State Secrets, Open Justice, and the Criss-Crossing Evolution of Privilege in the United States and the United Kingdom

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Abstract:

This essay argues that the state secrets privilege in the United States and the corresponding public interest immunity in the United Kingdom have evolved in exactly the opposite directions. Thus in the United States, the state secret privilege has evolved from a common law privilege that allowed for meaningful judicial review to a potentially sweeping privilege that crowds out any consideration of the plaintiff’s interests in access. But in the United Kingdom, public interest immunity evolved from a robust immunity with no meaningful judicial review to a much weaker immunity with significant judicial oversight and consideration of the plaintiff’s interest in access to justice.

This essay compares the contemporary application of the two privileges directly, by examining how courts treated the privileges in two very similar cases—Binyam Mohamed’s cases in both countries arising out of his extraordinary rendition and torture.
STATE SECRETS, OPEN JUSTICE, AND THE CRISS-CROSSING EVOLUTION OF PRIVILEGE IN THE UNITED STATES AND THE UNITED KINGDOM

By

Steven D. Schwinn*

Résumé

Cet article tend à démontrer que le privilège du secret d'État aux États-Unis et l'immunité dans l'intérêt public au Royaume-Uni ont évolué dans des directions complètement opposées. En effet le privilège du secret d'État aux États-Unis a évolué d'un privilège de droit commun, qui autorisait un véritable contrôle judiciaire jusqu'à un privilège potentiellement abusif qui balaye toute considération pour les intérêts des plaintants. Dans le même temps, l'immunité dans l'intérêt public au Royaume-Uni a évolué d'une immunité solide, sans contrôle judiciaire réel, jusqu'à une immunité diminuée avec une surveillance judiciaire significative et une prise en compte des intérêts des plaintants dans leur accès à la justice.

Summary

This essay argues that the state secrets privilege in the United States and public interest immunity in the United Kingdom have evolved in exactly the opposite direction. Thus the United States state secret privilege has evolved from a common law privilege that allowed for meaningful judicial review, to a potentially sweeping privilege that crowds out any consideration of the plaintiff's interests in access. At the same time, public interest immunity in the United Kingdom evolved from a robust immunity with no meaningful judicial review to a much weaker immunity with significant judicial oversight and consideration of the plaintiff's interest in access to justice.

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INTRODUCTION

The state secrets privilege in the United States and public interest immunity in the United Kingdom are both designed to protect sensitive national security evidence from disclosure in the courts. Under both doctrines, the government may assert a claim of privilege over certain evidence that may contain or reveal state secrets, military secrets, national security secrets, and the like, and thus jeopardize national security. The court, upon a claim of privilege, then assesses the claim and either allows or suppresses the contested evidence. If the court suppresses the evidence, it determines whether and how the case might move forward based on other evidence.

While the state secrets privilege in the US and public interest immunity in the UK share these very basic features – and while they share common roots in the common law of evidence – their similarities end there. From their origins, the US and the UK have treated their privileges dramatically differently, and the evolution of the two privileges up through the post-9/11 cases have moved in exactly the opposite direction.

Thus in the US the state secrets privilege began as a common law evidentiary privilege that featured an active role for the courts in assessing claims of privilege and contemplated a balance in certain cases between the government's interest in the privilege and the plaintiff's interest in the contested evidence. But the state secrets privilege strengthened with time, and today the robust privilege crowds out both the judicial role in assessing claims of privilege and any consideration of the plaintiff's interest in the contested evidence (and thus the plaintiff's interest in open justice, or access to justice).1

The evolution of public interest immunity in the UK evolved just the opposite. Thus public interest immunity (then called the Crown privilege) started as a robust immunity that allowed for little or no meaningful judicial review and did not seriously account for the plaintiff's interest in open justice. It weakened with time, and today the courts play an active, probing role in evaluating claims of immunity and carefully balance the government's interest against the plaintiff's significant, weighty, and individual interest in open justice.

This essay aims to trace the criss-crossing evolution of the two privileges and to show how the sweeping contemporary state secrets privilege is seriously out-of-step with its putative cousin, public interest immunity. The essay thus traces the evolution of the two privileges from their origins through their modern, post-9/11 incarnations and concludes that they have evolved in exactly the opposite direction.

The comparison suggests that the US courts and Congress would do well to take a page from the approach in the UK as they craft the next stage in the evolution of the state secrets privilege. But any serious argument on this point is well beyond the scope of this modest essay and therefore will have to wait for another day.2

1 I adopt the UK Court of Appeal's phrase "open justice" from Mohamed v. Secretary of State for Foreign and Commonwealth Affairs, WLR, vol.3, 2010, p.554, discussed below, and use it to encompass access to the judiciary and the interest or right in an effective remedy.

2 For one argument on this point, see SETTY (S.), "Litigating Secrets: Comparative Perspectives on the State Secrets Privilege", Brook. L. Rev., vol.75, 2009, p.201.
II - EVOLUTION

1. Origins

The privileges in the United States and in the United Kingdom share common origins. But the original approaches were vastly different. The original states secrets privilege in the United States applied in one of two ways: first, as an absolute bar to litigation in a class of cases that by their very nature involved state secrets; and second, as a common law evidentiary privilege that courts applied like any other evidentiary privilege and, even if successfully invoked, could permit a case to move forward on other evidence. Under both applications, the courts played a significant role in evaluating the claim of privilege; in the second application, the courts seriously considered the plaintiff's need for the evidence (and thus the plaintiff's interest in open justice).

