COMMENT

Controlling Government Secrecy: A Judicial Solution to the Internal and External Conflicts Surrounding the State Secrets Privilege

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“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.”

-Chief Justice John Marshall, 1807

SECRETS AND SPIES:
AN INTRODUCTION TO THE STATE SECRETS PRIVILEGE

John and Jane Doe were foreign nationals from an enemy country. John was a high-ranking diplomat for that country. After the couple expressed interest in defecting to the United States, Central Intelligence Agency (“CIA”) “agents persuaded them to remain at their posts and

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1. United States v. Burr, 25 F. Cas. 30, 37 (C.C.D. Va. 1807) (No. 14,692d) (Marshall, C.J.) (noting the quandary presented when disclosure of documents is material to the defendant in a capital case but the secrecy of the documents is necessary for national security).


3. Id.
conduct espionage for the United States . . . promising in return that the [g]overnment ‘would arrange for travel to the United States and ensure financial and personal security for life.’”  

“After ‘carrying out their end of the bargain’ by completing years of purportedly high-risk, valuable espionage services . . . [John and Jane] defected (under new names and false backgrounds) and became United States citizens, with the [g]overnment’s help.”

After several years in the United States, John was laid off and unable to find employment due to CIA restrictions. When the CIA refused to give further financial assistance, the couple sued CIA director George Tenet, claiming “that the CIA violated their procedural and substantive due process rights by denying them support and by failing to provide them with a fair internal process for reviewing their claims.” John and Jane could not support themselves within the United States; they could clearly not return to their home country after defecting as United States spies.

The couple, however, found the highest court in the land powerless to hear their dispute. Indeed, Chief Justice Rehnquist, writing for a unanimous Supreme Court in *Tenet v. Doe*, held that “[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.” As Rehnquist explained, the CIA, as an executive branch agency, has a legally recognized privilege to withhold information that may bear on national security. Additionally, Supreme Court

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4. Id. at 3-4.

5. Id. at 4. “This provision allows a limited number of aliens and members of their immediate families per year to be admitted to the United States for permanent residence, regardless of their admissibility under the immigration laws, upon a determination by the Director of the CIA, the Attorney General, and the Commissioner of Immigration that admission of the particular alien ‘is in the interest of national security or essential to the furtherance of the national intelligence mission.’” Id. at n.2 (quoting 50 U.S.C. § 403h (2000)).

6. Id. at 4-5.

7. Id. at 5.

8. Id. at 8 (emphasis in original) (quoting *Totten v. United States*, 92 U.S. 105, 107 (1875)).

9. Id. at 8, 10-11.
precedent from *Totten v. United States* recognizes that contracts for espionage services qualify categorically as national security information.\(^{10}\) Therefore, John and Jane Doe were barred entirely from any legal remedy in United States courts because the validity of their claim rested on state secrets.

The state secrets claim, once invoked by the government, is “‘absolute’ and ‘cannot be compromised by any showing of need on the part of the party seeking the information.’”\(^{11}\)

### A. Conflicts Arising from a Claim of Privilege

If the government formally claims the state secrets privilege and that claim is accepted by the courts, no individual right can overcome the claim.\(^ {12}\) The courts do not apply a balancing test of individual right against the need for secret-keeping; rather, they preclude the “secret” information outright.\(^ {13}\) Therefore, the privilege often has the effect of removing key evidence from a trial, making it impossible for the plaintiff to meet his burden of proof or for the defendant to present a defense. On the other hand, the privilege protects sensitive information that may substantially impact foreign policy relationships, national security, and military secrets.

The use of the privilege has become contentious and highly politicized over the past decade as politicians, scholars and the media have disagreed over the answers to fundamental questions about the separation of powers

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10. *Totten*, 92 U.S. at 106-07 (1875). “[A]s a general principle . . . public policy forbids the maintenance of any suit . . . the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential . . . On this principle, suits cannot be maintained which would require a disclosure of 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. Much 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.* at 107.


13. See *id.*
doctrine, constitutional law, and government competencies. Indeed, the privilege presents legal and political conflicts both within the government (internal) and between the government and other stakeholders (external). Internal conflict stems from the lack of clarity about the separation of powers. It remains undecided which branch or branches of the government have the right to define and control the privilege. External conflict stems from the impact that state secrets decisions may have on relations between the government and stakeholders outside the government, especially including other governments and private businesses. This Comment explores these internal and external conflicts in order to determine who should define and control the privilege.

B. Internal Conflict

First, this Comment explores internal conflict using legal and historical traditions as a framework to determine which branch or branches of the government have the legitimate power and competency to define and control the state secrets privilege. The current democratic majority in Congress views the privilege as a common law rule of evidence, malleable to legislation. To prove its point, both houses have introduced legislation to define and control the privilege, with the goal of removing decision-making power from the hands of the executive by requiring judicial oversight and review in all cases. The Obama administration opposes these bills; indeed, it has aligned itself with past administrations by arguing that the privilege falls under the foundational powers given


15. See Adam Liptak, Obama Administration Weighs in on State Secrets, Raising Concern on the Left, N.Y. TIMES, Aug. 4. 2009, at A11 (“If the privilege is an ordinary common-law rule of evidence, Congress is probably free to alter it.”).

exclusively to the executive through Article II of the Constitution. The judiciary recognizes a qualified constitutional privilege for the executive subject to judicial review under certain circumstances. The circumstances for such review depend on the type of information at issue. For instance, the courts accord great deference to the executive for military and foreign relations secrets, while the courts treat disclosure for other types of secrets under statutory guidelines set by Congress.

A careful analysis reveals that the congressional approach would impermissibly broaden the disclosure of secrets. The executive approach remains too protective of

17. See Brief for the United States as Amicus Curiae Supporting Respondent at 28-32, Mohawk Indus., Inc. v. Carpenter, No. 08-678 (U.S. July 13, 2009) [hereinafter Mohawk Brief] (“[P]rivileges such as those protecting Presidential communications and state secrets qualify for [immediate appealability under the collateral order doctrine] in light of their structural constitutional grounding under the separation of powers, relatively rare invocation, and unique importance to governmental functions.”); Memorandum from Constitutional & Specialized Torts Staff, Civil Div., Torts Branch, U.S. Dep’t of Justice on Personal Liability Claims Arising out of National Security Operations, 3 (Dec. 2008) [hereinafter National Security Operations Memorandum] (on file with Buffalo Law Review) (“The state secrets privilege is based on the President’s Article II power to conduct foreign affairs and to provide for the national defense, and therefore has constitutional underpinnings.”).

18. See, e.g., United States v. Nixon, 418 U.S. 683 (1974) (asserting review of privileged executive communications where due process requires those communications be submitted as evidence); Mohamed v. Jeppesen Dataplan, Inc., 579 F.3d 943, 944 (9th Cir. 2009), aff’d en banc, 614 F.3d 1070 (9th Cir. 2010) (“While the court should ‘defer to the [e]xecutive on matters of foreign policy and national security’ in making this determination, ‘[j]udicial control over the evidence in a case cannot be abdicated to the caprice of executive officers.’”) (internal citations omitted) (quoting Al-Haramain Islamic Found., Inc. v. Bush, 507 F.3d 1190, 1203 (9th Cir. 2007); United States v. Reynolds, 345 U.S. 1, 9-10 (1953)).

19. See Tenet v. Doe, 544 U.S. 1, 3 (2005); Reynolds, 345 U.S. at 11.

20. See, e.g., In re Nat’l Sec. Agency Telcomms. Records Litig., 564 F. Supp. 2d 1109, 1124 (N.D. Cal. 2008) (holding that FISA preempts the state secrets privilege); see also Liptak, supra note 15 (“The judge in San Francisco . . . ruled that Congress had indeed overridden the state secrets privilege when it enacted [FISA]. The judge said that by setting up a secret court to consider requests for intelligence surveillance, and by setting up other domestic regulations of foreign intelligence surveillance, ‘Congress intended for the executive branch to relinquish its near-total control over whether the fact of unlawful surveillance could be protected as a secret.’”).
purported secrets. The independent approach by the judiciary appropriately weighs the situational nuances that such decision making requires. Therefore, the position of the judiciary should, as it has in the past, remain the rule.

C. External Conflict

The second part of this Comment uses extraordinary rendition cases to discuss the potential impact of United States secret-keeping on foreign relations, and how this impact may affect the decision about which branch of government should define and control the privilege. Extraordinary rendition involves the detention in the United States of an alien labeled as an “enemy combatant” and the subsequent transportation of that alien to a foreign country. Former detainee allegations have raised the hackles of scholars, the media, and the public (and therefore politicians) because of claims that the extraordinary rendition program relies on illegal detention, harsh interrogations and even torture. No claims raised against the government by former victims of extraordinary rendition have succeeded, in part because of the state secrets privilege.

After discussing what the extraordinary rendition cases tell us about the nature of the privilege, this paper concludes that the extraordinary rendition cases strengthen the position that the executive branch should control and define the state secrets privilege, with limited oversight by the judiciary.

I. THE MODERN DEBATE: WHO ARE THE SECRET-KEEPERS?

It seems a foregone conclusion that the government must keep secrets. Although we look to the rights of the

21. See Jeppesen Dataplan, 614 F.3d at 1073-75; Arar v. Ashcroft, 585 F.3d 559, 564 n.1 (2d. Cir. 2009), cert. denied, 130 S. Ct. 3409 (2010); El-Masri v. United States, 479 F.3d 296, 300 (4th Cir. 2007).
22. See infra pp. 41-42 and note 187.
23. See Pallitto & Weaver, supra note 14, at 93-94. Although critical of the state secrets privilege, the authors admit that “[w]hile judges occasionally ground the privilege in the separation of powers, the ultimate reason to uphold its use is on the practical grounds that it is necessary for the survival of the state. . . . Sometimes it is characterized as pre-constitutional, even pre-legal,
individual to frame many of our legal procedures, our laws, and, arguably, our very notion of sovereignty, we remain staunchly utilitarian when framing the issue of our national security.

We often place national security issues on par with notions of basic nationhood and survival. Indeed, as in the case of John and Jane Doe discussed above, we seem willing to overlook actual wrongs perpetrated against individuals in order to guard against potential harm to national security. After all, “we the people” do not want our economic, engineering, and atomic secrets to fall into the wrong hands. However, we are not a unified entity but a country of 300 million individuals. Secrecy requires exclusion. If all individuals had access to all information, we would not have any secrets. Some secrecy, however, remains necessary to accomplish various public policy objectives. Therefore, we have entrusted the government to fill the role of secret-keeper. However, like the citizenry, the government is not a unified entity. Rather, the government stands on a foundation of internal conflict designed to balance power by breaking the whole into multiple parts, each holding only a fraction of power. And these parts all fight like hell to hang onto—and increase—their turf.

and arises from the raw fact that countries have a responsibility to prevent becoming instruments in their own destruction.” Id.

24. See, e.g., U.S. Const. amends. IV-VII (Fourth Amendment right against unreasonable searches and seizures; Fifth Amendment protection against double jeopardy, right against self incrimination, and right to due process of law; Sixth Amendment rights to speedy trial and impartial jury, right to notice, right to cross examine witnesses, and right to counsel; Seventh Amendment right to a jury trial); The Declaration of Independence para. 2 (U.S. 1776) (rights to life, liberty, and the pursuit of happiness).

25. See United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 318 (1936) (“The powers to declare and wage war, to conclude peace, to make treaties, to maintain diplomatic relations with other sovereignties, if they had never been mentioned in the Constitution, would have vested in the federal government as necessary concomitants of nationality.”); see also Pallitto & Weaver, supra note 14, at 94 (“Justice Sutherland noted in 1936 that the power to ensure national survival is not one granted by the Constitution but is a ‘necessary concomitant of nationality.’” (quoting Curtiss-Wright, 299 U.S. at 318)).


27. For example, in order to protect witnesses in certain criminal cases, we may protect the witnesses’ identity and location from the public with a witness protection program.
Therefore, it is no surprise that the three branches of government disagree about which branch has the power to control secret-keeping under the privilege. Indeed, “[a]t the root of the issue over the state secrets privilege are contested views about the limits of judicial review of administrative actions and about intrusions by judges into the complex worlds of intelligence gathering and analysis and law enforcement.”

Despite the recent controversy surrounding it, the state secrets privilege sat squarely in the executive camp for most of the nineteenth and twentieth centuries. Since the time of President Lincoln, the executive branch has controlled the privilege, nurturing it as it grew to become a deeply rooted principle of modern federal practice. Certain events in history helped solidify use of the privilege. Indeed, the “habits of secrecy which took hold during World War II and the administrative mythology connected with the ‘secret’ of the atomic bomb are partly responsible for the hide-and-seek atmosphere in the [f]ederal executive branch today.”

However, in the first eight years of the twenty-first century, during the presidency of George W. Bush, controversy surrounded the privilege as it collided with congressional acts like the Foreign Intelligence Surveillance Act (“FISA”), the Classified Information Procedures Act (“CIPA”), and the Freedom of Information Act (“FOIA”). The media and legal scholars derided the privilege as a means for unchecked abuse, adding yet another issue to the litany of controversy undermining the Bush administration.

In January 2008, responding to “a strong public perception” that the privilege is “a tool for [e]xecutive abuse” and facing off against a weakened President Bush,

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28. Pallitto & Weaver, supra note 14, at 88.
a newly-democratic Congress attempted to seize power from the unwieldy Executive by introducing S-2253, a bill sponsored by Senator Edward Kennedy called the State Secrets Protection Act. This bill defined the state secrets privilege as a rule of evidence, placing parameters on executive use, and guiding courts in their applications. The Senate Judiciary Committee made a full report on S-2253, clearly laying out the views of the majority and minority on the origins of the privilege and the appropriate role of Congress. In this report, the majority argues that the privilege has common law roots. Although the bill died at the end of the 110th Congress, it was reintroduced to the Senate Judiciary Committee on February 11, 2009, during the 111th Congress, as S-417, where it must again undergo the committee reporting process in order to move forward.

