter, the United States filed a Statement of Interest in the case and moved to invoke the state secrets privilege.[62]

After the United States moved to dismiss the action, "El-Masri responded that the state secrets doctrine did not necessitate dismissal of his Complaint, primarily because CIA rendition operations, including [his] alleged rendition, had been widely discussed in public forums."[63] Upon consideration of the parties' memoranda and declarations, the district court found that the claim of the state secrets privilege "was valid, and that, 'given the application of the privilege to this case, the United States' motion to dismiss must be . . . granted.'"[64]

In considering the matter on appeal, the Fourth Circuit noted that "[w]e review de novo a district court's 'legal determinations involving state secrets,' including its decision to grant dismissal of a

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[60] *Id.* (quoting Complaint ¶ 3, El-Masri v. Tenet, 437 F. Supp. 2d 530 (E.D. Va. 2006)).

[61] *Id.* (quoting Complaint, *supra* note 60, ¶ 61).

[62] *Id.* at 301.

[63] *Id.* In support of El-Masri's claim,

> Steven Macpherson Watt, a human rights adviser to the American Civil Liberties Union, filed a sworn declaration . . . in which he asserted that United States officials—including Secretary of State Condoleezza Rice, White House Press Secretary Scott McClellan, and Directors Tenet and Goss—had publicly acknowledged that the United States had conducted renditions.

Id.

[64] *Id.* at 302 (alteration in original) (citing El-Masri v. Tenet, 437 F. Supp. 2d 530, 541 (E.D. Va. 2006)).

complaint on state secrets grounds."[65] The court of appeals also observed that:

> In the period after the district court's dismissal of El-Masri's Complaint, his alleged rendition—and the rendition operations of the United States generally—have remained subjects of public discussion. In El-Masri's view, two additions to the body of public information on these topics are especially significant in this appeal. First, on June 7, 2006, the Council of Europe released a draft report on alleged United States renditions and detentions involving the Council's member countries. This report concluded that El-Masri's account of his rendition and confinement was substantially accurate. Second, on September 6, 2006, in a White House address, President Bush publicly disclosed the existence of a CIA program in which suspected terrorists are detained and interrogated at locations outside the United States.[66]

Faced with El-Masri's contentions, the court of appeals then articulated the process by which a case concerning the state secrets privilege was to be analyzed:

> A court faced with a state secrets privilege question is obliged to resolve the matter by use of a three-part analysis. At the outset, the court must ascertain that the procedural requirements for invoking the state secrets privilege have been satisfied. Second, the court must decide whether the information sought to be protected qualifies as privileged under the state secrets doctrine. Finally, if the subject information is determined to be privileged, the ultimate question to be resolved is how the matter should proceed in light of the successful privilege claim.[67]

Respecting the procedural requirements for invoking the privilege, the court then fashioned the Supreme Court's language from *Reynolds* into a unified primary step: "First, the state secrets privilege must be asserted by the United States. . . . [since] [i]t 'belongs to the Government and . . . can neither be claimed nor waived by a private party.'"[68] This requires "'a formal claim of privilege, lodged by the head of the department which has control

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[65] *Id.* (citing Sterling v. Tenet, 416 F.3d 338, 342 (4th Cir. 2005)).

[66] *Id.* at 302.

[67] *Id.* at 304.

[68] *Id.* (alteration in original) (quoting United States v. Reynolds, 345 U.S. 1, 7 (1953)).

over the matter.' . . . made only 'after actual personal consideration by that officer.'"[69]

After the court has determined that the head of a government department has invoked the privilege after personal consideration of the matter, "it must determine whether the information that the United States seeks to shield is a state secret, and thus privileged from disclosure. This inquiry is a difficult one, for it pits the judiciary's search for truth against the Executive's duty to maintain the nation's security."[70] The government "bears the burden of satisfying a reviewing court that the *Reynolds* reasonable-danger standard is met,"[71] but in deciding whether this burden has been satisfied courts:

> must take care not to "forc[e] a disclosure of the very thing the privilege is designed to protect" by demanding more information than is necessary. Frequently, the explanation of the department head who has lodged the formal privilege claim, provided in an affidavit or personal declaration, is sufficient to carry the Executive's burden. In [other] situations, a court may conduct an *in camera* examination of the actual information sought to be protected, in order to ascertain that the criteria set forth in *Reynolds* are fulfilled. The degree to which such a reviewing court should probe depends in part on the importance of the assertedly privileged information to the position of the party seeking it.[72]

Once this second analytical step has been conducted and the information has been determined to be privileged under the state secrets doctrine, it is absolutely protected from

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[69] *Id.* (quoting *Reynolds*, 345 U.S. at 7–8).