In contrast, the Crown privilege in the UK left almost no role for the courts. Instead, courts deferred to the government. Moreover, the Crown privilege allowed no consideration of the plaintiff's interest or open justice principles.

This section briefly surveys the original cases in each jurisdiction.

1.1. United States

The state secrets privilege in the United States traces its origins to two Supreme Court cases, Totten v. United States (1875) and United States v. Reynolds (1953).

In Totten, the Supreme Court rejected a claim against President Lincoln arising out of a secret spy contract during the Civil War. The plaintiff in the case, William A. Lloyd, contracted with President Lincoln "to proceed South and ascertain the number of troops stationed at different points in the insurrectionary States, procure plans of forts and fortifications, and gain such other information as might be beneficial […] and report the facts to the President […]". In exchange for these services, Lloyd was to be paid $200 per month. Lloyd claimed that President Lincoln failed to pay him under the agreement.

The Supreme Court affirmed the dismissal of the case on the pleadings. It ruled that secret contracts by their nature required confidentiality on the part of both parties – that "[b]oth employer and agent must have understood that the lips of the other were to be for ever sealed respecting the relation of either to the matter." Revealing these contracts, through litigation or otherwise, could "compromise or
embarrass our government in its public duties, or endanger the person or injure the character of the agent.” Wartime contracts and contracts related to foreign policy only heighten these concerns. Moreover, the Court ruled that if it were to allow suits based on secret contracts, it would encourage contractors like Lloyd to seek more compensation or other benefits from the government in exchange for not suing. The Court later called this threat “graymail.” Finally, Lloyd, by bringing a breach-of-contract claim in court, violated the confidentiality that the contract required, thus necessarily defeating his own claim.

The Court dismissed Totten’s case on these "public policy" considerations alone, without citing a single case or other legal authority. It aligned its new principle, the "Totten bar," with common law privileges respecting communications between clergy and parishioner, husband and wife, client and counsel, and patient and doctor, underscoring the Totten bar's roots in the common law of evidence.

In Reynolds the Supreme Court ruled that an official government accident investigation report was protected against discovery because it contained military secrets. Reynolds involved a negligence claim against the US government by widows of civilians killed in the crash of an Air Force B-29 airplane. The plaintiffs sought the investigation report through discovery, but the government balked, claiming the airplane was engaged in a test of secret electronic equipment and that the investigation report contained military secrets. The Court agreed with the government and suppressed the investigation report.

The Court suppressed the report based on a "well established" evidentiary privilege that protected military secrets. The Court ruled that the privilege derived from Totten, among other sources. But the Court ruled that it was merely an evidentiary privilege, and not a constitutional principle.

The Court ruled that the privilege belonged to the government and could be asserted in court by a formal claim by the head of a department with control over the matter and after personal consideration. But the Court also reserved a robust role

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Footnote 9 of the opinion, which some use as evidence that the Court rooted the privilege in constitutional separation-of-powers principles, is not to the contrary. That footnote merely restates the government's argument that the privilege enjoys constitutional status. Ibid. p.531, n.9 ("It is said that [law authorizing the government to assert the privilege] is only a legislative recognition of an inherent executive power which is protected in the constitutional system of separation of powers."). Nothing in the Court's ruling roots the privilege in constitutional principles.

Ibid., p.532.
for the judiciary in assessing these claims. In particular, the Court ruled that judges should balance the claim of privilege against a plaintiff's need for the evidence: "In each case, the showing of necessity which is made will determine how far the court should probe in satisfying itself that the occasion for invoking the privilege is appropriate. 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." 

The Court ruled that the widow's need for the information here was minimized. It ruled that the government offered to produce three surviving crew members for interviews (in lieu of the investigation report), and the widows therefore had alternative sources for the information they sought. Because the government properly lodged its claim of privilege, and because the plaintiffs' need for the evidence was "dubious", the Court suppressed the evidence and remanded the case to the trial court for further proceedings without the protected evidence.

Thus the original privileges in the United States, the Totten bar and the Reynolds privilege, were common law evidentiary privileges (and not constitutional principles) which left ample room for evaluation by the courts. Moreover, the Reynolds privilege covered evidence, not information, and allowed a case to proceed if a plaintiff could prove his or her case even without the privileged evidence. (The Totten bar was only a special instance of this principle: it required dismissal on the pleadings only in those narrow cases in which a plaintiff could not prove his or her case with any evidence.) Most importantly, the Reynolds privilege involved a careful balancing of a plaintiff's need for the contested evidence and thus his or her interest in open justice.

1.2. United Kingdom

The modern privilege in the United Kingdom traces its origin to Duncan v. Cammell, Laird & Co. (1942). In that case, plaintiffs sued for damages after a submarine, which was built by the defendants under contract with the Admiralty, sank while engaged in a trial dive in Liverpool Bay. The Treasury Solicitor invoked the Crown privilege, arguing that "it would be injurious to the public interest that any of the said documents should be disclosed to any person."