In March 2008, the House of Representatives introduced its own State Secrets Protections Act which, like the Senate bill, died at the end of the 110th Congress, and was resurrected by the 111th. This bill will likely die with the expiration of the 111th Congress and may or may not receive a new life in 2011-2012. The House and Senate bills each contain requirements that would compel a judge to review all secret material before allowing a state secrets privilege claim. Two of the original co-sponsors of the Senate bill, Senators Hillary Clinton and Joseph Biden, now

37. See S. 2253: State Secrets Protection Act, GOVTRACK.US, http://www.govtrack.us/congress/bill.xpd?bill=s110-2533 (last visited Sept. 19, 2010) (“Sessions of Congress last two years, and at the end of each session all proposed bills and resolutions that haven't passed are cleared from the books. Members often reintroduce bills that did not come up for debate under a new number in the next session.”).
serve under President Obama in the executive branch as Secretary of State and Vice President, respectively. After the bill was re-introduced, the Obama administration filed an amicus brief with the Supreme Court for Mohawk Industries v. Carpenter,42 arguing on a point tangent to the case that the state secrets privilege has a constitutional foundation.43 This argument stands contrary to the congressional claim that the privilege is merely a common law rule of evidence.

Both Congress and the executive branch each believe it alone has the power to define and control the state secrets privilege. However, each recognizes the constitutional ambiguity of the privilege and looks to the Supreme Court to buttress their arguments. The Court, however, has not addressed the privilege directly since United States v. Reynolds in 1953; and, in Reynolds, the Court did not clarify the origins and nature of the privilege.44

The Supreme Court heard oral arguments in the case of Mohawk Industries on October 5, 2009, during which the government spoke on the issue of state secrets privileges.45 In essence, the government argued that the privilege forms a function of “constitutional significance.”46 Chief Justice Roberts indirectly acknowledged the government position.47 The privilege, however, was not a central issue in Mohawk Industries. Indeed, the Court avoided the issue in its opinion. Justice Sotomayor wrote, in a footnote: “Participating as amicus curiae . . . the United States contends that . . . appeals should be available for rulings involving certain governmental privileges ‘in light of their structural constitutional grounding under the separation of powers, relatively rare invocation, and unique importance to

42. Mohawk Brief, supra note 17.
43. Id. at 28-32.
44. 345 U.S. 1 (1952).
46. Id. at 42.
47. Id. at 42-43 (“CHIEF JUSTICE ROBERTS: So you are saying that you—government lawyers cannot seek an interlocutory appeal of any privilege claimed, other than presidential communications and [s]tate secrets?”).
governmental functions’ . . . We express no view on that issue.”

On September 23, 2009, several months before the Court released its decision in *Mohawk Industries*, the Obama administration created a new state secrets policy initiative to appease Congress and the public. President Obama had made pledges during his presidential campaign and during his first year of office to limit the privilege. The new policy requires all state secrets privilege claims to be submitted to the Department of Justice, recommended by the Assistant Attorney General and by a State Secrets Review Committee, and approved by the Attorney General before the privilege can be claimed in court. In addition, the policy delineates criteria that must be used to evaluate the claim of privilege and the evidentiary support necessary for the Department of Justice


50. See Liptak, supra note 15.

51. See, e.g., President Barack Obama, Remarks at the Nat’l Archives & Records Admin. 8 (May 21, 2009), available at http://www.gpoaccess.gov/presdocs/2009/DCPD-200900388.pdf (“[M]y administration is also confronting challenges to what is known as the state secrets privilege. This is a doctrine that allows the [g]overnment to challenge legal cases involving secret programs. . . . [W]hile this principle is absolutely necessary in some circumstances to protect national security, I am concerned that it has been overused. It is also currently the subject of a wide range of lawsuits. So let me lay out some principles here. We must not protect information merely because it reveals the violation of a law or embarrassment to the [g]overnment. And that’s why my administration is nearing completion of a thorough review of this practice. And we plan to embrace several principles for reform. We will apply a stricter legal test to material that can be protected under the state secrets privilege. We will not assert the privilege in court without first following our own formal process, including review by a Justice Department committee and the personal approval of the Attorney General. And each year, we will voluntarily report to Congress when we have invoked the privilege . . . because, as I said before, there must be proper oversight over our actions.”).

52. See State Secrets Privilege Memorandum, supra note 49, at 1-3.
to consider such a claim. In response to the new policy, Senator Patrick Leahy, sponsor of the State Secrets Protection Act, stated he was “pleased that the Attorney General is moving in the right direction[,]” but remains “especially concerned with ensuring that the government make a substantial evidentiary showing to a federal judge in asserting the privilege.” Senator Leahy gave no indication that the new policy lessened the need for a congressional act defining and controlling the privilege.

Indeed, despite the new policy, neither the Senate nor the House has killed the pending state secrets legislation. The privilege remains hotly contested in both houses. Such contention, however, is not new. Debate on the ability of the government to withhold evidence under a claim of secrecy has continued for over two centuries, often couched in gripping tales of espionage, treason, and torture. Most recently, the government filed a memorandum in the District Court for the District of Columbia arguing that the state secrets privilege bars a claim by a plaintiff seeking an injunction to stop the government from targeting a known terrorist with an alleged CIA assassination program.

Despite these two centuries of debate, the government has carefully avoided a direct answer to the question: “Who are the secret-keepers?” Therefore, this country has never fully dealt with the origins, meaning, and implications of the privilege. To understand why this issue has come to a head at this particular time and what path to take from here, we must understand the historical context of the debate.

A. The “Treason” of Aaron Burr

In 1807, before a grand jury was convened to indict him for treason, Aaron Burr sought a subpoena to order the
disclosure of letters written between President Thomas Jefferson and General James Wilkinson about his alleged treason. President Jefferson discussed the letters sought by Burr in a special message to Congress delivered on January 22, 1807, stating: “The mass of what I have received . . . is voluminous . . . In this state of the evidence, delivered . . . under the restriction of private confidence, neither safety nor justice will permit the exposing names, except that of the principal actor, whose guilt is placed beyond question.” The drama of Burr’s treason trial gripped the country and provided a key test for the new Constitution. The Court eventually acquitted Burr after the prosecution could not present two witnesses as required by the Constitution. However, Justice Marshall’s discussion of the Wilkinson letters provides a foundation for the state secrets debate.

Anticipating the subpoena for letters written from Wilkinson to President Jefferson, the government prosecutors argued that the letters could not be turned over because they contained “matter which ought not to be disclosed.” Chief Justice Marshall did not address this objection directly, instead ordering that the issue be discussed after the return of the subpoena. He left open the possibility that material may be suppressed if that material is necessary to national security and is not material to the defense. Indeed, Marshall wrote:

58. See United States v. Burr, 25 F. Cas. 30, 30 (C.C.D. Va. 1807) (No. 14,692d). Wilkinson, a Commander in the Army, purported to have conspired with Burr in a plan to seize the Spanish territory of Mexico, break the West from the rest of the country, and create a new Western empire with Burr as the leader. Sensing personal gain, Wilkinson betrayed Burr’s plans to President Jefferson, who passively waited nearly a year before issuing an arrest warrant for Burr in 1807. Historians have since determined that Wilkinson was a paid double agent of Spain. See Andro Linklater, An Artist in Treason: The Extraordinary Double Life of General James Wilkinson 1-6 (2009).


60. See Frederic Jesup Stimson, Lowell Institute Lecture on English Liberty and the Freedom of Labor at Boston (Oct.-Nov. 1907), in The American Constitution 63, 89 (1908); see also U.S. Const. art. III, § 3 ("No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court.").

61. Burr, 25 F. Cas. at 37.
There is certainly nothing before the court which shows that the letter in question contains any matter the disclosure of which would endanger the public safety . . . . If it does contain any matter which it would be imprudent to disclose, which it is not the wish of the [E]xecutive to disclose, such matter, if it be not immediately and essentially applicable to the point, will, of course, be suppressed.62

Burr also requested a subpoena for letters written by President Jefferson to Wilkinson, allegedly communicating the political situation between the United States and Spain. To this request, Marshall wrote: “If it contain [sic] matter not essential to the defence [sic], and the disclosure be unpleasant to the [E]xecutive, it certainly ought not to be disclosed.”63 However, he again stated that this determination would be made upon the return, not the issuance, of the subpoena.64 Marshall never discussed what would happen if the material which “ought not to be disclosed” were material to the defense.

Several courts have cited Burr as standing for the validity of executive branch control of state secrets.65 The executive branch has, likewise, cited Burr to justify its assertion that “[t]he necessity of permitting the [e]xecutive [b]ranch to protect military, intelligence, and diplomatic secrets from disclosure has been recognized since the earliest days of the Republic.”66 However, at least one author argues that Burr does not stand for the proposition that a president can withhold information at his or her discretion; indeed, the Burr case leaves open the question of whether the decision to withhold sensitive national security

62. Id.
63. Id.
64. Id.
65. See In re United States, 872 F.2d 472, 474-75 (D.C. Cir. 1989) (“[T]he privilege in this country has its initial roots in Aaron Burr’s trial for treason . . . .”); Edmonds v. U.S. Dep’t of Justice, 323 F. Supp. 2d 65, 70 (D.D.C. 2004) (“The origins of the state secrets privilege can be traced back to the treason trial of Aaron Burr . . . .”); Jabara v. Kelley, 75 F.R.D. 475, 483 (E.D. Mich. 1977) (“Although the origins of the military or state secrets privilege can be traced as far back as Aaron Burr’s trial in 1807, the seminal decision of the Supreme Court on this privilege is United States v. Reynolds.”) (internal citation omitted).

66. National Security Operations Memorandum, supra note 17, at 3; see also id. at 2-12 (discussing the potential for asserting the state secrets privilege).
information should be made by a judge or by the executive. Likewise, the members of the United States Senate opposing the State Secrets Protection Act argue that Burr provides an example dating to the earliest days of the Republic where the courts were faced with the question of “whether a court may constitutionally force the [e]xecutive [b]ranch to disclose secret information.” However, the Senate report does not explain whether Burr is understood to confine state secret decision-making power to the courts or to the executive branch.

Indeed, a determination of the locus of state secrets control cannot come from Burr alone because Burr did not clearly address whether the roots of the privilege stem from the Constitution, from the common law, or from a combination of the two. The power of the privilege itself rests on such a distinction. Marshall refused to address the question. Instead, he explained that the seeming conflict between the right of the accused to see information material to his defense and the necessity of secrecy for the sake of national security “presents a delicate question, the discussion of which, it is hoped, will never be rendered necessary in this country.”

B. A Fiery Plane Crash in Georgia

The question that Chief Justice Marshall hoped would never be raised has only once been addressed directly by the Supreme Court. In 1952, at the height of the McCarthy era, the Court heard United States v. Reynolds, in which the spouses of several United States service members brought an action under the Tort Claims Act against the federal government after a plane exploded over Georgia during a military test of “secret electronic equipment,” killing nine of the thirteen people aboard. Chief Justice Vinson wrote the majority opinion for six members of the Court, creating a

67. See Pallitto & Weaver, supra note 14, at 95.
69. See generally id.
72. Id. at 2 (citing 28 U.S.C. §§ 1346, 2674 (1952)).
73. Id. at 1, 3.
four-part test through which the head of an executive agency could invoke the state secrets privilege: (1) “[t]here must be a formal claim of privilege,” (2) “lodged by the head of the department which has control over the matter,” (3) “after actual personal consideration by that officer” and (4) “[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.”

The Court likened the state secrets privilege to the Fifth Amendment privilege against self-incrimination, reasoning that “[t]oo much judicial inquiry . . . would force disclosure of the thing the privilege was meant to protect, while a complete abandonment of judicial control would lead to intolerable abuses.” The Court reasoned that the Fifth Amendment privilege developed with some advocates claiming “the bare assertion by the witness must be taken as conclusive, and others saying that the witness should be required to reveal the matter behind his claim of privilege to the judge for verification.” The Fifth Amendment right, like the state secrets privilege, requires that “the court must be satisfied from all the evidence and circumstances . . . that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result.” “If the court is so satisfied . . . the privilege will be accepted without requiring further disclosure.”

The Fifth Amendment, however, is different from the state secrets privilege in at least two material respects—it is specifically mentioned in the Constitution and is considered a “right” not a “privilege.” Government secret-keeping is not guided by plain language in the Constitution. Furthermore, the term “privilege” indicates the presence of some limiting or qualifying mechanism. The Court in Reynolds did not note these distinctions.

74. Id. at 7-8.
75. Id. at 8.
76. Id. at 9.
77. Id. (quoting Hoffman v. United States, 341 U.S. 479, 487 (1951)).
78. Id.
After setting forth the four-part test, the Court refused to give fixed parameters for the disclosure of information to judges. Instead, it held 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 . . . .” The Court also held that the interest of military secrets will always overcome the interests of the individual.

Reynolds has been criticized harshly in recent years because the information originally sought has been declassified, and does not appear to contain the sensitive national security secrets the government originally claimed. Indeed, the declassified information seems to reveal little more than potential negligence on the part of the government. In response to the declassified information, the daughter of one of the fallen servicemen filed a suit in district court seeking a writ of coram nobis to reverse Reynolds. The Supreme Court denied the writ in this case; however, as information claimed under the state secrets privilege in other cases becomes declassified with time, courts may see more lawsuits seeking to reverse “erroneous” decisions of courts in state secrets matters.

79. Id. at 9-10.
80. Id. at 11 (“Where there is a strong showing of necessity, the claim of privilege should not be lightly accepted, but even the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that military secrets are at stake.”).
81. See e.g., FISHER, supra note 14, at 166-69; see also Herring v. United States, No. 03-CV-5500-LDD, 2004 U.S. Dist. LEXIS 18545, at *6, *15-21 (E.D. Pa. Sept. 10, 2004), aff’d, 424 F.3d 384 (3d Cir. 2005) (upholding the original Reynolds decision despite new evidence that the state secrets privilege had been inappropriately claimed).
82. See Herring, 2004 U.S. Dist. LEXIS 18545, at *21, *30 (alleging that the declassified documents show negligence and do not contain military secrets).
83. FISHER, supra note 14, at 169 (“The writ of coram nobis, originating in England, is a motion to a court to review and correct its judgment because it was based on error of fact.”).
85. Id.
Critics note that Reynolds largely patterns the overruled English case Duncan v. Cammell, Laird & Co.,\(^{86}\) which allowed the British Crown to make conclusive determinations about secrecy needs.\(^{87}\) However, this critique remains unfounded, since Reynolds permits judicial review of documents if necessary while Duncan does not. The fact that courts can review secret information, however, does not indicate their willingness to do so. One author critical of the courts' current role notes that in camera inspection is required in less than one-third of U.S. cases, and, during the “presidency of George H. W. Bush, the numbers drop[ped] to below one-quarter."\(^{88}\) Arguably, however, if the courts review information in one-third of cases, then the courts may already be striking the balance articulated in Reynolds.\(^{89}\) However, because of the Court’s refusal in Reynolds to set a bright line rule for judicial review of secret information, and the failure to classify the privilege as either a common law rule or a constitutional power, Reynolds provides fodder for both the executive and legislative branches in the state secrets debate.