[70] *Id.* It is in the context of this interaction between the Executive and the judiciary that the full constitutional significance of the privilege becomes apparent.

> Although the state secrets privilege was developed at common law, it performs a function of constitutional significance, because it allows the executive branch to protect information whose secrecy is necessary to its military and foreign-affairs responsibilities. *Reynolds* itself suggested that the state secrets doctrine allowed the Court to avoid the constitutional conflict that might have arisen had the judiciary demanded that the Executive disclose highly sensitive military secrets. In *United States v. Nixon*, the Court further articulated the doctrine's constitutional dimension, observing that the state secrets privilege provides exceptionally strong protection because it concerns "areas of Art. II duties [in which] the courts have traditionally shown the utmost deference to Presidential responsibilities."

Id. at 303 (alteration in original) (citation omitted).

[71] *Id.* at 305.

[72] *Id.* (first alteration in original) (emphasis added) (citations omitted).

> disclosure—even for the purpose of *in camera* examination by the court. . . . Moreover, no attempt is made to balance the need for secrecy of the privileged information against a party's need for the information's disclosure; a court's determination that a piece of evidence is a privileged state secret removes it from the proceedings entirely.[73]

The Court then noted that with the final step of how the case should proceed in light of a successful privilege claim:

> The effect of a successful interposition of the state secrets privilege by the United States will vary from case to case. If a proceeding involving state secrets can be fairly litigated without resort to the privileged information, it may continue. But if "'the circumstances make clear that sensitive military secrets will be so central to the subject matter of the litigation that any attempt to proceed will threaten disclosure of the privileged matters,' dismissal is the proper remedy."[74]

The court of appeals' tripartite "analysis of the Executive's interposition of the state secrets privilege"[75] essentially condenses into two principles:

> First, evidence is privileged pursuant to the state secrets doctrine if, under all the circumstances of the case, there is a reasonable danger that its disclosure will expose military (or diplomatic or intelligence) matters which, in the interest of national security, should not be divulged. Second, 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.[76]

El-Masri's case could not be litigated without threatening the disclosure of privileged information, so the court of appeals found that its dismissal by the district court was appropriate.[77]

B. Al-Haramain Islamic Foundation, Inc. v. Bush

In August 2004, during a proceeding conducted by the Treasury

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[73] *Id.* at 306 (emphasis added) (citation omitted).
[74] *Id.* (quoting Sterling v. Tenet, 416 F.3d 338, 348).
[75] *Id.* at 307.
[76] *Id.* at 307–08 (citation omitted).
[77] *See id.* at 313.

Department to determine whether it was a "Specially Designated Global Terrorist" organization, the Al-Haramain Islamic Foundation—a Muslim charity active in more than fifty countries—was inadvertently provided with a "Top Secret" document.[78] When the *New York Times* reported in December 2005 that the President had secretly authorized the National Security Agency to conduct warrantless electronic surveillance on Americans' "international communications of people with known links to Al Qaeda and related terrorist organizations,"[79] Al-Haramain allegedly realized that the classified document it had been provided "was proof that it had been subjected to warrantless surveillance in March and April of 2004."[80]

In February 2006, Al-Haramain brought suit in the District of Oregon seeking damages and declaratory relief stemming from the government's "electronic surveillance of [its] private telephone, email, and other electronic communications without probable cause, warrants, or other prior authorization."[81] The government "moved to dismiss the case, or in the alternative, for summary judgment, on the basis of the state secrets privilege," under the theory that "the very subject matter of the action was a state secret."[82] The government also moved to prohibit Al-Haramain from having any access to the classified document while simultaneously asserting that "continuation of the litigation would result in the disclosure of information relating both to the nature of the Al Qaeda threat and the [Terrorist Surveillance Program], which could cause grave damage to national security."[83]

In denying the government's motion to dismiss, the district court found that the existence of the Terrorist Surveillance Program was not a secret and that "no harm to the national security would occur if [Al-Haramain were] able to prove the general point that they were

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[78] Al-Haramain Islamic Found., Inc. v. Bush, 507 F.3d 1190, 1194–95 (9th Cir. 2007) [hereinafter *Al-Haramain II*]. When the Department of the Treasury produced a number of unclassified documents for Al-Haramain's counsel and directors as part of its investigation, the classified "Top Secret" document was accidentally included. *Id.* Although the FBI retrieved "all copies of the Sealed Document [as the court referred to it] from Al-Haramain's counsel" by October 2004, "it did not seek out Al-Haramain's directors to obtain their copies," presumably because it was unaware they had copies in their possession. *Id.*

[79] *Id.* at 1194 (quoting George W. Bush, President of the United States of America, President's Radio Address (Dec. 17, 2005), *available at* http://www.whitehouse.gov/news/releases/2005/12/20051217.html).