The Law Lords first noted that when the government is a party to a suit, it cannot be compelled to produce discovery evidence at all: "When the Crown (which for this purpose must be taken to include a government department, or a minister of the Crown in his official capacity) is a party to a suit, it cannot be required to give discovery of documents at all. No special ground of

20 Ibid., p.533 ("Judicial control over the evidence in a case cannot be abdicated to the caprice of executive officers.").
21 Ibid., p.533.
22 Ibid., p.534.
23 Ibid., p.533.
24 Ibid., p.534.
26 Ibid., p.626.
objection is needed. The common law principle is well established [...]. In Attorney-General v. Newcastle-upon-Tyne Corporation, Rigby L.J. said: "The law is that the Crown is entitled to full discovery, and that the subjects as against the Crown is not. That is a prerogative of the Crown, part of the law of England, and we must administer it as we find it." [...] Where the Crown is a part to a suit, therefore, discovery of documents cannot be demanded from it as a right [...]."

In practice, however, "for reasons of fairness and in the interests of justice," the Court noted, "all proper disclosure and production would be made."

The Law Lords went on to explain how the privilege applied in private cases, like Duncan. The court wrote that the government could invoke the privilege on the pleadings or in response to a subpoena. Either way, the judge's role in evaluating the invocation was quite limited and highly deferential to the government's judgment that release of the evidence would harm the public interest: "It appears to us, therefore, that the question, whether the production of the documents would be injurious to the public service, must be determined, not by the judge but by the head of the department having custody of the paper; and if he is in attendance and states that in his opinion the production of the document would be injurious to the public service, we think the judge ought not to compel the production of it."

The court ruled that the government, not judges, were in the best position to evaluate the public interest and that close judicial review would necessarily involve ex parte communications between the judge and the government (presumably because the plaintiff would not have access to the evidence, even to argue its admissibility, until the judge ruled on the privilege).

At the same time, the Law Lords ruled that the plaintiff's interest in the evidence was immaterial, because the public interest always trumped the private interest. The language is worth quoting at length: "When these conditions are satisfied and the minister feels it is his duty to deny access to material which would otherwise be available, there is no question but that the public interest must be preferred to any private consideration. [...] After all, the public interest is also the interest of every subject of the realm, and while, in these exceptional cases, the private citizen may seem to be denied what is to his immediate advantage, he, like the rest of us, would suffer if the needs of protecting the interests of the country as a whole were not ranked as a prior obligation."

Thus Duncan represented a far more robust privilege than Reynolds, even as both cases contemplated the privilege applying to evidence at both the pleading stage and through discovery and trial. First, Reynolds identified an important role for

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27 Ibid., pp.623-633.
28 Ibid., p.633.
29 Ibid., p.637.
30 Ibid., p.639.
31 Ibid., pp.639-641. The court nevertheless recognized that the final decision belonged to the judge. Ibid., p.642 ("Although an objection validly taken to production, on the ground that this would be injurious to the public interest, is conclusive, it is important to remember that the decision ruling out such documents is the decision of the judge").
32 Ibid., pp.642-643.
the courts in evaluating the government's invocation of the privilege, while Duncan left almost no room for judicial review. Under Reynolds, for example, courts could review supporting affidavits and even the contested evidence in camera to make an independent determination whether it involved a state secret. Under Duncan, in contrast, judges could not conduct an independent assessment; instead, they must defer to the government.

Second, Reynolds requires a serious consideration of the plaintiff's need for the evidence, even if that need might ultimately yield to the privilege. Duncan, however, allows for no consideration of the plaintiff's interests; those interests are subsumed by the broader public interest claimed by the government and accepted as a matter of course by the court.

2. Evolution

The privileges evolved in different directions in the two jurisdictions. Thus in the United States, the state secrets privilege became stronger, crowding out the role of the judiciary in evaluating the claim of privilege and crowding out serious consideration of the plaintiff's need for the contested evidence and thus his or her interests in open justice. In contrast, the Crown privilege, now called public interest immunity, became weaker (in fits and starts), ultimately allowing a greater role for the judiciary in evaluating claims and balancing the immunity against the interest in administration of justice. (This latter interest is a variation on the more individual interest in open justice.)

This section briefly surveys the evolution in the two jurisdictions.

2.1. United States

After Reynolds, some lower courts applied the Reynolds privilege as it was designed — as a common law evidentiary privilege that could suppress certain evidence, but might allow a case to move forward nonetheless. Most notably, a line of cases from the DC Circuit shared these characteristics: they applied the privilege to individual contested pieces of evidence; they seriously considered the plaintiffs' need for the evidence; they gave meaningful scrutiny to the government's claim of privilege; and they gave serious consideration to alternative ways the plaintiffs might prove their cases. In short, these cases treated the common law evidentiary state secrets privilege just as any other common law evidentiary privilege.

But at the same time, the privilege evolved in other courts in two critical ways. First, the Supreme Court expanded the Totten bar beyond the narrow class of breach-of-contract claims on spy contracts. Thus the Court ruled in Weinberger v. Catholic Action of Hawaii/Peace Education Project (1981) that the Totten bar

33 See In re Sealed Case, 494 F.3d 139 (DC Cir. 2007); In re United States, 872 F.2d 472 (DC Cir. 1989); Molerio v. FBI, 749 F.2d 815 (DC Cir. 1984); Ellsberg v. Mitchell, 709 F.2d 51 (DC Cir. 1983); Halkin v. Helms (Halkin II), 690 F.2d 977 (DC Cir. 1982); Halkin v. Helms (Halkin I), 598 F.2d 1 (DC Cir. 1978).
required dismissal of a case involving broader military secrets. In Weinberger the plaintiffs sued to compel the Navy to prepare to an environmental impact statement in connection with the Navy's alleged plans to store nuclear weapons at a facility in Hawaii. Navy regulations prohibited the Navy from either admitting or denying that it stored nuclear weapons at the facility. The Supreme Court thus dismissed the case under the Totten bar, thus applying the bar beyond the facts of Totten – to any case in which "the very subject matter of the action" is a state secret.