II. INTERNAL CONFLICTS: DISAGREEMENTS IN THE THREE BRANCHES

A. The Executive Approach

The executive branch believes it has constitutional and other authority giving it an absolute power to withhold secret information from external actors and from the other branches of government. For the United States government to function, the executive branch must obey and enforce the laws of Congress without being directly controlled by Congress in its enforcement. Such a distinction remains vital to the separation of powers upon which our government relies. For instance, in 1958, President Eisenhower refused to allow executive branch employees to

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86. Duncan v. Cammell, Laird & Co., [1942] AC 624 (H.L.) 641 (appeal taken from Eng.), overruled by Conway v. Rimmer [1968] AC 910 (H.L.). In overruling Duncan, Conway held that the English Court had the power to override the Crown’s assertion of privilege.

87. See, e.g., Pallitto & Weaver, supra note 14, at 102.

88. Id. at 105.

89. See United States v. Reynolds, 345 U.S. 1, 9-10 (1953).
testify to Senate subcommittee members about certain executive branch conversations.\textsuperscript{90} He wrote, “I direct this action so as to maintain the proper separation of powers between the executive and legislative branches . . . in accordance with my responsibilities and duties under the Constitution. This separation is vital to preclude the exercise of arbitrary power by any branch of the [g]overnment.”\textsuperscript{91} Indeed, the information used by the executive branch to make internal decisions is not created for or controlled by Congress.

Rather, the executive branch creates and controls its own information. Article II, Section 2 of the Constitution states that the President “may require the [o]pinion, in writing, of the principal [o]fficer in each of the executive [d]epartments, upon any [s]ubject relating to the [d]uties of their respective [o]ffices,”\textsuperscript{92} The Constitution does not give this power to Congress. Several other presidential powers, such as the power to make treaties, and the power to make certain nominations, require the advice and consent of the Senate; however, the requesting of information from executive branch agencies is given to the Executive exclusively. Although the President “shall from time to time give to the Congress [i]nformation of the State of the Union,” and “shall take [c]are that the [l]aws be faithfully executed,”\textsuperscript{93} he is not required to collect and disseminate information at the behest of Congress.

Even if the state secrets privilege lacks constitutional roots, the President may draw secret-keeping powers from other sources. Indeed, the Supreme Court reasoned in \textit{United States v. Curtiss-Wright Export Corp.},\textsuperscript{94} that there are clear differences between powers to conduct internal affairs and powers to conduct external affairs.\textsuperscript{95}

Although much of the \textit{Curtiss-Wright} discussion centered on foreign affairs powers with respect to treaties, it arguably contemplated other types of foreign agreements

\begin{itemize}
\item \textsuperscript{90} \textit{Longaker}, \textit{supra} note 29, at 177.
\item \textsuperscript{91} \textit{Id.} (internal citation omitted); see also \textit{id.} at 176-78.
\item \textsuperscript{92} \textit{U.S. Const.} art. II, § 2, cl. 1.
\item \textsuperscript{93} \textit{Id.} art. II, § 3.
\item \textsuperscript{94} 299 U.S. 304 (1936).
\item \textsuperscript{95} \textit{Id.} at 315-16.
\end{itemize}
and communications as well as internal executive
discussions of policy relating to foreign policy strategy. In
Curtiss-Wright, the Court reasoned that external affairs
powers are not given by an affirmative grant of the
Constitution, because the Constitution contains powers
doled out by the states.\textsuperscript{96} The states never had the authority
to conduct external affairs; only the Union had this power.\textsuperscript{97} The states did not have to agree to this grant of power;
rather, the Executive already had the power stemming from
the Articles of Confederation.\textsuperscript{98} Therefore, in the context of
external affairs, “the President alone has the power to
speak or listen as a representative of the nation.”\textsuperscript{99}

If the President’s capacity to make secret agreements
with other countries and to create secret policies governing
foreign affairs falls within the scope of Curtiss-Wright, then
it may be outside the scope of power of the judiciary, who
manages internal legal affairs, or Congress, who serves as a
representative of the states under the Constitution, to
require that the President disclose secrets of foreign affairs.

The Obama administration, in its new state secrets
policy, has defined the state secrets privilege as necessary
only when it “protect[s] information the unauthorized
disclosure of which reasonably could be expected to cause
significant harm to the national defense or foreign relations
. . . of the United States.”\textsuperscript{100} By defining national security
issues as those specifically pertaining to “national defense or foreign relations[,]” the policy draws support from
Curtiss-Wright. Although the Court in Curtiss-Wright
reasoned that the President’s foreign relations powers were
subordinate to certain provisions of the Constitution,\textsuperscript{101} it

\textsuperscript{96} Id. at 317.
\textsuperscript{97} Id.
\textsuperscript{98} Id.
\textsuperscript{99} Id. at 319.
\textsuperscript{100} State Secrets Privilege Memorandum, supra note 49, at 1.
\textsuperscript{101} Curtis-Wright, 299 U.S. at 319-20 (“It is important to bear in mind that
we are here dealing not alone with an authority vested in the President by an
exertion of legislative power, but with such an authority plus the very delicate,
plenary and exclusive power of the President as the sole organ of the federal
government in the field of international relations—a power which does not
require as a basis for its exercise an act of Congress, but which, of course, like
every other governmental power, must be exercised in subordination to the
applicable provisions of the Constitution.”).
also underscored the importance of presidential “discretion and freedom” in foreign affairs that would not be allowable in the context of domestic affairs alone.\textsuperscript{102}

The Court discussed several sources of information that the President alone has power to interpret.\textsuperscript{103} The nature of this information may create the need for secrecy. “Secrecy in respect of information gathered by [the President’s foreign affairs sources] may be highly necessary, and the premature disclosure of it productive of harmful results.”\textsuperscript{104} To support this point, the Court cited the following statement by President George Washington:

“The nature of foreign negotiations requires caution, and their success must often depend on secrecy; and even when brought to a conclusion a full disclosure . . . might have a pernicious influence on future negotiations, or produce . . . danger and mischief, in relation to other powers. The necessity of such caution and secrecy was one cogent reason for vesting the power of making treaties in the President, with the advice and consent of the Senate . . . . To admit, then, a right in the House of Representatives to demand . . . papers respecting a negotiation with a foreign power would be to establish a dangerous precedent.”\textsuperscript{105}

Although \textit{Curtiss-Wright} specifically discussed secrecy in the foreign relations context, the federal government keeps secrets in many other areas. Indeed, the type of secrecy discussed by Washington has been continuously defined and redefined by the forty-three Presidents since Washington, both in external and internal affairs contexts. The secrecy of certain information and communication is necessary to carry out executive duties. To this end, several Presidents have signed executive orders codifying the classification and dissemination of information.\textsuperscript{106}

\textsuperscript{102} \textit{Id.} at 320.
\textsuperscript{103} \textit{Id.}
\textsuperscript{104} \textit{Id.}
\textsuperscript{105} \textit{Id.} at 320-21 (quoting President George Washington, Reply to the House of Representatives of the United States (Mar. 30, 1796), in 1 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 194, 194-95 (James D. Richardson, 1897)).
\textsuperscript{106} See William G. Phillips, \textit{The Government’s Classification System}, in \textit{NONE OF YOUR BUSINESS: GOVERNMENT SECRECY IN AMERICA} 61, 62-64 (Norman Dorsen & Stephen Gillers eds., 1974). The modern classification system was first established during World War I, modeled after British and French procedures to
In 1973, under President Nixon, a special committee led by Assistant Attorney General and future Chief Justice of the Supreme Court William H. Rehnquist\(^{107}\) finished more than a year of work to create Executive Order 11652, which modernized the classification system using the power vested in the President by the Constitution and by statute.\(^{108}\) With a touch of historical irony, President Nixon released the following statement to accompany the order:

> Unfortunately, the system of classification . . . has failed to meet the standards of an open and democratic society, allowing too many papers to be classified for too long a time . . . . Classification has frequently served to conceal bureaucratic mistakes or to prevent embarrassment to officials and

apply to military information. \textit{Id.} at 62-63. In 1940, President Roosevelt’s Executive Order 8381 became the first such order to regulate the classification of non-military information. \textit{Id.} at 63. After World War II began, the Office of War Information instituted a government-wide classification system pursuant to Executive Orders 9103 and 9182. \textit{Id.} The National Security Act of 1947 codified the classification system; however, the military still used the 1940 order. \textit{Id.} In 1950, President Truman issued Executive Order 10104, which revised and updated the 1940 order as applied to military classification. \textit{Id.} In 1951, after state secrets were published in national magazines during the Korean War, President Truman signed Executive Order 10290 establishing secrecy classifications for all non-military information in the hands of the federal government. \textit{Longaker, supra note 29}, at 178 (discussing Exec. Order No. 10,290, 16 Fed. Reg. 9795 (Sept. 27, 1951)). “The order extended to all agencies the power to impose restrictions on the release of information which had once been limited to the Departments of State and Defense and the Atomic Energy Commission.” \textit{Id.} In 1953, President Eisenhower issued Executive Order 10501 to meet some criticisms of the classification system by limiting the power of agency heads to delegate classification duties and clarifying the definition of information that could be withheld from the public. \textit{Id.} (discussing Exec. Order No. 10,501, 18 Fed. Reg. 7049 (Nov. 10, 1953)). Despite criticism, the Eisenhower system was kept, with few amendments, for nearly twenty years. Phillips, \textit{supra}, at 63-64.

107. Rehnquist was an advocate for the executive branch viewpoint of the state secrets privilege. He argued that the President had the power to withhold state secret information. See generally Office of Legal Counsel Memorandum from William H. Rehnquist, Assistant Att’y Gen., Dep’t of Justice & John R. Stevenson, Legal Advisor, Dep’t of State on the President’s Executive Privilege to Withhold Foreign Policy and National Security Information (Dec. 8, 1969) [hereinafter Executive Privilege Memorandum] (on file with \textit{Buffalo Law Review}). Justice Rehnquist also wrote the opinion in Tenet v. Doe, 544 U.S. 1 (2005).

administrations . . . [W]hen information which properly belongs to the public is systematically withheld by those in power, the people soon become ignorant of their own affairs, distrustful of those who manage them, and—eventually—incapable of determining their own destinies.\(^{109}\)

Only one year later, Nixon was embroiled in his own legal quagmire as he tried to exercise an executive privilege to withhold information requested during a criminal investigation into the Watergate scandal.\(^{110}\) In \textit{United States v. Nixon}, the Supreme Court remained ambiguous as to the extent of the President’s constitutional power to withhold information.\(^{111}\) Nixon ultimately submitted to a judicial request to turn over the information; however, the Court also gave some credence to Nixon’s argument that the executive branch has the power to refuse to turn over information.\(^{112}\) The Court held that “[c]ertain powers and privileges flow from the nature of enumerated [constitutional] powers; the protection of the confidentiality of [p]residential communications has similar constitutional underpinnings.”\(^{113}\)

The Court did not discredit Nixon’s argument that the President has a right to withhold presidential communications.\(^{114}\) Nixon argued that all governments share a common and valid need to protect communications between high-level officials.\(^{115}\) The Court agreed, reasoning that “the importance of this confidentiality is too plain to require further discussion . . . [T]hose who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process.”\(^{116}\) Nixon also argued that the independence of the executive branch

\(^{109}\) Statement of the President Upon Establishing a New Classification System and Directing the Acceleration of Publication of the “Foreign Relations” Series, \textit{9 WEEKLY COMP. PRES. DOC.} 542, 543 (Mar. 8, 1972).


\(^{111}\) \textit{See id.} at 706.

\(^{112}\) \textit{Id.} at 705-06.

\(^{113}\) \textit{Id.}

\(^{114}\) \textit{Id.} at 706.

\(^{115}\) \textit{Id.} at 705.

\(^{116}\) \textit{Id.}
under the separation of powers doctrine absolutely protects presidential communications from disclosure to the other branches.\textsuperscript{117} The Supreme Court neither directly confirmed nor denied this assertion. Instead, the Court wrote that that “neither the doctrine of separation of powers, nor the need for confidentiality of high-level communications, without more, can sustain an absolute, unqualified [p]residential privilege of immunity from judicial process under all circumstances.”\textsuperscript{118} This implies that, in some circumstances, the Executive may have an absolute power to withhold information.