[80] *Id.* at 1195.

[81] *Id.* Al-Haramain also provided the district court with a sealed copy of the classified document. *Id.*

[82] *Id.*

[83] *Id.*

subject to surveillance as revealed in the Sealed Document, without publicly disclosing any other information contained in the Sealed Document."[84] While granting the government's motion to prohibit them from accessing the document on account of its protection under the state secrets privilege, the court stated that "it would, however, permit Al-Haramain-related witnesses to file *in camera* affidavits attesting from memory to the contents of the document to support Al-Haramain's assertion of standing and its prima facie case."[85]

On appeal, the Ninth Circuit disagreed with the government's claim that "the very subject matter of the action was a state secret,"[86] and thus worthy of automatic dismissal, but did find that the three-step *El-Masri* analysis[87] was necessary to determine the case's outcome.[88] In conducting the analysis, the court of appeals found it to be undisputed that "the procedural requirements for invoking the state secrets privilege [had] been met," and that the first step was satisfied.[89] With respect to the second step of determining whether the state secrets privilege was applicable, the court then divided its analysis of the privilege's propriety into discussions about Al-Haramain being subjected to surveillance and the use of the sealed document.[90] On the issue of Al-Haramain allegedly being surveilled, the court agreed with the district court's finding that "'because the government has not officially confirmed or denied whether plaintiffs were subject to surveillance, even if plaintiffs know they were, this information remains secret'" and

[84] Al-Haramain Islamic Found., Inc. v. Bush, 451 F. Supp. 2d 1215, 1222–24 (D. Or. 2006) [hereinafter *Al-Haramain I*], *rev'd*, 507 F.3d 1190 (9th Cir. 2007).

[85] *Al-Haramain II*, 507 F.3d at 1196 (citing *Al-Haramain I*, 451 F. Supp. 2d at 1229). This idea posited by the district court of using *in camera* affidavits to attest to the document's contents from memory—however "commendable [an] effort to thread the needle"—was struck down by the Ninth Circuit as being contrary to Supreme Court precedent and flawed for the premise that an *in camera* review of reconstructed memories would either be (1) "tantamount to [a] release of the document itself," which could not be done, or (2) would unhelpfully provide the [c]ourt with inaccurate information. *Id.* at 1204.

[86] *See id.* at 1195, 1198. The court of appeals cites at length the disclosures various government officials made in the days following the exposure of the Terrorist Surveillance Program, including a forty-two page paper released by the Department of Justice that "not only confirmed that President Bush had authorized the interception of international communications into and out of the United States, but also justified the intercepts with a legal analysis." *Id.* at 1197–1200.

[87] *See* El-Masri v. United States, 479 F.3d 296, 304 (4th Cir. 2007).

[88] *Al-Haramain II*, 507 F.3d at 1202.

[89] *Id.*

[90] *Id.*

thus protected by the privilege.[91] With the use of the sealed document, however, the court noted that "[t]his case presents a most unusual posture because Al-Haramain has [actually] seen the Sealed Document and [on the basis of its information] believes that its members were subject to surveillance."[92] After an *in camera* review of the document, the Court ultimately concluded that it too was protected by the state secrets privilege.[93]

Discussing the final step of the *El-Masri* analysis—determining how the litigation should proceed in light of the privilege's successful invocation—the Ninth Circuit drew upon the language of *Ellsberg v. Mitchell* that the effect of the privilege's invocation "'is simply that the evidence is unavailable, as though a witness had died, and the case will proceed accordingly, with no consequences save those resulting from the loss of evidence.'"[94] Unfortunately for the plaintiffs, this loss of evidence meant they could not "establish that [they] suffered injury in fact" because the classified document, "which Al-Haramain alleges proves that its members were unlawfully surveilled, is protected by the state secrets privilege."[95] Quoting *Reynolds*, the Ninth Circuit recognized that "'[e]ven the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that military secrets are at stake'"[96] and "conclu[ding] that the Sealed Document, along with [the] data concerning surveillance" was privileged necessarily meant that Al-Haramain could not establish that it had standing to sue.[97]

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[91] *Id.* at 1202–04 (quoting Al-Haramain Islamic Found., Inc. v. Bush, 451 F. Supp. 2d 1215, 1223 (D. Or. 2006) [hereinafter *Al-Haramain I*]).

[92] *Id.* at 1202. The court of appeals did not dispute the district court's finding that "the government did not waive its privilege by inadvertent disclosure of the Sealed Document." *Id.* (citing *Al-Haramain I*, 451 F. Supp. 2d at 1228).