Second, many lower courts blurred the lines between the Totten bar and the Reynolds privilege, treating the state secrets privilege more like a justiciability doctrine than an evidentiary privilege. The government in these cases moved to dismiss on the pleadings, arguing that the very subject matter of the suit was a state secret, or that the state secrets privilege barred certain evidence that a plaintiff needed to establish a prima facie case, or both. Courts dismissed these cases on the pleadings, gave little or no consideration to the plaintiffs’ need for the challenged evidence or their interests in open justice, and gave little or no consideration to how the plaintiffs might proceed with their case without the challenged evidence.

Farnsworth Cannon, Inc. v. Grimes (1980) provides a good example. In that case the plaintiff, a defense contractor, alleged that Grimes, a Navy employee, wrongfully interfered with its prospective contractual relations with the Navy. Grimes moved to dismiss the complaint, claiming that essential elements of the plaintiff's claim and of his defense would require probing into military and state secrets. The trial court granted the motion; the judge stated, "I don't see how the plaintiff's case can possibly go forward without going into those matters covered by the military and state secrets privilege." After reviewing an affidavit supporting the invocation of the privilege by the Secretary of the Navy, the en banc Fourth Circuit affirmed, holding that "any attempt on the part of the plaintiff to establish a prima facie case would so threaten disclosure of state secrets that the overriding interest of the United States and the preservation of its state secrets precludes any further attempt to pursue this litigation."

The approach in Grimes, followed in a line of subsequent cases, fused (or confused) the Totten bar and the Reynolds privilege, resulting in the dismissal of

34 Weinberger v. Catholic Action of Hawaii/Peace Education Project, 454 US 139 (1981); see also Tenet v. Doe, op. cit. (characterizing Weinberger as a case applying the Totten bar).
36 Ibid., p.141.
37 Ibid., pp.146-47 ("In other circumstances, we have held that 'public policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential, and respecting which it will not allow the confidence to be violated.'") (quoting Totten, op. cit., p.107).
40 Ibid., pp.269-270.
41 Ibid., p.270.
42 Ibid., p.271.
43 See, e.g., Fitzgerald v. Penthouse International, Ltd., 776 F.2d 1236 (4th Cir. 1985) (dismissing a libel case based on the government's assertion of the state secrets privilege over a plaintiff's witness); Bareford v. General Dynamics Corp., 973 F.2d 1138 (5th Cir. 1992) (dismissing a private tort suit on the pleadings based on the government's assertion of the privilege); Black v. United States, 62 F.3d
entire cases, often on the pleadings alone, based on the government's assertion that any probing would risk revealing state secrets. These courts gave little or no consideration to the plaintiffs' need for the evidence or their interests in open justice, and they gave little or no consideration to how the plaintiffs might proceed with their cases without the challenged evidence. These cases thus treated state secrets less like a common law evidentiary privilege and more like a doctrine of justiciability.

These two innovations – the application of the Totten bar to a case beyond the facts of Totten itself and the fusing of the Totten bar and the Reynolds privilege – marked a significant expansion of the state secrets privilege. Using these innovations, courts increasingly deferred to the government and removed themselves from serious assessment of the government's claim of privilege. At the same time, the expanding privilege crowded out any serious judicial consideration of plaintiffs' need for evidence or their interest in open justice. Because Reynolds contemplated serious roles for judicial review and for consideration of plaintiffs' interests, these innovations expanded the privilege significantly beyond Reynolds and worked to substantially narrow, or even eliminate, judicial consideration and balancing of plaintiffs' interests the contested evidence and thus in open justice.

2.2. United Kingdom

While the state secrets privilege expanded in US courts after Reynolds, and while judicial consideration of open justice principles narrowed, the Crown privilege in the UK moved in exactly the opposite direction. This change in UK practice has been attributed to the "alarm" in the courts "by the extent to which access to evidence was being blocked by ministers of the Crown on grounds of privilege and by their own inability to exercise supervision over the validity of claims to Crown privilege." ZUCKERMAN (A.A.S.), "Public Interest Immunity – A Matter of Prime Judicial Responsibility", Modern L. Rev., vol.57, 1994, p.707.

The watershed case was Conway v. Rimmer (1968). The plaintiff in that case, a former probationary police constable, brought suit against his former superintendent for malicious prosecution. The Secretary of State for Home Affairs objected to the release of certain documents in the defendant's possession on the ground that they would be injurious to the public interest. The Law Lords rejected the Secretary's claim. The court ruled that judges must play a much more active role in evaluating the government's claim of privilege, and that they must balance the government's claimed public interest against the competing public interest in administration of justice.

1115 (8th Cir. 1995) (dismissing a defense contractor employee's suit on the pleadings based on the privilege); Kasza v. Bronner, 133 F.3d 1159 (8th Cir. 1996) (granting full summary judgment after the government asserted the privilege in response to the plaintiff's discovery request).