The Court qualified its right to call on the President to release confidential information, writing that, “[a]bsent a claim of need to protect military, diplomatic, or sensitive national security secrets, we find it difficult to accept the argument that even the very important interest in confidentiality of [p]residential communications is significantly diminished by production of such material for in camera inspection . . . ”\textsuperscript{119} The Court likened Nixon’s privilege to withhold confidential information to the constitutional right of a citizen to expect privacy.\textsuperscript{120}

In a late-term policy memo, the Bush administration used Nixon to support its claim of right to absolutely withhold military and diplomatic secrets.\textsuperscript{121} Likewise, the Obama administration quoted Nixon in its Mohawk Industries amicus brief when arguing that “[t]he privilege is fundamental to the operation of [g]overnment and

\begin{itemize}
  \item \textsuperscript{117} Id. at 706.
  \item \textsuperscript{118} Id.
  \item \textsuperscript{119} Id.
  \item \textsuperscript{120} Id. at 708. Additionally, the Court reasoned that “[t]here is nothing novel about governmental confidentiality. The meetings of the Constitutional Convention in 1787 were conducted in complete privacy.” Id. at 705 n.15 (citing 1 \textsc{The Records of the Federal Convention of 1787}, at xi-xxv (Max Farrand ed. 1911)). “Moreover, all records of those meetings were sealed for more than [thirty] years after the Convention.” Id. (citing 3 Stat. 475, J. Res. 8, 15th Cong. (1818)). “Most of the Framers acknowledged that without secrecy no constitution of the kind that was developed could have been written.” Id. (citing CHARLES WARREN, THE MAKING OF THE CONSTITUTION 134-39 (1937)).
  \item \textsuperscript{121} See National Security Operations Memorandum, supra note 17, at 3 (“The state secrets privilege is based on the President’s Article II power to conduct foreign affairs and to provide for the national defense, and therefore has constitutional underpinnings.”); see also Nixon, 418 U.S. at 710.
\end{itemize}
inextricably rooted in the separation of powers under the Constitution,’ and it derives largely from the ‘necessity for protection of the public interest in . . . [p]residential decisionmaking.’”\(^\text{122}\)

Throughout the late nineteenth century, various United States attorneys general “reiterated the opinion that the [P]resident has absolute power to withhold documents in the face of a judicial order,”\(^\text{123}\) Although courts disagree about whether the privilege is rooted in common law or the Constitution, courts have often cited Nixon as standing for the President’s right to withhold secrets that are “inimical to national security.”\(^\text{124}\)

At least one critic of the executive viewpoint of the state secrets privilege differentiates the constitutional reasoning in Nixon from application to the modern state secrets privilege, arguing that the executive privilege to keep presidential communications in confidence at issue in Nixon differs from the ability to withhold information created by and for executive agencies.\(^\text{125}\) In Presidential Secrecy and the

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122. Mohawk Brief, supra note 17, at 28-29 (quoting Nixon, 418 U.S. at 708).

123. Pallitto & Weaver, supra note 14, at 96. “For example, in 1865, Attorney General James Speed stated that presidents are ‘not bound to produce papers or disclose information communicated to them where, in their own judgment, the disclosure would, on public considerations, be inexpedient.’” Id. (quoting 11 Op. Att’y Gen. 137, 142-43 (1865)). “And on the matter of compulsion, in 1905 Attorney General William Moody opined that ‘it seems clear that while a subpoena may be directed against the President to produce a paper, or for some other purpose, in case of his refusal to obey the subpoena, the courts would be without power to enforce process.’” Id. (quoting 25 Op. Att’y Gen. 326, 330-31 (1905)). The author then interjected his view that there was “nothing in law to support these assertions . . . .” Id.

124. Zuckerbraun v. Gen. Dynamics Corp., 935 F.2d 544, 546 (2d Cir. 1991) (“The state secrets privilege is a common law evidentiary rule that allows the government to withhold information from discovery when disclosure would be inimical to national security.”); see also El-Masri v. United States, 479 F.3d 296, 303 (4th Cir. 2007) (“The Nixon court [recognized] that, to the extent an executive claim of privilege ‘relates to the effective discharge of a President’s powers, it is constitutionally based’. . . . [T]he Executive’s constitutional authority is at its broadest in the realm of military and foreign affairs.” (quoting Nixon, 418 U.S. at 711)); Halkin v. Helms, 598 F.2d 1, 9 (D.C. Cir. 1978), rev’d on other grounds, In re Halkin, 598 F.2d 176 (D.C. Cir. 1979) (“Courts should accord the ‘utmost deference’ to executive assertions of privilege upon grounds of military or diplomatic secrets.” (quoting Nixon, 418 U.S. at 710)).

125. See Pallitto & Weaver, supra note 14, at 93.
the authors argue that the executive privilege, which attaches only to the President and protects him from predation by Congress and the public, acts as a qualified privilege subject to a balancing test, while the state secrets privilege attaches to the heads of agencies and acts as an absolute privilege relying on practicality more than constitutional principle.\textsuperscript{126}

This argument remains unsound. Presidential authority, though delegated to the heads of the executive agencies, is not removed from the presidency itself. Indeed, the executive agency heads serve at the pleasure of the President. When making decisions—especially those related to military and intelligence matters—agency heads are drawing on the President’s constitutional authority. In \textit{El-Masri v. United States}, the Fourth Circuit explained that “the Executive’s constitutional authority is at its broadest in the realm of military and foreign affairs.”\textsuperscript{127}

Also, as explained in \textit{Nixon}, to the extent a claim of privilege concerns areas of Article II duties, “the courts have traditionally shown the utmost deference to [p]residential responsibilities.”\textsuperscript{128} The fact that the head of an agency must lodge the formal claim of privilege\textsuperscript{129} could not remove from the President the ability to assert the privilege himself. The President acts as the ultimate director of all executive agencies. The state secrets privilege does not vest solely with the heads of executive agencies, but in the President himself, as delegated to agency heads.

Therefore, the privilege of withholding military secrets should not be treated differently than the privilege to withhold high-level communications. The practical and constitutional reasoning for secrecy is identical for the two types of information. For practical reasons, the President and his executive branch members must be able to communicate freely about information in order to make decisions—they must be able to maintain informational records in order to make decisions without fear that maintaining decision-making records will endanger national security. Under the Constitution, the President alone

\textsuperscript{126} \textit{Id.}

\textsuperscript{127} \textit{El-Masri}, 479 F.3d at 303.

\textsuperscript{128} \textit{Nixon}, 418 U.S. at 710.

\textsuperscript{129} \textit{United States v. Reynolds}, 345 U.S. 1, 7-8 (1953).
retains the power to command executive agencies to provide written information about any subject. 130 Likewise, the President alone acts as the Commander in Chief of the military, and shares the power and burden of military information. 131 If the potential security of many outweighs a potential legal remedy for an individual, the President must protect the many by securing secret information. 132

The executive branch presents, on its face, a strong argument—especially with regard to military and foreign relations secrets. Despite its seemingly staunch position of absolute authority, the executive branch has never refused outright to turn over information at the request of the judicial branch. Therefore, in substance if not in form, the executive has acquiesced to the judicial position that state secrets are subject to judicial review. The executive branch has taken the de facto position that state secrets protection is a privilege, not a right, and therefore, carries at least some limitations. The consistent acquiescence by the executive branch may represent a tactical move to appease Congress to avoid escalating the debate to a showdown about the privilege, or, it may represent a genuine acknowledgment of the legitimacy of judicial review in such matters.

Regardless of the reasoning, the executive branch’s actions support the idea of judicial review and belie the folly of the executive’s argument. The federal system relies on intergovernmental cooperation and trust because no branch has direct control over another branch—only checks and balances. If the Executive holds, as he claims, an absolute, irrefutable power to withhold information, then the system of checks and balances that ensures cooperation and trust will fail because there is no check to balance executive power. The executive will continue to argue that the judiciary should not ask for such information; however, when asked, the executive will likely continue to oblige. Therefore, the viewpoint espoused by the executive branch fails as an extreme solution that avoids the practical reality of government functioning.

131. Id.
132. See generally Executive Privilege Memorandum, supra note 107.
B. The Congressional Approach

Congress wants the courts to review all information claimed secret under the privilege. As the only branch of government comprised of directly elected officials without term limits, Congress arguably remains the most sensitive to political pressure from scholars and commentators. Over the past decade, as the state secrets privilege has become more widely used, it has also become the subject of increased criticism. As one scholar notes, “[e]xploiting the legitimate claims of secrecy, the executive branch habitually overclassifies documents, absurdly segments scientific research, and maintains convenient shields to protect administrators from the curiosity of the public and the press.”

Such criticism has pressured Congress to take action to curtail what many see as an unchecked executive abuse of power. Indeed, former Republican (now Democratic) Senator Arlen Specter stated:

In view of its increasing use, inconsistent application, and public criticism, we think the time is ripe to pass legislation codifying standards on the state secrets privilege. Our bill builds upon proposals by the American Bar Association and legal scholars who have called upon Congress to legislate in this area.

Congress argues that it has the constitutional authority to make such laws, considering its powers to “make [r]ules for the [g]overnment and [r]egulation of the land and naval [f]orces” and “make all [l]aws which shall be necessary and proper” for carrying out its powers.

Congress does not effectively address the argument that using legislation based largely on the American Bar Association (“ABA”) and academic analyses may fail to take into consideration the practical and real security threats underlying any mandatory disclosure regime. Instead of relying on executive officials who have all necessary contextual information to make a decision, the congressional approach places decision making about disclosure in the hands of judges who likely do not have

133. Longaker, supra note 29, at 175.
enough contextual information to make appropriate decisions about disclosure. Congress does this because it wants to prevent conflicts of interest in the decision-making process. However, a judge's job in relation to the state secrets privilege should involve preventing executive abuses and conflicts of interest, but should not involve the making of disclosure decisions. Congress fails to recognize the nuance of this distinction in its proposed legislation, and does not propose an effective way to accomplish the prevention without transferring complete oversight of disclosure to the judiciary.

President George W. Bush, like other Presidents throughout history, arguably abused legal doctrines—even the Constitution—to avoid some harm or reap some benefit. 136 “The Bush administration has raised the privilege in over 25% more cases per year than previous administrations, and has sought dismissal in over 90% more cases.”137 However, even before the Bush administration came to power, executive use of the privilege had been rising. As one author notes,

[i]n the twenty-three years between the decision in Reynolds and the election of Jimmy Carter in 1976, there are eleven reported cases where the government invoked the privilege. Since 1977, there have been more than seventy reported cases where the courts ruled on invocation of the privilege . . . . In only four cases have courts ultimately rejected the government’s assertion of the privilege . . . in two of those cases the privilege was obviously misused to protect unclassified information in the Department of Commerce.138

136. See, e.g., Longaker, supra note 29, at 2-3 (“In the early days of the Republic, John Adams encouraged and abetted the Alien and Sedition Acts, while Jefferson contributed to their demise; at the same moment Lincoln brought about the end of Negro slavery, he trampled on constitutional rights in order to save the Constitution; and Woodrow Wilson presided over the suppression of individual rights during the First World War in an effort to secure freedom for millions abroad . . . . Andrew Jackson threatened to dispatch troops to uphold the law against a recalcitrant southern state; Theodore Roosevelt broke the color line in White House social propriety; Warren G. Harding used the pardoning power to mitigate some of the injustices of World War I.”).


138. Pallitto & Weaver, supra note 14, at 106.
Congress fails to acknowledge that the increase in use may not correlate to increased abuse. As the federal government has grown larger and the latest technology revolution has made information exponentially more accessible, it is plausible that the government has a larger volume of information and, therefore, must keep more secrets. Therefore, abuse may or may not be widespread. It is difficult to justify a claim of abuse based solely on the fact that state secrets cases have become more frequent.

Some recent cases arguably indicate possible abuse, however, pinpointing the breadth of abuse remains difficult because of the inherently secret nature of the information. Whether or not the executive branch engages in impropriety, one can certainly recognize its appearance. The executive branch has a blatant conflict of interest in some instances since the same executive agency may be the subject of a lawsuit while simultaneously having exclusive authority to make disclosure decisions about information relevant to that lawsuit.

President Clinton recognized this conflict when issuing Executive Order 12958, which forbids the classification of information in order to “(1) conceal violations of law, inefficiency, or administrative error; (2) prevent embarrassment to a person, organization, or agency; (3) restrain competition; or (4) prevent or delay the release of information that does not require protection in the interest of national security.” In contrast, the Bush administration broadened the applicability and scope of the privilege in 2001, with Executive Order 13233, which extended presidential secrecy to former Presidents to prevent disclosure of information generated during their presidencies. Also during the Bush administration, many departments that could not previously classify documents

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139. See Lyons, supra note 33, at 111-18 (listing and explaining the use of the privilege in several cases and then explaining that the cases are examples of “overbroad and blanket assertions” of the state secrets privilege).
141. PALLITTO & WEAVER, supra note 14, at 117.
and claim the state secrets privilege gained the authority to do so.\textsuperscript{142}

Under pressure to reign in the privilege after perceived abuses during the Bush years, President Obama implemented a policy requiring Department of Justice approval for state secret claims which makes further steps to check abuse; however, this policy does not necessarily require actual disclosure of information between agencies, only a description of the information sought to be kept secret.\textsuperscript{143}

Congress takes issue with the fact that the courts do not provide a preemptive check on possible abuses by requiring \textit{in camera} review in all state secrets cases. Congress advocates for such review with the proposed State Secrets Protection Act (“SSPA”),\textsuperscript{144} it rejects the idea that executive secret-keeping has a basis in the Constitution, instead arguing that the privilege is merely a common law rule of evidence which, like other privileges such as attorney-client, priest-penitent, and patient-doctor, Congress can legislate.\textsuperscript{145}

However, Congress did not always take such a restrictive view of the privilege. In 1960, the 86th Congress issued a report stating that “[t]he authority enabling the executive branch to withhold information is found in some one hundred and seventy statutes and in constitutional reasoning which rests on the separation of powers and presidential responsibility for foreign policy.”\textsuperscript{146} In the same report, however, Congress provided a list of generally “unwarranted” secrecy cases, emphasizing its disapproval of alleged abuse by the executive.\textsuperscript{147}

\begin{flushleft}
\textsuperscript{142} \textit{Id.} at 87 (the Department of Agriculture, Department of Health and Human Services, Environmental Protection Agency, and the Office of Science and Technology Policy).
\textsuperscript{143} \textit{See} State Secrets Privilege Memorandum, \textit{supra} note 49, at 1-3.
\textsuperscript{144} S. 417, 111th Cong. § 4054(d)(1) (2009).
\textsuperscript{146} LONGAKER, \textit{supra} note 29, at 176 (citing H.R. Rep. No. 2084, H. Comm. on Gov’t Ops., 86th Cong., Twenty-Fourth Rep. on Availability of Information from Federal Departments and Agencies (1960)).
\textsuperscript{147} \textit{Id.} at 186 n.15 (citing H.R. Rep. No. 2084, H. Comm. on Gov’t Ops., 86th Cong., Twenty-Fourth Rep. on Availability of Information from Federal Departments and Agencies 4-36 (1960)).
\end{flushleft}
During the Nixon administration, Congress attempted, but failed, to enact legislation to counter these "unwarranted" secrecy cases. As part of the process to adopt the Federal Rules of Evidence, Congress ultimately evaluated and rejected proposed Federal Rule of Evidence 509 which would have defined and set guidelines for use of the state secrets privilege. Some scholars argue that Congress rejected Rule 509 because it would have expanded and legitimized the privilege. However, other sources argue that Congress rejected the rule because the Department of Justice, part of the executive branch, lobbied strongly against the rule as a curtailment of executive power. In either case, Rule 509 was rejected, and Congress never passed a law governing use of the state secrets privilege.