[93] *Id.* at 1203. Despite the unusual fact that the plaintiffs had already seen the classified document, the court found that an *in camera* review was appropriate "because of Al-Haramain's admittedly substantial need for the document to establish its case," relying upon *Reynolds*' "showing of necessity" language. *Id.* The Court then posited how

> [t]he process of *in camera* review ineluctably places the court in a role that runs contrary to our fundamental principle of a transparent judicial system. It also places on the court a special burden to assure itself that an appropriate balance is struck between protecting national security matters and preserving an open court system. That said, we acknowledge the need to defer to the Executive on matters of foreign policy and national security and surely cannot legitimately find ourselves second guessing the Executive in this arena.

Id.

[94] *Id.* at 1204 (quoting Ellsberg v. Mitchell, 709 F.2d 51, 64 (D.C. Cir. 1983)).

[95] *Id.* at 1205. "At oral argument, counsel for Al-Haramain essentially conceded that [they] cannot establish standing without reference to the Sealed Document." *Id.*

[96] *Id.* (quoting United States v. Reynolds, 345 U.S. 1, 11 (1953)).

[97] *Id.* The court did not render a determination on Al-Haramain's alternative argument

C. Tenet v. Doe

At the height of the Cold War, a high-ranking diplomat for a foreign country, "considered to be an enemy of the United States," decided to defect to America with his wife.[98] CIA agents allegedly persuaded them to "remain at their posts and conduct espionage for the United States for a specified period of time, promising in return that the Government would 'arrange for travel to the United States and ensure financial and personal security for life.'"[99] After "years of purportedly high-risk, valuable espionage services, respondents defected (under new names and false backgrounds) and became United States citizens, with the Government's help. The CIA designated respondents with 'PL-110' status and began providing financial assistance and personal security."[100] With assistance from the CIA, the former diplomat "John Doe" obtained employment and, after satisfactory salary increases, agreed to a discontinuation of support.[101]

In 1997—many years after his defection—John Doe was laid off as part of a corporate merger.[102] Because he was allegedly "unable to find new employment as a result of CIA restrictions on the type of jobs he could hold," Doe contacted the CIA seeking financial assistance.[103] When the desired financial support was denied, Doe and his wife brought suit seeking "injunctive relief ordering the CIA to resume monthly financial support" and a "declaratory judgment stating that the CIA failed to provide a constitutionally adequate review process" for their claim.[104] After the government moved to

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that the state secrets privilege was statutorily preempted by the Foreign Intelligence Surveillance Act (FISA), 50 U.S.C. §§ 1801–71 (2000 & Supp. 2006), but chose to remand that point to the district court for consideration as part of its overall reversal of the trial court's verdict. *Id.* at 1205–06.

[98] Tenet v. Doe, 544 U.S. 1, 3 (2005).

[99] *Id.* at 3–4 (quoting Petition for Writ of Certiorari at *2, Tenet v. Doe, 544 U.S. 1 (2005) (No. 03-1395), 2004 WL 759643).

[100] *Id.* at 4 (citation omitted). Under 50 U.S.C. § 403h (2000), a provision enacted as part of the Central Intelligence Agency Act of 1949, a limited number of aliens and their immediate family members are allowed entry into the United States as permanent residents without regard to the normal immigration process if the admission "is in the interest of national security or essential to the furtherance of the national intelligence mission." *Id.* The government neither confirmed nor denied that the parties were part of this admission program. *Tenet*, 544 U.S. at 4 n.2.

[101] *Id.* at 4. This agreement was allegedly structured such that as Doe's salary increased his CIA living stipend would decrease by a commensurate amount. *Id.*

[102] *Id.*

[103] *Id.* at 4–5.

[104] *Id.* at 5. The respondents "allegedly received a letter from the CIA in June 1997,

dismiss the complaint, "principally on the ground that *Totten*" barred the action, the district court "denied [its] *Totten* objection, ruling that the due process claims could proceed."[105] On interlocutory appeal, the Ninth Circuit found that "*Totten* posed no bar to reviewing some of [the] claims and . . . the case could proceed to trial, subject to the Government's asserting the evidentiary state secrets privilege and the district court's resolving that issue."[106]

In a unanimous decision, the Supreme Court reaffirmed the validity of *Totten*, writing:

> We think the Court of Appeals was quite wrong in holding that *Totten* does not require dismissal of respondents' claims. That court, and respondents here, reasoned first that *Totten* developed merely a contract rule, prohibiting breach-of-contract claims seeking to enforce the terms of espionage agreements but not barring claims based on due process or estoppel theories. In fact, *Totten* was not so limited: "[P]ublic 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." No matter the clothing in which alleged spies dress their claims, *Totten* precludes judicial review in cases such as respondents' . . . .[107]