One commentator attributes the change to the "alarm" in the courts "by the extent to which access to evidence was being blocked by ministers of the Crown on grounds of privilege and by their own inability to exercise supervision over the validity of claims to Crown privilege." ZUCKERMAN (A.A.S.), "Public Interest Immunity – A Matter of Prime Judicial Responsibility", Modern L. Rev., vol.57, 1994, p.707.

46 Ibidem.
"It is universally recognised that here there are two kinds of public interest which may clash. There is the public interest that harm shall not be done to the nation or the public service by disclosure of certain documents, and there is the public interest that the administration of justice shall not be frustrated by the withholding of documents which must be produced if justice is to be done. There are many cases where the nature of the injury which would or might be done to the nation or the public service is of so grave a character that no other interest, public or private, can be allowed to prevail over it. With regard to such cases it would be proper to say, as Lord Simon did [in Duncan], that to order production of the document in question would put the interest of the state in jeopardy. But there are many other cases where the possible injury to the public service is much less and there one would think that it would be proper to balance the public interests involved. I do not believe that Lord Simon really meant that the smallest probability of injury to the public service must always outweigh the gravest frustration of the administration of justice".48

While Conway v. Rimmer affirmed the important role of the courts in assessing claims of public interest immunity and the place of the counter-veiling interest in administration of justice, courts were reluctant to assert their full authority.49 Thus, for example, courts deferred to the government in its claims of public interest immunity for documents belonging to a broader class that itself raised public interest concerns, e.g., national security documents.50 Faced with these "class claims", courts declined to assess evidence on a case-by-case basis and instead suppressed the contested evidence based on the government's claim that the contested evidence was part of a broader class that raised public interest problems.51 In effect, the public interest privilege regained the strength it had before Conway v. Rimmer.

Around the same time, the European Court of Human Rights ruled in a line of cases that national security claims that would suppress evidence must be considered alongside a litigant's interest in open justice and the right to an effective

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48 Ibid., p.940; see also ibid., pp.950-951 ("But in this field it is more than ever necessary that in a doubtful case the alleged public interest in concealment should be balanced against the public interest that the administration of justice should not be frustrated. If the Minister, who has no duty to balance these conflicting public interests, says no more than that in his opinion the public interest requires concealment, and if that is to be accepted as conclusive in this field […] it seems to me not only that very serious injustice may be done to the parties, but also that the due administration of justice may be gravely impaired for quite inadequate reasons.").

49 ZUCKERMAN (A.A.S.), op. cit., p.709.


51 Ibidem.

52 FORSYTH (C.), ibid., pp.52-54.
remedy under Article 13 of the European Convention on Human Rights.\textsuperscript{53} In particular, domestic courts had a duty to fashion procedures to address national security concerns while allowing claims to move forward.\textsuperscript{54} This approach balances national security concerns with the interest in administration of justice – particularly, the litigant's interest in open justice and his or her right to an effective remedy – in a way much like that balance in Conway v. Rimmer.

Thus while the state secrets privilege in the United States strengthened and evolved to crowd out both the role of the judiciary in evaluating claims of privilege and the plaintiff's interest in the contested evidence, public interest immunity in the United Kingdom (and the right to an effective remedy at the European Court of Human Rights) expanded the role of the courts and added a balancing interest in the administration of justice.

3. Modern Practice and Post-9/11 Cases

The state secrets privilege in the United States has only gained strength in the post-9/11 era.\textsuperscript{55} The government has more aggressively moved to crowd out any meaningful role for the judiciary (even going so far as to argue that the privilege is rooted in constitutional separation-of-powers principles) and any consideration of the plaintiff's interest in the contested evidence or in open justice principles. Some courts have adopted the government's sweeping claims. In sharp contrast, public interest immunity in the United Kingdom has weakened. In the UK, the courts now play a central role in evaluating claims of immunity, and they give great weight to the counter-veiling individualized interest in open justice (and not just the more abstract interest in administration of justice).

\textsuperscript{53} Article 13 reads as follows: "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

\textsuperscript{54} See, e.g., Chahal v. United Kingdom, 23 EHRR 413, pp.469-471 (1996) ("The Court recognises that the use of confidential material may be unavoidable where national security is at stake. This does not mean, however, that the national authorities can be free from effective control by the domestic courts whenever they choose to assert that national security and terrorism are involved. The Court attaches significance to the fact that, as the intervenors pointed out in connection with Article 13, in Canada a more effective form of judicial control has been developed in cases of this type. This example illustrates that there are techniques which can be employed which both accommodate legitimate security concerns about the nature and sources of intelligence information and yet accord the individual a substantial measure of procedural justice."); Tinnelly & Sons Ltd. & Others and McElduff & Others v. United Kingdom, 27 EHRR 249, p.291 (1998) (stating that national courts can "safeguard national security concerns about the nature and sources of intelligence information and yet accord the individual a substantial degree of procedural justice.").

This section briefly surveys the developments in each jurisdiction, with attention to the case of Binyam Mohamed, a case that courts in both jurisdictions have ruled on, and a case that therefore provides a good comparison of the two modern approaches.