Rule 509 would have taken a more balanced approach to the process for claiming the state secrets privilege than that taken by Congress in the SSPA. The Advisory Committee Notes of Rule 509 explain that "[t]he showing required as a condition precedent to claiming the privilege represents a compromise between complete judicial control and accepting as final the decision of a departmental officer." In contrast, section 4054 of the proposed SSPA requires the courts to take full control, reviewing all evidence claimed

149. See Timothy P. Glynn, Federalizing Privilege, 52 AM. U. L. REV. 59, 88 (2002) ("In the wake of the Watergate scandal, Congress did not look fondly upon proposed Rule 509, which redefined—and arguably expanded—the scope of the secrets of state and official information privileges."); Raymond F. Miller, Creating Evidentiary Privileges: An Argument for the Judicial Approach, 31 CONN. L. REV. 771, 774 (1999) ("In 1973, in addition to considering the rules of evidence, Congress and the nation were grappling with the unfolding Watergate situation. The idea that executive secrets would now be protected by statute invoked a violent reaction.").
150. FISHER, supra note 14, at 140-45 (discussing the Justice Department’s strong opposition to the proposed rule). The Department of Justice wanted the rule changed “to recognize that the [E]xecutive’s classification of information as a state secret was final and binding on judges.” Id. at 141. “In addition to the opposition from the Justice Department, several prominent members of Congress voiced their objections” because of procedural issues, and because the rule might have weakened the decision in Reynolds. Id.
151. FED. R. EVID. 509 advisory committee’s note subdiv. (b) (Proposed Draft 1972).
under the privilege unless the volume of evidence is so great that sampling is required.\textsuperscript{152}

Instead of adopting rules that separated and defined legal privileges (e.g., attorney-client, priest-penitent, spousal, etc.), Congress adopted Federal Rule of Evidence 501.\textsuperscript{153} Rule 501 enables privileges to develop through common law, unless guidance is otherwise provided for by “Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority.”\textsuperscript{154} As Louis Fisher explains in his book, \textit{In the Name of National Security}, the legislative history of Rule 501 explains why the provisions in Rule 509 were rejected.\textsuperscript{155} “When the bill reached the House floor, it came with a closed rule that prohibited amendments to it. The privileges covered by the rule (including government secrets . . . ) were considered ‘matters of substantive law’ rather than rules of evidence . . .”\textsuperscript{156} Congress was “so divided on that subject” that it “would never get a bill [out] if [it] got bogged down in that subject matter . . . .”\textsuperscript{157} Congress did, however, pass significant legislation in the latter half of the twentieth century to curtail executive abilities to conduct activities that may necessitate secret activities,\textsuperscript{158} and to make government information more accessible and transparent.\textsuperscript{159}

Despite its initial failure/refusal to codify the state secrets privileges in the Federal Rules of Evidence, Congress believes it retains the right to do so. As Congress

\begin{itemize}
\item \textsuperscript{152} S. 417, 111th Cong. § 4054(d) (2009).
\item \textsuperscript{153} \textit{Fed. R. Evid.} 501 (“Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall 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.”).
\item \textsuperscript{154} \textit{Id.}
\item \textsuperscript{155} Fisher, \textit{supra} note 14, at 145 (providing a history of the language used in the many versions of Rule 509 before its ultimate rejection by Congress).
\item \textsuperscript{156} \textit{Id.} (quoting 120 \textit{Cong. Rec.} 1409 (daily ed. Jan. 30, 1974) (statement of Rep. Dennis)).
\item \textsuperscript{157} \textit{Id.}
\item \textsuperscript{159} Freedom of Information Act, 5 U.S.C. § 552 (2000).
\end{itemize}
explained with Rule 501, the common law may only govern in lieu of an Act of Congress, constitutional guidance, or Supreme Court rules under statutory authority.\textsuperscript{160} Since adopting Rule 501, Congress has only modified privilege rules on one occasion.\textsuperscript{161} 

The Senate argues that it can legislate the state secrets privilege because judges already have the power to review evidence claimed secret under the privilege, however, the power of judicial review often goes “unused.”\textsuperscript{162} In order to force judges to use their oversight authority, the new Senate bill “requires judges to look at the evidence that the [g]overnment claim is privileged . . . .”\textsuperscript{163} Additionally, the bill

forbids judges from dismissing cases at the pleadings stage on the basis of the privilege. This makes clear that the . . . privilege is an evidentiary rule, not a justiciability rule, and can only be asserted with respect to items of evidence that plaintiffs seek in discovery or intend to disclose in litigation.\textsuperscript{164} 

In its report on the SSPA, the Senate Judiciary Committee rebutted the executive’s constitutional claim.\textsuperscript{165} The Committee explained that the executive has “relied heavily on \textit{Department of Navy v. Egan} . . . for the proposition that statutes regulating the disclosure of sensitive national security information may raise constitutional concerns.”\textsuperscript{166} \textit{Egan}, however, also holds that “\textit{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.”}\textsuperscript{167} This, states the Committee, “plainly implies that

\begin{itemize}
\item \textsuperscript{160} \textit{Fed. R. Evid.} 501.
\item \textsuperscript{161} In 2008, President George W. Bush signed S. 2450, creating Rule 502, which provides guidelines about attorney-client privilege, work product privilege, and limitations on waiver. \textit{See} \textit{Fed. R. Evid.} 502.
\item \textsuperscript{162} \textit{S. Rep. No.} 110-442, at 11 (2008).
\item \textsuperscript{163} \textit{Id.}
\item \textsuperscript{164} \textit{Id.} at 11-12.
\item \textsuperscript{165} \textit{Id.} at 7-8 n.37.
\item \textsuperscript{166} \textit{Id.} (citing Dep’t of Navy v. Egan, 484 U.S. 518 (1988)).
\item \textsuperscript{167} \textit{Id.} (emphasis added) (quoting \textit{Egan}, 484 U.S. at 530) (internal quotation marks omitted).
\end{itemize}
Congress possesses the constitutional authority to pass such regulations. The Committee fails to note that the Court in *Egan* acknowledged “the generally accepted view that foreign policy was the province and responsibility of the Executive[.]” and also acknowledged that “the courts have traditionally shown the utmost deference” for “Art. II duties.”

Although, at the time of publishing this Comment, committees have not yet reported on the House bill, the substance of the bill is essentially the same as that of the Senate bill. The majority congressional position has some support from the Supreme Court. The Court in *Bourjaily v. United States* noted that “*Nixon* [was] decided before Congress enacted the Federal Rules of Evidence,” implying that the rules of evidence may have governed, or at least persuaded, the Court in its holding.

Like the courts, Congress is not unified on the issue of the constitutionality of the privilege or the necessity of the SSPA. In the 2008 Senate Committee report on the SSPA, the minority opinion argued that the judiciary and executive branches have, over the past two centuries, struck a compromise which “sets the right balance between openness, justice, and national security.” The minority also argued that the privilege is rooted in both “the common

168. *Id.* The Senate Committee also noted that “the Court in *Egan* appears to have adopted this formulation from the Justice Department itself, which argued in its brief that ‘[a]bsent an unambiguous grant of jurisdiction by Congress, courts have traditionally been reluctant to intrude upon the authority of the executive in military and national security affairs.’” *Id.* (quoting Brief for the Petitioner at 21 Dep’t of Navy v. Egan, 484 U.S. 518 (1988) (No. 86–1552)).


Considering its long and settled history in the courts, the minority argues that legislation is unnecessary. Indeed, “judges already have the necessary tools and procedures to adjudicate state secrets cases. The courts have carefully crafted state secrets doctrine to give themselves wide procedural latitude, and to preserve for themselves the ultimate determination of whether the government has proven that the state secrets privilege is properly invoked.”\(^\text{175}\) Note the difference between the government proving the privilege is “properly invoked” and the courts making the ultimate decision about what to disclose or not to disclose. The minority wants the courts to perform the former task, not the latter, and believes the courts already have the necessary tools to do this; therefore, “legislative intervention is not urgent.”\(^\text{176}\) The comments in this report by both the majority and the minority died along with the original bill, S-2253.

The bill, in its new form as S-471, has been given back to the Senate Judiciary Committee of the 111th Congress. Support for the bill appears divided along partisan lines, with Democrats sponsoring the bill and Republicans speaking out against it. In recent comments, Republican Senator Orren Hatch said the new bill will “bring chaos to the balance struck by Reynolds.”\(^\text{177}\) The tumultuous political reality on the Hill during the 111th Congress creates a high probability that the bill will die again with the election of the 112th Congress in November, 2010. The bill’s future rests on the make-up of the new Congress. However, even if the bill does not get a new life in its current form, the debate will certainly resurface in some other form, as it has for the past two centuries.

A standoff has emerged between the congressional Democrats who claim they have the constitutional right to

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174. Id. at 37. The minority argued that “[t]he Common Law roots of the privilege date back at least to the early 17th Century . . . . By the time of the framing of the Constitution, the state secrets privilege was so enshrined in the common law that Blackstone took note of the privilege in his Commentaries on the Laws of England.” Id. at 37-38.

175. Id. at 39.

176. Id.

legislate the privilege as an evidentiary rule, and the executive branch, which treats the privilege as a right of office—a fundamental constitutionally-grounded power reserved for the President to protect national security.

As with the absolute power view espoused by the executive branch, the congressionally-advocated, forced judicial review of all state secrets, cannot stand under the practical reality of real-world governance issues. Even if judges review all secret information, they lack the competency to provide the sought-after check on abuse. Decisions about information secrecy must be made in the context of a larger base of knowledge. Judges lack this context. Instead, they will be forced to view information out of context, as the expediency of review cannot permit an unlimited look through agency records to ascertain a full context in all cases. Also, judges will still remain at the mercy of representations by executive officials.

To make a decision about allowing assertion of the privilege, a judge need not understand the exact information at issue; he or she only need understand the type of information sought to be protected. It would not matter, for instance, whether a new military weapon tends to overheat at 121 degrees Fahrenheit or 131 degrees Fahrenheit—it matters only that the information sought contains information that might confirm or deny the existence of a certain new weapon. In most cases, there is no need for judges to know the details of secrets to make assessments of their security risk. Since the executive branch is already required to disclose, under Reynolds, the type of information sought to be protected, there is no need to burden the courts with details.

In rare cases where a specific detail matters, judges can request in camera inspections. However, in some cases, even the occurrence of an in camera inspection will reveal that certain records exist, and therefore tend to confirm or deny certain information. Disclosure of secret information (as opposed to disclosure of types of information) requires a judge to make decisions about areas in which he or she has no expertise, is without any knowledge of the greater context of available information, and assumes an impermissible risk of disclosure of detrimental information. Such a position leaves no flexibility, and may result in a breakdown of trust between the executive and judicial branches, or may reduce the efficiency and transparency in
government by forcing the executive to curtail recordkeeping of potentially secret information.

C. The Judicial Role: A Compromise

The judiciary recognizes the executive branch’s power to withhold information, but only in certain circumstances. Depending on the reason for information secrecy, the executive action may fall under the executive’s constitutional powers, or may fall under common law. In El-Masri v. United States, the Fourth Circuit articulated the position that the state secrets privilege may have dual origins, explaining that, “[a]lthough 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.”

The courts have, over time, categorized types of information claimed secret under the privilege, treating different types of information in different ways. For instance, in Tenet v. Doe, the Supreme Court explained that the executive branch must receive utmost deference with respect to military and intelligence secrets. However, in In re National Security Agency Telecommunications Records Litigation, a district court held, on remand from the Ninth Circuit, that the Foreign Intelligence Surveillance Act (“FISA”) preempts the state secrets privilege because the subject matter of FISA is regulated by Congress.

178. 479 F.3d 296, 303 (4th Cir. 2007).
179. 544 U.S. 1, 9 (2005).
181. See Al-Haramain Islamic Found., Inc. v. Bush, 507 F.3d 1190, 1205-06 (9th Cir. 2007) (“Al-Haramain posits that FISA preempts the state secrets privilege. The district court chose not to rule on this issue . . . . Now, however, the FISA issue remains central to Al-Haramain’s ability to proceed with this lawsuit. Rather than consider the issue for the first time on appeal, we remand to the district court to consider whether FISA preempts the state secrets privilege and for any proceedings collateral to that determination.”) (citations omitted), remanded sub. nom. In re Nat’l Security Agency, 564 F. Supp. 2d at 1109.
Although courts have rarely invoked their ability to review information, and even less rarely denied the claim of privilege, courts have never acknowledged the state secrets privilege as an absolute power. The executive invocation of the privilege is a power which must be balanced against the power of judicial review.\textsuperscript{183} In \textit{Haig v. Agee}, the Supreme Court articulated that, “[m]atters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention.”\textsuperscript{184} However, this power must be balanced by considering the circumstances of the request while giving special deference to military issues.

Throughout the two centuries since \textit{Burr}, the courts have created a framework for balancing the power of the judiciary to review constitutional issues against the power of the executive to protect military matters. The Supreme Court has given full consideration to congressional legislation in matters not directly related to the military, such as wiretapping and other intelligence-gathering mechanisms. This nuanced approach provides the flexibility necessary to preserve the necessary separation of powers. In contrast, neither the executive claim of absolute privilege nor the congressional attempt to force judicial review allows for the flexibility needed to adjudge state secrets issues without creating an imbalance of power.

The approach taken by the judiciary, however, does not directly address the criticism that the executive often abuses the privilege and the judiciary is not performing its role as reviewer with enough frequency to discourage such abuses. If the judiciary applies a balancing test to each claim, and the executive frequently passes the balancing tests with abusive uses of the privilege, then the balancing test fails, at least in the eyes of Congress.