Relying principally on *United States v. Reynolds*, "the Court of Appeals . . . claimed that *Totten* [had] been recast simply as an early expression of the evidentiary 'state secrets' privilege, rather than a categorical bar to [certain] claims."[108] As the Supreme Court recognized, however:

> There is, in short, no basis for respondents' and the Court of Appeals' view that the *Totten* bar has been reduced to [a merely historical] example of the state secrets privilege. In a far closer case than this, we observed that if the "precedent

expressing regret that the agency no longer had funds available to provide assistance" while they were supposedly told shortly thereafter in another message that "the agency [had] determined 'the benefits previously provided were adequate for the services rendered.'" *Id.* at n.3 (quoting Second Amended Complaint at 11, Doe v. Tenet, 99 F. Supp. 2d 1284 (W.D. Wash. 2000) (No. C99-1597L)).

[105] *Id.* The district court found that in addition to the due process issue the complaint also raised an estoppel claim, which was allowed to continue after the court "found there were genuine issues of material fact warranting a trial" on the two matters. *Id.* at 6.

[106] *Id.*

[107] *Id.* at 8 (alteration in original) (citation omitted) (quoting Totten v. United States, 92 U.S. 105, 107 (1876)).

[108] *Id.*

> of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."
>
> We adhere to *Totten*.[109]

The Supreme Court also noted that

> there is an obvious difference . . . 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.[110]

"Forcing the Government to litigate these claims would also make it vulnerable to 'graymail,' *i.e.*, individual lawsuits brought to induce the CIA to settle a case (or prevent its filing) out of fear that any effort to litigate the action would reveal classified information" and "requiring the Government to invoke the privilege on a case-by-case basis risks the perception that it is either confirming or denying relationships with individual plaintiffs."[111] The policy reasons articulated in *Totten* forbidding the maintenance of *any suit* which could inevitably lead to the disclosure of classified information were unanimously found to be as valid in the twenty-first century as they were in the nineteenth.[112]

IV. CONCLUSION

As the aforementioned decisions illustrate, the state secrets privilege has played an important role in shaping the admissibility of certain pieces of evidence in actions against the United States

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[109] *Id.* at 10–11 (citation omitted) (quoting Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 484 (1989)).

[110] *Id.* at 10. Following up on this distinction, the Court referenced *Webster v. Doe*, 486 U.S. 592 (1988), in which a CIA employee "proceeded under a pseudonym because 'his status as a CIA employee [could not] be publicly acknowledged.'" *Id.* at 10 n.5 (quoting Brief for Petitioner at 3 n.1, Webster v. Doe, 486 U.S. 592 (1988) (No. 86-1294), 1987 WL 881344). The important difference between that scenario and the immediate action by the plaintiffs, though, was that just because "the plaintiff in *Webster* kept his *identity* secret did not mean that the employment *relationship* between him and the CIA was not known and admitted by the CIA." *Id.* "[T]he CIA regularly entertains Title VII claims concerning the hiring and promotion of its employees . . . yet *Totten* has long barred suits such as respondents.'" *Id.* at 10.

[111] *Id.* at 11.

[112] *Id.*

and affiliated parties. More significantly, the holding established in *Tenet v. Doe* demonstrates the continuing vitality of a doctrine first established in the days following the Civil War. From the "general principle" recognized in *Totten* to the highly formalized articulation found in *El-Masri*, the state secrets privilege has evolved as the administration of government has grown more complex, and will almost assuredly continue to do so.

In the context of the War on Terror, the state secrets privilege has the potential to radically alter the scope of litigation available to aggrieved parties. Although courts have a responsibility to ensure that the privilege "not be used to shield any material not strictly necessary to prevent injury to national security,"[113] courts have also demonstrated great deference to the Executive's assertions of how that injury could occur.[114] As illustrated by *Al-Haramain*, a party may be in possession of proof that their interests have been adversely affected by the government, yet be unable to vindicate them because the privilege deprives them of standing. Whether and to what extent this will have a "chilling effect" on future litigation remains to be seen, but early indications suggest that as the War on Terror shifts from the battlefield to the courtroom, parties would do well to remember the historical longevity and adaptive versatility the privilege has already demonstrated.

[113] Ellsberg v. Mitchell, 709 F.2d 51, 57 (D.C. Cir. 1983).

[114] El-Masri v. United States, 479 F.3d 296, 305 (4th Cir. 2007).