3.1. United States

The US government in the post-9/11 cases has pressed hard for an even greater expansion of the state secrets privilege. It has argued that the courts should dismiss these cases on the pleadings alone, that judges should not aggressively scrutinize the government's assertion of the privilege, and that the plaintiffs' need for evidence has no place in the state secrets analysis. But in the post-9/11 cases, the government has moved one dangerous step further: it has argued that the state secrets privilege is a constitutional separation-of-powers principle.\(^{56}\)

Thus in a line of cases growing out of the government's terrorist surveillance program, or "TSP," which involved data mining and warrantless interception of telephone and electronic communications, the government argued that the courts should defer highly to the government and entirely neglect the plaintiffs' need for the evidence when evaluating an invocation of the state secrets privilege.\(^{57}\) In another line of cases growing out of the government's extraordinary rendition program, which involved the involuntary transportation of terrorist suspects to third countries for torture and other harsh interrogation techniques, the government echoes these arguments and added this significant new claim: the state secrets privilege is rooted in the Constitution.

\(El-Masri v. United States\) (2007) provides a good example. El-Masri claimed that the government and government officials violated international law and his constitutional rights in transporting him to third countries under its extraordinary rendition program.\(^{58}\) The government moved to intervene and to dismiss the case on the pleadings and argued that the very subject matter of the suit was a state secret – that neither the plaintiff nor the government could litigate the case without revealing state secrets.\(^{59}\) The government also argued that the state secrets privilege was rooted in the Constitution:

"While plaintiff describes the state secrets doctrine as merely an "evidentiary" privilege, the assertion of that privilege is of immense importance. It is the means by which the Executive Branch exercises its critical constitutional responsibility to protect secrets of state in the national interest.

Significantly, the Supreme Court has explained that the state secrets privilege is rooted in, and is an aspect of, the powers granted to the President by Article II of the Constitution. United States v. Nixon, 418 US 683, 710 (1974). As a manifestation of the President's Article II powers as "the sole organ of the federal

\(^{56}\) See SCHWINN (S.D.), ibid., pp.819-822.
\(^{57}\) See, e.g., American Civil Liberties Union v. National Security Agency, 493 F.3d 644 (6th Cir. 2007); 
\(^{58}\) Al-Haramain Islamic Foundation, Inc. v. Bush, 507 F.3d 1190 (9th Cir. 2007); Hepting v. AT&T Corp., 439 F. Supp. 2d 974 (ND Cal. 2006).
\(^{59}\) El-Masri v. United States, 479 F.3d 296, 301 (4th Cir. 2007).
\(^{Ibidem}\).
government in the field of international relations," United States v. Curtiss-Wright Export Corp., 229 U.S. 304, 320 (1936) [...] the state secrets privilege has a substantial constitutional basis.

The government contended that because the privilege was rooted in the Constitution, the government could assert it unilaterally, with no meaningful judicial review, and that the plaintiff's need for the evidence and interest in open justice played no role in the court's analysis. Taken together with the government's claim that the state secrets privilege required complete dismissal on the pleadings anytime the subject matter of the suit involved state secrets, the government's constitutional argument meant that it could unilaterally shut down any lawsuit merely by asserting that its very subject matter was a state secret.

The claim was sweeping, novel, and unsupported by law. In particular, nothing in Totten, Reynolds, or Nixon – the principal Supreme Court cases on the point – supported the government's claim. As described more fully above, the Court in both Totten and Reynolds emphasized that the privilege was a common law evidentiary privilege, not a constitutional doctrine. The Court in Reynolds merely mentioned the government's constitutional claim in a footnote, but declined to base the privilege on it. And the Court in Nixon did not even discuss the state secrets privilege, except in passing, as dicta, and did not specifically link the privilege to the Constitution.

Nevertheless, the Fourth Circuit dismissed the case on the pleadings and largely adopted the government's position. The Court ruled that neither the plaintiff nor the government could prove its case without relying on secret information, and that the very subject matter of the case was a state secret. The Court also held that the privilege enjoys constitutional status:

"Although the state secrets privilege was developed at common law, it performs a function of constitutional significance, because it allows the executive branch to protect information whose secrecy is necessary to its military and foreign-affairs responsibilities. [...] Significantly, the Executive's constitutional authority is at its broadest in the realm of military and foreign affairs. The Court accordingly has

60 Brief of the Appellee, pp.8-9, El-Masri v. United States, 479 F.3d 296 (4th Cir. 2007).
61 Ibid., p.5 ("The law is clear that the decision to invoke the state secrets privilege constitutes the exercise of duties uniquely confided by the Constitution to the Executive Branch in order to safeguard the nation and to conduct the foreign relations of the United States."); see also ibid., p.14 ("Thus, the state secrets privilege has a constitutional foundation, is interposed as a matter of policy by the Executive Branch in order to further important foreign policy and national security concerns, is absolute when properly invoked, and can be asserted at any point in litigation when the privilege is needed in order to protect state secrets from disclosure, either purposeful or inadvertent."); ibid., p.16 ("Because the decision to assert the privilege for secrets of state involves a policy determination on a matter constitutionally committed to the Executive Branch, the scope of the inquiry undertaken by the Judicial Branch when the claim is interposed is very limited.").
62 Ibid., pp.10-11 ("Because of its constitutional underpinning, 'the privilege to protect state secrets must head the list of the various governmental privileges recognized in our courts. [...] Thus, in evaluating a claim of state secrets privilege, the presiding court does not balance the interests of the United States in protecting its secrets against the interests of the litigant in gaining access to the information, for '[t]hat balance has already been struck.'") (citations omitted).
63 United States v. Reynolds, 345 US 528, p.531, n.9 (1942).
indicated that the judiciary's role as a check on presidential action in foreign affairs is limited. [...] Moreover, both the Supreme Court and this Court have recognized that the Executive's constitutional mandate encompasses the authority to protect national security information. [...] 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".  