However, if the judiciary is to make an error, we must decide whether the error should favor secrecy or disclosure. If our utilitarian approach to national security has any legitimacy, then judges must err on the side of secrecy. We have already given preferential treatment to secrecy over

\textsuperscript{183} See \textit{Marbury v. Madison}, 5 U.S. 137, 1 Cranch 137 (1803) (explaining that courts have a constitutional duty to review issues of law and determine constitutionality).

disclosure by allowing legitimate claims of secrecy to absolutely trump individual rights.\textsuperscript{185}

To counter abuse, we must rely on political processes rather than legislation. The government is designed to allow “we the people” to elect officials who will act as trustworthy secret-keepers. If an executive abuses his power, we have checks, balances, and safeguards to remove him from office through democratic processes. The actual or alleged abuse by one executive should not create a presumption that the privilege is a bad practice or that the laws surrounding use of the privilege must change. The Executive has a myriad of powers, such as the ability to grant pardons, the ability to issue signing statements, and the ability to refuse to enforce laws, which he may abuse if so inclined. However, it would be ridiculous to suggest that Congress should control every potential executive abuse through legislation. This would destroy the fundamental powers inherent in the executive branch. Rather, political processes, court cases, and the media should remain the predominant tools to keep presidential power in check.

Likewise, when considering the state secrets privilege, we must take a balanced approach that will stand consistently throughout time. The judiciary remains the only branch advocating for balance, while the executive and the legislative branches argue for extreme approaches. If we accept either extreme position, the issue becomes polarizing. Indeed, if the power to withhold state secrets is absolute and cannot be checked through the process of judicial review—as the executive branch often insinuates—it becomes a potentially dangerous power. However, despite executive rhetoric about the absolute nature of the privilege, the executive branch has never refused to comply with judicial requests to turn over information.\textsuperscript{186} If a president did refuse, we would be in a constitutional quandary since the executive controls the enforcement procedures of laws.

\textsuperscript{185} See, e.g., \textit{In re Sealed Case}, 494 F.3d 139, 144 (D.C. Cir. 2007). “[O]nce invoked, the privilege is ‘absolute’ and ‘cannot be compromised by any showing of need on the part of the party seeking the information.’” \textit{Id.} (quoting Northrop Corp. v. McDonnell Douglas Corp., 751 F.2d 395, 399 (D.C. Cir. 1984)).

Considering the history of compliance with judicial review, the respect accorded by the executive to the powers of the courts, and the quandary presented should the executive refuse a judicial request for information, there is no reason to believe that the executive branch will remain, in practice, staunch in its "absolute power" interpretation.

The only thing likely to create such behavior in the executive is legislation by Congress requiring judicial review. If Congress passes the SSPA, the executive may withhold information in order to seek a Supreme Court decision on the legitimacy of the law. If such a situation arises, the Court will either relinquish their request as unconstitutional under the separation of powers doctrine, nullifying the SSPA, or, will reiterate their request, with no mechanism for enforcement, creating a potentially devastating rift in the stability of the federal government. Therefore, the congressional approach cannot stand the test of time.

Rather than take a radical approach which may force a radical response, we must take a balanced approach that will remain consistent yet flexible. The judicial approach, which allows for executive control with limited judicial review, achieves this end. The judiciary has the capacity to act as a neutral fulcrum with the balance and flexibility necessary to adapt to the changing landscape of national security while retaining the consistency necessary to apply the privilege in a way that considers appropriately the issue of secrecy versus disclosure.

III. EXTERNAL CONFLICTS PRESENTED BY EXTRAORDINARY RENDITION

As discussed above, a critical analysis of the internal United States conflict over the state secrets privilege discloses a host of legal conundrums about the separation of powers and the nature of the Constitution. Ultimately, at least in the internal context, the judicial branch takes the most defensible position on the definition and control of the state secrets privilege. However, the discussion of internal divisions over the privilege only recognizes as stakeholders the three branches of government and, to a lesser extent, persons who may face the state secrets privilege in court. Before coming to a final conclusion on the appropriate role for the privilege, we must acknowledge additional stakeholders, namely, foreign governments and private
businesses that interact with our government in foreign relations and military contexts.

To explore the role and relevance of these stakeholders in United States secret-keeping, we can look to three recent cases concerning the United States’ extraordinary rendition program. The program, which involves detaining and transporting suspected terrorists to foreign countries for interrogation, requires significant cooperation from foreign governments and private businesses. This cooperation is so intrinsic to the extraordinary rendition program, that a successful claim brought against the United States by an aggrieved party would likely expose, not only United States involvement in a particular instance, but also secret agreements, communications, and alliances between the United States and foreign governments or cooperating organizations.

A discussion of the legality of the extraordinary rendition program is outside the scope of this Comment. The tremendous conflict over this question, however, deserves acknowledgement. It remains unclear whether the United States government has the legitimate power to detain and transport non-citizens to foreign countries for interrogations—especially if the United States has actual or constructive knowledge that the detainee will be interrogated illegally or tortured. These issues warrant serious consideration and have been discussed extensively in other articles.187 For the sake of this Comment, it is enough to say that the United States government has acknowledged the existence of the program.188 An analysis of the cases that discuss this program and its relation to the state secrets privilege will yield insight into the concerns


188. See El-Masri v. United States, 479 F.3d 296, 301 (4th Cir. 2007).
raised by external conflicts, and whether the external conflicts complicate or support the conclusion that the judiciary is best poised to assess the appropriateness of the application of the state secrets privilege after the executive has determined that the privilege should be applied.

A. Case #1: El-Masri v. United States

In 2006, Khaled El-Masri, a German man of Lebanese descent, filed a complaint with the District Court of Virginia against three corporate defendants, ten CIA employees, former CIA director George Tenet, and ten employees of defendant corporations. The complaint alleged that, while travelling in Macedonia, El-Masri had been detained in December 2003 by Macedonian law enforcement, kept in custody for twenty-three days, transferred to the custody of CIA operatives, flown to a CIA-operated detention facility in Afghanistan, held for several months, and eventually released in May 2004. The man alleged he was held against his will, beaten, bound, blind-folded, and prevented from communicating with outside persons.

“The United States intervened as a defendant in the district court, asserting that El-Masri’s civil action could not proceed because it posed an unreasonable risk that privileged state secrets would be disclosed.” The district court agreed, dismissing the complaint. El-Masri appealed to the Fourth Circuit, arguing the district court erred by misapplying the state secrets doctrine. The Fourth Circuit reviewed de novo dismissal on state secrets grounds.

The plaintiff claimed that the state secrets privilege was not properly applied because the extraordinary rendition program had been “widely discussed in public forums,” and therefore the information could not be

189. Id. at 296.
190. Id. at 299.
191. Id. at 300.
192. Id.
193. Id. at 299-300.
195. El-Masri, 479 F.3d at 300.
196. Id. at 302 (citing Sterling v. Tenet, 416 F.3d 338, 342 (4th Cir. 2005)).
considered secret.\textsuperscript{197} In its analysis, the Fourth Circuit explained that “both the Supreme Court and this Court have recognized that the Executive’s constitutional mandate encompasses the authority to protect national security information.”\textsuperscript{198} “The state secrets privilege that the United States has interposed in this civil proceeding thus has a firm foundation in the Constitution, in addition to its basis in the common law of evidence.”\textsuperscript{199}

El-Masri argued that the “facts essential to his [c]omplaint have largely been made public,” and that “the subject of this action is simply ‘a rendition and its consequences,’” with the critical facts being “the CIA’s operation of a rendition program targeted at terrorism suspects, plus the tactics employed therein.”\textsuperscript{200} He argued that these facts “have been so widely discussed that litigation concerning them could do no harm to national security.”\textsuperscript{201}

In response to this argument, the court held that the above mentioned facts were not those central to the case.\textsuperscript{202} Instead, these facts were just “the general terms in which El-Masri has related his story to the press.”\textsuperscript{203} For El-Masri to proceed with his claim, the court would have to determine the personal liability of each defendant.\textsuperscript{204} Such a determination would include, for instance, “evidence that exposes how the CIA organizes, staffs, and supervises its most sensitive intelligence operations . . . how the head of the CIA participates in such operations, and how information concerning their progress is relayed to him . . . [and] the existence and details of CIA espionage contracts . . . .”\textsuperscript{205} Furthermore, El-Masri would have to rely on witnesses to make these showings “whose identities . . .

\begin{itemize}
\item \textsuperscript{197} Id. at 301.
\item \textsuperscript{198} Id. at 304 (citing Dep’t of Navy v. Egan, 484 U.S. 518, 527 (1988); United States v. Marchetti, 466 F.2d 1309, 1315 (4th Cir. 1972)).
\item \textsuperscript{199} Id.
\item \textsuperscript{200} Id. at 308.
\item \textsuperscript{201} Id.
\item \textsuperscript{202} Id.
\item \textsuperscript{203} Id.
\item \textsuperscript{204} Id. at 309.
\item \textsuperscript{205} Id.
\end{itemize}
must remain confidential in the interest of national security.\textsuperscript{206}

Lastly, even if El-Masri could make out a prima facie case without state secrets, the court held that the defendants could not present a defense “without using privileged evidence.”\textsuperscript{207} The court then discussed several scenarios whereby any defense would require privileged information. Next, the court summarized several cases where claims had been dismissed pursuant to a government claim that the disclosure of CIA methods of operations, the malfunctioning of military weapons, classified operating locations of the Air Force, and sensitive CIA personnel decisions would have been required.\textsuperscript{208}

El-Masri also claimed that the district court should have reviewed the documents \textit{in camera} because of their constitutional duty to review claims of egregious misconduct by the executive.\textsuperscript{209} In response, the court first quoted the holding in \textit{Reynolds} that “when ‘the occasion for the privilege is appropriate, . . . 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.”\textsuperscript{210} Also, the court countered El-Masri’s assertion that this decision represents a “surrender of judicial control” by reasoning that “the court, not the Executive . . . determines whether the state secrets privilege has been properly invoked.”\textsuperscript{211} The court ultimately upheld the dismissal of El-Masri’s claim based on the United States government’s insertion of itself as a defendant and assertion of the state secrets privilege.\textsuperscript{212}

\textit{El-Masri} highlights the difference between types of wrongdoing and methods of wrongdoing. In \textit{El-Masri}, the plaintiff sought justice from wrongs inflicted by a program, the existence of which is widely publicized and acknowledged. However, the privilege was not invoked to

\textsuperscript{206} \textit{Id.}
\textsuperscript{207} \textit{Id.}
\textsuperscript{208} \textit{Id.} at 310-11.
\textsuperscript{209} \textit{Id.} at 311.
\textsuperscript{210} \textit{Id.} (quoting United States v. Reynolds, 345 U.S. 1, 10 (1953)).
\textsuperscript{211} \textit{Id.} at 312.
\textsuperscript{212} \textit{Id.} at 313.
protect from disclosure the facts of whether these wrongs occurred. Instead, the privilege was used to protect the identities of persons inside and outside the government who allegedly perpetrated the wrongs, the roles of those persons and organizations, and the agreements made between the government and outside organizations.

Indeed, the plaintiff defined the essential facts of his case differently than the court. El-Masri focused in his claim on the consequences of alleged wrongful acts. The court, however, focused on the decision-making methods, government agreements and clandestine communications that would be required for such acts to take place. Even in relatively benign circumstances, these types of internal processes are often exempted from disclosure.

For instance, under the Freedom of Information Act ("FOIA"), government agencies must disclose all requested agency records to any interested persons.\(^{213}\) However, agencies can refuse to disclose records for national security reasons, as well as for reasons "related solely to the internal personnel rules and practices of an agency\(^ {214}\) and "interagency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency."\(^ {215}\) These exceptions allow agencies within the executive branch to freely communicate with one another, and carefully deliberate decisions without fear that materials related to their decision-making processes will become public and politicized. Additionally, under the Administrative Procedures Act ("APA") rulemaking requirements,\(^ {216}\) agencies are exempted from going through a public notice and comment process when they make rules that are related to military and foreign affairs functions\(^ {217}\) or to agency management or personnel.\(^ {218}\)

These exceptions are in place to enable the President to perform core executive branch functions. These core

\(^{214}\) § 552(b)(2).
\(^{215}\) § 552(b)(5).
\(^{217}\) § 553(a)(1).
\(^{218}\) § 553(a)(2).
functions involve, among other things, the enforcement of laws, the carrying out of military and foreign affairs, and the negotiation of international agreements. If the executive branch could not control information related to these core functions, it arguably could not perform the functions efficiently or effectively.

Indeed, the underlying national security fear in disclosing the type of information sought by El-Masri lies in the potential for such disclosure to undermine the effectiveness of executive branch operations, the safety of government personnel and United States citizens, and the ability of the government to maintain relationships with foreign governments and other organizations. Furthermore, other countries have strong self interest in United States disclosure policies. In an article posted on the CIA’s public website, Rutgers professor Warren F. Kimball explains that: “It could jeopardize lives if agents or contacts were revealed; it could jeopardize continued access to important information if special relationships with foreign agencies were acknowledged.” For instance, Kimball hypothesizes, “if the United States had a ‘liaison’ relationship with the government intelligence agency in a nation that had a strong anti-American political element . . . [and] the United States acknowledged that it received information from the intelligence agency in [that country,]” the government of that country “could fall.”

The El-Masri case relies on a similar fear. The plaintiff alleged, for example, that he was first detained by the Macedonian government and then transferred to the custody of CIA operatives. This suggests that the United States and Macedonia may have engaged in some sort of agreement either to detain the plaintiff or to hand him over to the United States or both. Macedonia, which is formerly part of Yugoslavia, has been trying to gain acceptance into the European Union since 2004, hindered, in part, by a disagreement with Greece over the right to use the name

220. Id.
221. See supra note 191 and accompanying text.
“Macedonia.”222 Macedonia is, however, a member of the Council of Europe, the well-respected European organization that stands separately from the European Union, and which deals with human rights and democratic principles.223 The Council of Europe recently published a scathing review of the United States’ extraordinary rendition program, stating, in part, that El-Masri’s claims were highly credible.224

If the United States were to announce formally any cooperation that Macedonia gave in such detentions, it could hinder Macedonia’s political relationships within the Council of Europe, and give the European Union additional material to use in a decision to exclude Macedonia from membership. Therefore, Macedonia is a stakeholder in the decision to disclose or keep secret some of the information required in the El-Masri case. Furthermore, if someone within Macedonia cooperated without the formal consent of the Macedonian government, then details about the cooperation could expose that person or group to Macedonian legal consequences. If we “out” those who cooperate with us, we may dry up the flow of future cooperators and alienate those persons with whom we have already built or are cultivating relationships. El-Masri’s claims also implicated cooperation between the United States government and Afghanistan and Albania, as well as cooperation between the United States government and

222. See, e.g., Lucy Moore, What’s in a Name? A Lot if You’re Macedonia, PASSPORT (Feb. 29, 2008, 2:58 PM), http://blog.foreignpolicy.com/posts/2008/02/29/whats_in_a_name_a_lot_if_youre_macedonia (“Greek prime minister Costas Karamanlis said today that his country will block Macedonia’s entrance into the EU and NATO if the country does not change its name.”); see also Paul Lewis, Compromise Likely to Take Macedonia Into U.N., N.Y. TIMES, Jan. 26, 1993, at A8 (discussing Macedonia’s eventual acceptance into the United Nations after compromising with Greece on its name); Candidate Countries: Former Yugoslav Republic of Macedonia, EUROPA.EU, [http://europa.eu/abc/european_countries/candidate_countries/fyrom/index_en.htm](http://europa.eu/abc/european_countries/candidate_countries/fyrom/index_en.htm) (last visited Oct. 20, 2010) (listing Macedonia as a candidate country for European Union membership).


private businesses who chartered the flights used to transport El-Masri.225

Individual judges cannot be expected to have expertise on the intricacies of foreign policy relationships, so they are not in the best position to make decisions about whether certain information should be kept secret. Rather, the executive branch alone has the competency to make decisions about foreign relationships and decide when certain information must remain secret. Since judges make decisions based on what is furnished by the executive branch, mandatory judicial review does not, necessarily, effectively check abuse. It does, however, increase the risk of inappropriate dissemination of information and jeopardize the future cooperation of foreign governments, agents, and private businesses.

B. Case #2: Mohamed v. Jeppesen Dataplan, Inc.226

Five foreign nationals sued Jeppesen Dataplan, Inc. under the Alien Torts Statute.227 Jeppesen is a domestic company based in California that provides logistical support for aviation (i.e., flight planning).228 The plaintiffs, all victims of extraordinary rendition, alleged that Jeppesen’s participation in the program render it liable for damages.229 According to the plaintiffs, extraordinary renditions were “carried out by the CIA, with the assistance of U.S.-based corporations, such as Jeppesen, who have provided the aircraft, flight crews, and the flight and logistical support necessary for hundreds of international flights.”230 Plaintiffs allege that Jeppesen knew or should have known that plaintiffs would be subject to “forced disappearance, detention, and torture in countries where such practices are

225. See El-Masri v. United States, 479 F.3d 296, 300 (4th Cir. 2007).
226. 614 F.3d 1070 (9th Cir. 2010).
227. Mohamed v. Jeppesen Dataplan, Inc., 539 F. Supp. 2d 1128, 1129 (N.D. Cal. 2008), rev’d, 579 F.3d 943 (9th Cir. 2009), aff’d en banc, 614 F.3d 1070 (9th Cir. 2010).
230. Id.
and that such unlawful detention, interrogation, and torture occurred as a result of defendants’ participation.\textsuperscript{232}

The United States intervened in the case and moved to assert the state secrets privilege to bar the disclosure of certain information and therefore compel dismissal of the case.\textsuperscript{233} The Northern District of California granted the government’s motion to dismiss.\textsuperscript{234} The Ninth Circuit reversed and remanded, ordering the district court to determine what evidence was privileged under \textit{Reynolds}, and dismissing the argument that the “very subject matter” of the case barred it completely.\textsuperscript{235}

The Ninth Circuit then granted a rehearing en banc, and dismissed the suit entirely,\textsuperscript{236} holding:

This case requires us to address the difficult balance the state secrets doctrine strikes between fundamental principles of our liberty, including justice, transparency, accountability and national security. Although as judges we strive to honor \textit{all} of these principles, there are times when exceptional circumstances create an irreconcilable conflict between them. On those rare occasions, we are bound to follow the Supreme Court's admonition that ‘even the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that [state] secrets are at stake.’ After much deliberation, we reluctantly conclude this is such a case, and the plaintiffs’ action must be dismissed.\textsuperscript{237}

The Ninth Circuit differentiated claims of privilege that bar the subject matter of the suit entirely under \textit{Totten}, and those which require a detailed evidentiary analysis under \textit{Reynolds}.\textsuperscript{238} Courts may dismiss cases requiring the

\begin{itemize}
\item 231. \textit{Id.}
\item 232. \textit{See id. at} 1130-31.
\item 233. \textit{Id. at} 1132.
\item 234. \textit{Id. at} 1136.
\item 235. Mohamed \textit{v. Jeppesen Dataplan, Inc.}, 563 F.3d 992, 1003, 1009 (9th Cir. 2009).
\item 236. Mohamed \textit{v. Jeppesen Dataplan, Inc.}, 614 F.3d 1070, 1073 (9th Cir. 2010).
\item 237. \textit{Id. at} 1073 (emphasis in original) (quoting United States \textit{v. Reynolds}, 345 U.S. 1, 11 (1953)).
\item 238. \textit{Id. at} 1077-83.
\end{itemize}
disclosure of “clandestine spy relationships” or nuclear weapons storage plans under Totten.239

The Ninth Circuit chose to avoid the difficult questions about whether to extend the Totten bar here, because Reynolds provided an alternate means of dismissal.240 Instead, the court reviewed classified documents submitted by the government, and held that that the information claimed to be privileged falls into one of four categories claimed by the government:

[1] information that would tend to confirm or deny whether Jeppesen or any other private entity assisted the CIA with clandestine intelligence activities; [2] information about whether any foreign government cooperated with the CIA in clandestine intelligence activities; [3] information about the scope or operation of the CIA terrorist detention and interrogation program; [or 4] any other information concerning CIA clandestine intelligence operations that would tend to reveal intelligence activities, sources, or methods.241

The success of these four categories in persuading the court to dismiss litigation supports the thesis that Article III courts are in poor positions to override the executive branch on matters relating to external conflicts. These categories involve intelligence activities, foreign partnerships and agreements, and sources and methods of detention and intelligence-gathering operations.

The inability to challenge the executive branch on these matters rests, in part, on the court’s heavy reliance on the executive branch to furnish the information used in the decision. Indeed, the Ninth Circuit explained that it relied “heavily” on classified submissions of the government to reach its conclusion.242 Even after accepting the assumption that Mohamed’s case could progress without depending on privileged evidence, the court held it still must dismiss the case because “there is no feasible way to litigate Jeppesen’s

239. Id. at 1084 (citing Tenet v. Doe, 544 U.S. 1, 9-10 (2005); Totten v. United States, 92 U.S. 105, 107 (1875)).

240. Id. at 1085.

241. Id. at 1086 (quoting Redacted, Unclassified Brief for United States on Reh’g En Banc at 7-8, Mohamed v. Jeppesen Dataplan, Inc., 614 F.3d 1070 (9th Cir. 2010) (No. 08-15693)).

242. Id. at 1087.
alleged liability without creating an unjustifiable risk of divulging state secrets.”

In this case, as in *El-Masri*, the state secrets at issue were inextricably intertwined with any non-secret material. District courts are not competent, in cases like this, to effectively “wall off” secret information during the litigation progresses. Therefore, they must ban litigation entirely.

C. Jeppesen Dataplan’s *Commentaries on El-Masri and the Parameters of the State Secrets Privilege*

After agreeing that this case mirrors the outcome of *El-Masri*, the Ninth Circuit made a point to note its disagreement with the Fourth Circuit’s conflation of the *Totten* bar and the *Reynolds* privilege. The court reasoned that *Totten* bars cases because their “very subject matter” deals with espionage, while *Reynolds*, may bar litigation if a case present an “unacceptable risk of revealing state secrets.” After differentiating these cases, the court stated that *Totten and Reynolds* form a “continuum of analysis.”

This hair-splitting differentiation indicates only that espionage cases give a court a reason to dismiss a case without any scrutiny, while other types of cases require more scrutiny. Whether a court uses the *Totten or Reynolds* analysis, however, the court will likely reach the same

243. *Id.* (emphasis omitted).

244. *Id.* at 1087, 1089-90.

245. *See id.* at 1089 (“Although district courts are well equipped to wall off isolated secrets from disclosure, the challenge is exponentially greater in exceptional cases like this one, where the relevant secrets are difficult or impossible to isolate and even efforts to define a boundary between privileged and unprivileged evidence would risk disclosure by implication. In these rare circumstances, the risk of disclosure that further proceedings would create cannot be averted through the use of devices such as protective orders or restrictions on testimony.”).

246. *See id.*

247. *Id.* at 1087 n.12.

248. *Id.*

249. *Id.* (quoting Al-Haramain Islamic Found., Inc. v. Bush, 507 F.3d 1190, 1201 (9th Cir. 2007) (internal quotation marks omitted)).
conclusion. The latter just requires more work and justification.

This careful discussion about the lengths to which courts must go (or must not go) in assessing the validity of a state secrets claim, provides insight into the limitations of the courts in state secrets cases. The court in this case reviewed classified government briefs about the information sought to be protected. Despite its insistence on “close and skeptical scrutiny of the record and the government’s case for secrecy and dismissal[,]” the court still had to rely heavily on the government’s disclosure and representations.\(^\text{250}\) It is, therefore, impossible in this situation for the court to make a truly independent judgment of the merits of the claim of secrecy. Instead, the court is required to trust the executive branch’s disclosures. So, although the court goes through the motions, it would have a difficult time finding a basis on which to disagree with the government’s assertion of the privilege.

The Ninth Circuit, after acknowledging its handicap in such cases, suggested that other branches of government may share in the responsibility to provide justice.\(^\text{251}\) Indeed, the court made a plea to the executive and legislative branches to consider remedial actions where appropriate:

> First, that the judicial branch may have deferred to the executive branch’s claim of privilege in the interest of national security does not preclude the government from honoring the fundamental principles of justice. The government, having access to the secret information, can determine whether plaintiffs’ claims have merit and whether misjudgments or mistakes were made that violated plaintiffs’ human rights. Should that be the case, the government may be able to find ways to remedy such alleged harms while still maintaining the secrecy national security demands . . . .

> Second, Congress has the authority to investigate alleged wrongdoing and restrain excesses by the executive branch . . . .

> Third, Congress also has the power to enact private bills . . . . When national security interests deny alleged victims of wrongful governmental action meaningful access to a judicial forum, private bills may be an appropriate alternative remedy.

\(^{250}\) Id. at 1092-93.

\(^{251}\) Id. at 1091-92.

\(^{252}\) Id.
Fourth, Congress has the authority to enact remedial legislation authorizing appropriate causes of action and procedures to address claims like those presented here. When the state secrets doctrine ‘compels the subordination of appellants’ interest in the pursuit of their claims to the executive’s duty to preserve our national security, this means that remedies for . . . violations that cannot be proven under existing legal standards, if there are to be such remedies, must be provided by Congress. That is where the government’s power to remedy wrongs is ultimately reposed.\textsuperscript{253}

These suggestions indicate that the Ninth Circuit believes Congress and the executive may share some aspects of controlling fallout from the state secrets privilege. The Ninth Circuit indicated that the executive may independently and privately redress any wrong it has committed. Alternatively, Congress may provide a remedy at law to the plaintiffs or may check the executive branch’s use of the privilege through investigative proceedings.

In its fourth suggestion, the Ninth Circuit quoted \textit{Halkin v. Helms}, a state secrets case involving Vietnam-era wiretapping and other surveillance.\textsuperscript{254} Hawkins stated that “the Constitution compels the subordination of appellants' interest in the pursuit of their claims to the executive's duty to preserve our national security . . . .”\textsuperscript{255} The Ninth Circuit, in \textit{Jeppesen Dataplan}, altered the language to state that “the state secrets doctrine compels the subordination of appellants’ interest in the pursuit of their claims to the executive’s duty to preserve our national security.”\textsuperscript{256}

This change, in the context of the public internal debate over the roots of the privilege, signifies a willingness on the part of the Ninth Circuit to entertain the idea that Congress may have authority to define allowable uses of the privilege. The court did not, however, go so far as to state directly that Congress has the authority to enact legislation requiring the executive branch to disclose secret information. It merely reasoned that Congress has the power to create new

\textsuperscript{253} \textit{Id.} at 1092 (quoting Halkin v. Helms, 690 F.2d 977, 1001 (D.C. Cir. 1982)).

\textsuperscript{254} \textit{Halkin}, 690 F.2d at 977.

\textsuperscript{255} \textit{Id.} at 1001 (emphasis added).

\textsuperscript{256} \textit{Jeppesen Dataplan}, 614 F.3d at 1092 (internal quotation marks and citation omitted).
legal standards that enable courts to redress new categories of wrongs.