The court barely considered the plaintiff's need for the evidence or the plaintiff's interest in open justice. El-Masri appealed to the Supreme Court, but the Court declined to review the case.  The Fourth Circuit's ruling thus remains good law in that circuit.

In contrast to the Fourth Circuit's breathtaking ruling in El-Masri, the Ninth Circuit adopted a somewhat more modest approach in its case dealing with the extraordinary rendition program, Mohamed v. Jeppesen Dataplan, Inc. (2010). Like El-Masri, Mohamed challenged his involuntary rendition to third countries under the government's extraordinary rendition program.  The government, armed now with the Fourth Circuit ruling in El-Masri, moved aggressively to intervene and to dismiss the case because its very subject matter was a state secret. The government argued throughout the litigation that the privilege enjoyed constitutional status, that the court should evaluate the government's claim of privilege with only the most deference, and that the plaintiff's interest in the evidence and in open justice was immaterial. The government continued to press these positions even after the

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65 El-Masri, 479 F.3d, pp.303-04 (citations omitted).
67 Mohamed v. Jeppesen Dataplan, Inc., 614 F.3d 1070, pp.1075-76 (9th Cir. 2010).
68 Ibid., pp.1076-77.
69 See, e.g., Brief of Intervenor-Appellee, p.12, Mohamed v. Jeppesen Dataplan, Inc., ibid. ("Although the privilege 'was developed at common law, it performs a function of constitutional significance' by safeguarding the President's ability to conduct foreign affairs and to provide for the national defense.") (quoting El-Masri v. United States, 479 F3d 296, p.303 (4th Cir. 2007); Brief of Intervenor-Appellee on Rehearing En Banc, p.16, Mohamed v. Jeppesen Dataplan, Inc., ibid. ("Although the privilege was developed at common law, it performs a function of constitutional significance by allowing the Executive Branch to protect information whose secrecy is necessary to its military and foreign-affairs responsibilities.") (quoting El-Masri v. United States, ibid.).
70 See, e.g., Notice of Motion and Motion to Dismiss or, in the Alternative, for Summary Judgment by the United States of America, pp.7-9, Mohamed v. Jeppesen Dataplan, Inc., 539 F. Supp. 2d 1128 (ND Cal. 2008); Brief of Intervenor-Appellee on Rehearing En Banc, p.18, Mohamed v. Jeppesen Dataplan, Inc., 614 F.3d 1070 (9th Cir. 2010) (describing the court's review as "narrow" and limited to determining whether "there is a reasonable danger" that disclosure of the information will expose "matter which, in the interest of national security, should not be divulged.") (quoting Kasza, 133 F.3d, p.1166).
71 Notice of Motion and Motion to Dismiss or, in the Alternative, for Summary Judgment by the United States of America, pp.6-7, Mohamed v. Jeppesen Dataplan, Inc., 539 F. Supp. 2d 1128 (ND Cal. 2008); Brief of Intervenor-Appellee on Rehearing En Banc, p.18, Mohamed v. Jeppesen Dataplan, Inc., 614 F.3d, p.1070 (9th Cir. 2010) (arguing that the privilege trumps the plaintiff's showing of necessity and that the case should be dismissed even if the plaintiff could establish his claims using other evidence). The government even employed Duncan v. Cammell, Laird & Co. in support of its argument: 'Furthermore, in recognizing the state secrets privilege in Reynolds, the Supreme Court invoked and relied on the seminal English case, Duncan v. Cammell, Laird & Co. involving the parallel British privilege, the crown privilege. In Duncan, the Law Lords recognized that the crown privilege "is not properly to be regarded as a branch of law of privilege connected
Obama administration adopted new policies for invoking the state secrets privilege.  

The en banc Ninth Circuit dismissed the case on the pleadings. The court, in contrast to earlier cases confusing the Totten bar and the Reynolds privilege, carefully distinguished the two. Applying the Reynolds privilege (and not the Totten bar), it ruled that Mohamed's case could not move beyond the pleadings, even if Mohamed could prove his case using other evidence:

"[W]e assume without deciding that plaintiff's prima facie case and Jeppesen's defenses may not inevitably depend on privileged evidence. Proceeding on that assumption, we hold that dismissal is nonetheless required under Reynolds because there is no feasible way to litigate Jeppesen's alleged liability without creating an unjustifiable risk of divulging state secrets."

The Ninth Circuit discussed the application of the privilege at length, seriously considered its role in reviewing the government's invocation of the privilege, and stepped back from rooting it firmly in the Constitution. But in the end, the result was the same as the result in El-Masri: complete dismissal based on the pleadings, with a great deal of deference to the government, and little or no serious consideration of the plaintiff's need for the evidence or interest in open justice. The dissent summed it up this way: "The state secrets doctrine is a judicial construct without foundation in the Constitution, yet its application often trumps what we ordinarily consider to be due process of law. This case now presents a classic illustration."

Mohamed asked the Supreme Court to review the case. As this article went to print, the Supreme Court has not yet decided whether to hear it.