D. Case #3: Arar v. Ashcroft\(^{257}\)

The Second Circuit released its en banc opinion in November 2009, after three years of litigation.\(^{258}\) In his complaint, Arar claims he was

detained while changing planes at Kennedy Airport in New York (based on a warning from Canadian authorities that he was a member of Al Qaeda), mistreated for twelve days while in United States custody, and then removed to Syria via Jordan pursuant to an inter-governmental understanding that he would be detained and interrogated under torture by Syrian officials.\(^{259}\)

He sued the Attorney General, the Secretary of Homeland Security, the Director of the Federal Bureau of Investigation (“FBI”), and “others, including senior immigration officials”\(^{260}\) pursuant to the Torture Victims Protection Act (“TVPA”) alleging substantive due process rights violations related to “the conditions of his detention in the United States, the denial of his access to counsel and to the courts while in the United States, and his detention and torture in Syria.”\(^{261}\) After more than a year in Syria, the Canadian Embassy contacted Syria to determine Arar’s whereabouts.\(^{262}\) He was visited by Canadian consular officials, to whom he alleged that he had been tortured.\(^{263}\) After signing a confession admitting to being trained in a terrorist training camp, Arar was released to Canada.\(^{264}\)

The Canadian Broadcasting Company (“CBC”) reported that the Canadian government’s judicial inquiry into the case concluded that “Arar had no links to terrorist organizations or militants. [The judge] also concluded the

\(^{257}\) 585 F.3d 559, 559 (2d. Cir. 2009), cert. denied, 130 S. Ct. 3409 (2010).
\(^{258}\) Id.
\(^{259}\) Id at 563.
\(^{260}\) Id.
\(^{261}\) Id.
\(^{262}\) Id. at 566.
\(^{263}\) Id.
\(^{264}\) Id. at 566-67.
[Royal Canadian Mounted Police] had given misleading information to U.S. authorities, which may have been the reason he was sent to Syria.\[265\] This led the Ottawa government to reach a $10 million settlement with Arar.\[266\]

Arar sued the United States under a theory of Bivens liability.\[267\] The Court held that the Bivens-type remedy was not allowable because “special factors” necessitate hesitation on the part of the court when determining liability.\[268\] “The extraordinary rendition context involves exchanges among the ministries and agencies of foreign countries on diplomatic, security, and intelligence issues. The sensitivities of such classified material are ‘too obvious to call for enlarged discussion.’”\[269\] The court reasoned that “[e]ven the probing of these matters entails the risk that other countries will become less willing to cooperate with the United States in sharing intelligence resources to counter terrorism.”\[270\] Indeed, further probing would require the court “to consider what was done by the national security apparatus of at least three foreign countries, as well as that of the United States.”\[271\] Canada, which remains one of the three foreign countries allegedly involved, has “asserted the need for Canada itself to maintain the confidentiality of certain classified materials related to

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\[266\] Id.

\[267\] Arar, 585 F.3d at 563 (citing Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971)). The court reasoned that “[t]o decide the Bivens issue, we must determine whether Arar’s claims invoke Bivens in a new context; and, if so, whether an alternative remedial scheme was available to Arar, or whether (in the absence of affirmative action by Congress) ‘special factors counsel[] hesitation.’ This opinion holds that ‘extraordinary rendition’ is a context new to Bivens claims, but avoids any categorical ruling on alternative remedies—because the dominant holding of this opinion is that, in the context of extraordinary rendition, hesitation is warranted by special factors.” Id. (internal citations and quotation marks omitted).

\[268\] Id. at 565.

\[269\] Id. at 576 (quoting Dep’t of Navy v. Egan, 484 U.S. 518, 529 (1988)).

\[270\] Id.

\[271\] Id.
Arar’s claims” despite its payout of settlement money to Arar.\(^{272}\)

The courts in \textit{Arar, El-Masri, and Jeppesen Dataplan} all indicated a willingness to dismiss extraordinary rendition lawsuits—all stating gravely serious claims—on executive branch arguments that disclosure of information would jeopardize relationships between the United States and foreign governments or other organizations, would expose sources and methods of intelligence-gathering, and would reveal the names of cooperators. The Ninth Circuit in \textit{Jeppesen Dataplan} remains the only circuit court to reverse a district court decision on state secrets grounds in an extraordinary rendition case; and, the Ninth Circuit has allowed an en banc hearing to reconsider that decision.

This behavior by the courts suggests that the judiciary may not believe they have the competence to stand against the executive branch on a national security claim. Although the judiciary can make a somewhat informed decision by considering the confidential submissions required from the government,\(^{273}\) the executive agency is only presenting its side of the story and has an incentive to make its case as strongly as possible. Therefore, it remains unlikely the judge has all the necessary contextual information required to make a determination of the likelihood or extent of harm that could be caused by disclosure.

Additionally, exploration of these cases would undoubtedly put the policies behind United States foreign relationships, intelligence gathering, and law enforcement on trial. The judiciary tends to avoid uncomfortable separation of powers issues by arguing that it must avoid policy-making. Furthermore, the realms of foreign policy and United States relationship-building rely on the constitutional authority of the executive branch. Therefore, the judiciary may lack the authority, in this specific context,


\(^{273}\) According to \textit{United States v. Reynolds}, 345 U.S. 1 (1952), the government must submit a document explaining in detail the information sought to be protected. \textit{See supra} Part I.B. In \textit{Arar, El-Masri, and Jeppesen Dataplan}, the government submitted a confidential document to the judge and a non-confidential summary to the opposing party.
to require the disclosure of documents. Cases like *Nixon*[^274] which deal only with domestic legal issues, leave the judiciary more room to make demands on the executive.

### IV. Secrecy and Democracy

The executive branch’s national security justification presumes that the government has a primary responsibility to protect the citizenry from whatever ills may come from the disclosure of information. The arguments for secrecy—maintenance and promotion of cooperative relationships with foreign governments and businesses and the protection of vulnerable internal government processes—play on the idea that secrecy protects democracy.

Some commentators, however, imply that secret-keeping may be antithetical to democratic processes. For example, an unsigned 1972 Harvard Law Review article claims that secrecy has “important implications for the functioning of our democratic system of government—a political system which presupposes the existence of a knowledgeable electorate and Congress.”[^275] The article argues that effective democracy relies on disclosure, not secrecy. For instance, the article argues that “[t]he political controversy over the Vietnam war has raised the question of whether the public and Congress receive enough information about defense and foreign policy matters to be able to influence policy decisions and to exercise an effective external check on the power of the executive.”[^276] The article expresses no doubt, however, of the “constitutional necessity” for certain executive secrets, the disclosure of which would “unduly interfere with the functioning of the executive branch.”[^277]

With these constitutional concerns in mind, the article argues that the separation of powers doctrine “does not require, and may indeed preclude, any deference to the executive which goes beyond permitting the executive to protect specific types of information where disclosure would

[^276]: Id.
[^277]: Id. at 1218.
unduly interfere with the performance of its duties.\textsuperscript{278} These duties include, specifically, the prevention of “disclosures that could deter free debate within the executive branch or could provide sensitive information to an enemy.”\textsuperscript{279} The extraordinary rendition cases, according to the courts, present this very type of information.\textsuperscript{280} Indeed, courts will insist on protections from disclosures of methods and sources of intelligence, internal agency personnel decisions, and secret agreements and contracts with other governments, persons and entities.\textsuperscript{281}

New York University professor J.H.H. Weiler argues that the legitimacy of law relies on democracy by stating that “obedience [of citizens] to the law . . . can neither be claimed, nor justified, if the laws in question did not emanate from a legal system embedded in some form of democracy.”\textsuperscript{282} Seattle University law professor Mark A. Chinen discusses Weiler’s claim by asking whether the idea of secrecy is inherently democratic or undemocratic, concluding that secrecy may in some cases aid democracy, but that the argument for justifying certain intelligence secrets is “untenable.”\textsuperscript{283} On one hand, “secrecy can be inimical to democracy both as a means of achieving meaningful consent and as a process through which a polity makes community decisions.”\textsuperscript{284} On the other hand, there are several reasons why secrecy may aid democracy. “First, . . . secrecy can be used to combat coercion. Oppressed groups often need secrecy to strengthen group cohesion and to allow for mobilization for action. The very act of forming democratic constitutions has required secrecy.”\textsuperscript{285} Also, “if

\textsuperscript{278} Id. at 1219.

\textsuperscript{279} Id.

\textsuperscript{280} See e.g., Mohamed v. Jeppesen Dataplan, Inc., 614 F.3d 1070 (9th Cir. 2010); Arar v. Ashcroft, 585 F.3d 559 (2d. Cir. 2009), cert. denied, 130 S. Ct. 3409 (2010); El-Masri v. United States, 479 F.3d 296 (4th Cir. 2007).

\textsuperscript{281} See generally Jeppesen Dataplan, 614 F.3d at 1070; Arar, 585 F.3d at 559; El-Masri, 479 F.3d at 296.


\textsuperscript{283} Mark A. Chinen, Secrecy and Democratic Decisions, 27 QUINNIPIAC L. REV. 1, 3-4, 52-53 (2009).

\textsuperscript{284} Id. at 8.

\textsuperscript{285} Id. at 8-9.
meaningful consent depends on a government providing its citizenry with accurate assessments of states of the world, what happens if the flow of information needed for such accuracy dries up because the sources and methods enabling that flow are disclosed and thereby evaded?  

The author then explains that “democracy requires publicity to hold leaders accountable for their policy decisions, yet ‘some policies and processes, if they were made public, could not be carried out as effectively or at all.”  

After discussing secrecy in general, the article entertains an analysis of reasons behind national security secrecy, including what Richard Posner calls the “embarrassment factor”—“that intelligence gathering, if disclosed, will jeopardize foreign relations.”  

Also, intelligence information is vulnerable to countermeasures, if known.  

In his conclusion, the author argues that “it is entirely appropriate to subject the argument for secrecy to very high scrutiny when our representatives consider decisions of national moment, or when the judiciary is being asked to determine whether government is obeying the law.”  

However, the outcome of the secrecy debate “depends on whether citizens wish to enter the debate in the first place.”  

We have built-in processes in this country, like the electoral process and the constitutional amendment process, which allow citizens to rearrange government representatives or institute changes in government powers. However, if citizens do not engage in such collective action for change, it is possible that we can infer that (a) the citizenry does not desire to make such a change or (b) our democratic institutions have failed.

286. Id. at 9.  
287. Id. at 10 (quoting Dennis F. Thompson, Democratic Secrecy, 114 Pol. Sci. Q. 181, 182 (1991)).  
288. Id. at 14.  
289. Id. at 14, 17.  
290. Id. at 53.  
291. Id.  
292. For a detailed discussion of citizen engagement driving in substantial government changes, see generally Bruce Ackerman, I We the People (1993).
A careful reading of the extraordinary rendition cases reveal that courts have accepted the executive branch argument that the secrets kept were of the type that could cause embarrassment to our foreign and business cooperators, and would leave the executive branch processes vulnerable to countermeasures. The three articles on democracy discussed above imply that these concerns, while legitimate on their face, would lose legitimacy in the face of blatant opposition from the citizenry, but may gain legitimacy if the citizenry does not rise up in arms to demand a change.

At this time in the United States, the citizens have not risen up in arms against purported executive abuses of the privilege. Rather, the jockeying between the congressional and executive branches appears to be an internal tactical struggle over the rights to power and control. The electorate, for its part, did recently elect President Obama, who promised he would reign in the privilege. To carry through with that promise, President Obama created a new policy to safeguard abuses by funneling all state secret claims through the Department of Justice for approval. This policy arguably responded adequately to demands from the citizenry. Although it is not the only possible response, and may not be the quickest response, the political process remains one of our strongest safeguards against abuse. Even if the citizenry did rise up in arms against the policy of a particular executive, this disapproval would not create a right for Congress to take the reigns and rewrite the policy. Rather, it may create momentum for a changing of the guard.

The state secrets privilege, especially as it relates to conflicts in the foreign policy arena, interplays with the core functions of the executive branch. As it stands, the executive defines and controls the state secrets privilege. The judiciary assesses the application of that privilege. Based on recent political events in the United States, it does not appear that the current approach taken by the judiciary—to give extreme deference to the executive in protecting information that may create external conflicts—runs counter to the needs or desires of the citizenry. Democracy is a constant balance between the rights of the

293. See supra notes 51-53 and accompanying text.
many and of the few. In some cases, as here, the rights of the many will overcome the rights of the few. The judiciary remains best poised to weigh those rights without being constrained by bright line rules that fail to account for the nuances necessary to provide national protection while preventing blatant abuse.

CONCLUSION

Although it was hoped that such matters would never need to be discussed in this country, when such discussion arises we must apply a flexible rule of law and entrust the application of that law to the branch of government with the least incentive to skew its position for political or personal gain. The judiciary remains the branch most likely to interpret the privilege in a way that considers the separation of powers and national security concerns, while respecting the individual rights articulated in the Constitution. The judiciary does not drastically change its views based on election cycles; therefore, it has the unique capability to maintain consistency in interpretation and application of the law. Furthermore, the judicial branch approach does not create a power imbalance. Both the congressional and executive approaches will necessitate an extreme response from the opposing side and escalate the internal conflict surrounding the privilege.

The congressional approach, which mandates judicial review of all secret information, risks unnecessary disclosure, erects unnecessary barriers (e.g., requiring all attorneys to carry appropriate security clearances), and creates closed-door court proceedings which undercut the transparency necessary to ensure neutral decision making. This approach is especially inappropriate for cases which involve external foreign stakeholders, because Congress lacks the authority to substantively govern these areas. Therefore, the congressional view violates the separation of powers doctrine by undercutting core functions of the executive branch.

The executive argument for absolute control of the privilege leaves room for abuse and creates an unchecked imbalance of power. However, unlike the extreme imbalance posed by the congressional approach, the executive approach carries only a slight imbalance. It can be remedied by the subtle hand of the judiciary, but would be far overcompensated by the blind pounding fist of Congress. In
cases involving external conflicts, the executive claim becomes even stronger, requiring the greatest possible deference by the judiciary. Only in rare circumstances would the judiciary need to intervene.

As the extraordinary rendition cases reveal, a judge’s ability to analyze a state secrets claim remains limited because a judge does not have the time, access, or competency to look at all relevant information in context. First, even if the executive branch turns over all directly relevant information, the judge may not have access to the tangentially relevant information necessary to make a fully informed decision. Since the executive branch decides what information to turn over, a judge may not know he or she is missing key information. Second, the full scope of information necessary to make decisions may be too voluminous to review in detail. Third, even if a judge has access to all necessary information, the judge must view that information outside of the context of the programs and processes the information was created to support or protect. With respect to requiring the disclosure of information related to United States foreign relations, intelligence sources and methods, and the safety and security of United States personnel and cooperators, the federal courts are hamstrung by their inability to consider the entire context of executive decision making.

An analysis of both internal and external conflict situations supports the position that the executive branch is the only branch with the capability and competency to make appropriate decisions with respect to this type of information security. However, the judiciary has a limited responsibility to check executive abuses of this privilege by reviewing the type of information sought to be protected, and, on a case-by-case basis, specific and limited information if necessary.

The judicial approach of giving deference to the executive based on the type of information sought to be protected and reviewing claims on a case-by-case basis remains the most appropriate approach to the privilege. This approach has the capacity to ferret out some abuses, while respecting the separation of powers doctrine and considering national security concerns. For these reasons, and considering the incentives for both the executive and the legislature to take extreme viewpoints in order to isolate control of the privilege, the judiciary remains the best
suited to provide a subtle check on the executive branch as the executive branch defines and controls the privilege.