The contemporary approach to state secrets in the post-9/11 cases in the United States, then, is characterized by extraordinary judicial deference to the government (and even, in El-Masri, finding that such deference is commanded by the Constitution), and simultaneous limited consideration of the plaintiff's interest in the evidence or in open justice. In short, judicial deference to the government's invocation of the privilege — whether based upon the privilege's putative

with discovery," because it extends more broadly than traditional discovery privileges. Duncan recognized that the crown privilege could bar adjudication of certain matters where secrecy is in the public interest, regardless of a litigant's ability to produce evidence relating to the matter. Furthermore, Duncan recognized that the typical context in which the crown privilege was raised was not to bar discovery from the Government of specific documents in its possession, but instead to prevent a litigant from obtaining and using a document in the hands of a private party, because of its sensitive content.  

Brief of Intervenor-Appelle on Rehearing En Banc, pp.34-35, Mohamed v. Jeppesen Dataplan, Inc., 614 F.3d 1070 (9th Cir. 2010) (citations omitted). The government did not mention how the crown privilege had evolved since Duncan.


Ibid., p.1087.

Ibid., pp.1077-1090.

Ibid., p.1094 (Judge Hawkins, dissenting).
constitutional status, as in *El-Masri*, or based on extreme judicial deference, as in *Mohamed* – crowds out any serious consideration of the plaintiff's interest in the evidence or the plaintiff's interests in open justice.

### 3.2. United Kingdom

In sharp contrast, the contemporary approach in the UK is characterized by aggressive judicial oversight and scrutiny of claims of public interest privilege and serious consideration of the plaintiff's interest in open justice principles. The contrast is perhaps best illustrated by the Court of Appeal's decision in *Mohamed v. Secretary of State for Foreign and Commonwealth Affairs* (2010), the UK case involving the same Mohamed that brought suit in the US. Mohamed sought information from the government that might support his defense to terrorist charges in the US that confessions he had made had been obtained by torture. The information was eventually provided to Mohamed's US lawyers in his *habeas corpus* proceeding in the United States, save seven redacted paragraphs. (By the time the Court of Appeals ruled, however, Mohamed had been acquitted of charges; he now sought the information in support of his damages claim against the UK for its involvement in his treatment by the US). The Foreign Secretary continued to oppose releasing those paragraphs; the Secretary filed public interest immunity certificates claiming that release would damage the intelligence sharing relationship with the US and seriously prejudice the national security of the UK.

The Court of Appeals rejected the claim of privilege and ordered the paragraphs released. The Court began by noting that the issue required it "to address fundamental questions about the relationship between the executive and the judiciary in the context of national security in an age of terrorism and the interests of open justice in a democratic society" – issues that sounded very much like the constitutional separation-of-powers claims that the US government lodged in *El-Masri* and *Mohamed*. But the UK Court resolved these issues in a very different way.

The Court started with a thorough, 9-paragraph examination of the open justice principles at stake in the case. The Court ruled that principles of open justice and equality required that Mohamed know the "full reasons which led the court to conclude that […] his claim of involvement in wrongdoing by UK authorities […] was not merely sustainable, but amply vindicated," especially when the other party, the Foreign Secretary, had access to the paragraphs. The Court was
unconcerned that Mohamed had been acquitted; it wrote that "the redacted paragraphs formed an essential part of the court's reasoning that he was entitled to the relief he was seeking."\textsuperscript{82} The Court also ruled that "the principle of open justice encompasses the entitlement of the media to impart and the public to receive information in accordance with article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms."\textsuperscript{83}

The Court balanced the open justice principles against the "control principle" – the Foreign Secretary's claimed need for confidentiality in order to preserve the intelligence-sharing relationship with the United States. The Court's analysis is notable for its probing scrutiny of the Secretary's claims; it ends with this statement of the proper role for the judiciary:

"On the basis of all the evidence including the sensitive schedules, I have been unable to eradicate the impression that we are being invited to accept that once the Foreign Secretary has made his judgment of all the relevant considerations, including the interests of justice, and notwithstanding that in law the control principle is not absolute, so far as the court is concerned, as a matter of practical reality, that should be that. However, although in the context of public safety it is axiomatic that his views are entitled to the utmost respect, they cannot command the unquestioning acquiescence of the court."\textsuperscript{84}

The Court balanced the weighty open justice principles in the case against the control principle and rejected the government's claim of privilege.

Thus the modern, post-9/11 privilege in the United States is substantially stronger. It leaves little or no room for judicial review and crowds out any consideration of the plaintiff's interest in the contested evidence or in principles of open justice. In sharp contrast, public interest immunity in the UK requires active, probing scrutiny by the courts and a careful balancing of the individualized interest in open justice.

III - CONCLUSION

While the state secrets privilege in the US and public interest immunity in the UK share some basic features, their differences are, and always have been, far more significant. The two privileges have differed substantially since their origins, and they have evolved in exactly the opposite directions. Today, the state secrets privilege is a sweeping, robust privilege that crowds out both any meaningful role for the judiciary in evaluating claims of privilege and any serious consideration of the plaintiff's interest in the contested evidence (and thus in open justice). In sharp contrast, public interest immunity requires an active, probing role for the courts and a careful balancing of the very weighty and personal interest in open justice.

\textsuperscript{82} Ibid.
\textsuperscript{83} Ibid.
\textsuperscript{84} Ibid., p.576. The Court of Appeal's approach is consistent with the approach of the European Court of Human Rights. See, e.g., Imakayeva v. Russia, 47 EHRR 4, pp.181-83 (2008).
As US courts and Congress consider how the state secrets privilege might change in its next evolutionary stage, they would do well to learn from the UK and the Court of Appeal's approach in *Mohamed.*