
Andrew Burtless
"Let me say it as clearly as I can: Transparency and the rule of law will be the touchstones of this presidency."1

"According to the government's theory, the judiciary should effectively cordon off all secret government actions from judicial scrutiny, immunizing the CIA and its partners from the demands and limits of the law."2

**ABSTRACT**

Following President Obama's repeated pledges to bolster governmental transparency, Attorney General Eric H. Holder, Jr. issued guidelines to limit the government's use of an extraordinary evidentiary privilege to dismiss lawsuits that could expose secret information: the state secrets privilege.

Yet, halfway through the Obama administration's first term, the government has asserted an even more potent version of the privilege to foreclose the litigation of constitutional and human rights violations. Lacking any clear standards or procedures for balancing the conflicting needs of injured parties with the protection of governmental secrets, federal judges have made ad hoc determinations when handling sensitive information. Unguided decisions ultimately jeopardize valid state secrets, deny justice for deserving litigants, and invite time-consuming appeals in a growing field of litigation concerning controversial clandestine anti-terrorism efforts.

I argue that Congress should revive and pass the State Secrets Protection Act to establish a set of uniform court procedures and standards for judges to assess the privilege's

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1. Remarks of President Barack Obama to White House Senior Staff, 12 DAILY COMP. PRES. DOC. 2 (Jan. 21, 2009).

impact upon litigation. Passage of the Act will ensure that the
privilege will be used only as it was originally conceived by the
Court: a limited evidentiary privilege. By clarifying that the
privilege may be invoked after discovery and requiring the use of
evidentiary substitutes whenever possible, the act minimizes the
risk that the mere assertion of the privilege will result in a
wrongful dismissal of the case at the onset of litigation. Although
some commentators have argued that administrative mechanisms
like FISA should serve as a model for resolving such claims,
FISA's many weaknesses make it an unattractive model for
reform. Applying the proposed Act to a recent case demonstrates
the various ways in which the statutory standards would
represent an improvement over the privilege's current form.

I. INTRODUCTION

On the first full day of office, President Obama issued a
sweeping pledge to introduce a new era of governmental
accountability and transparency. For voters enticed by a platform
of change, the promise echoed repeated pledges made along the
campaign trail to rein in broad assertions of executive power.
Specifically, the Bush administration's reliance upon the state
secrets privilege ("privilege")—an evidentiary privilege which bars
military and state secrets from disclosure in judicial proceedings—
to dismiss suits against the government was cited as part of "[t]he
problem" on the Obama campaign website.3 One year into
President Obama's term in office, Attorney General Eric H.
Holder, Jr. unveiled a new "state secrets policy" ("Guidelines") for
the purposes of initiating a more sparing invocation of the
defense.4 Yet, under the Obama administration, the government
has continued to regularly assert the privilege to dismiss suits.5

3. "The Bush administration has ignored public disclosure rules and has
invoked a legal tool known as the 'state secrets' privilege more than any other
previous administration to get cases thrown out of civil court." ORGANIZING
(last visited Mar. 8, 2011).

4. Memorandum from the Office of the U.S. Att'y Gen. to the Heads of
Exec. Dept's & Agencies & Heads of Dep't Components 1 (Sept. 23, 2009)
/state-secret-privileges.pdf ("The Department is adopting these policies and
procedures to strengthen public confidence that the U.S. Government will
invoke the privilege in court only when genuine and significant harm to
national defense or foreign relations is at stake and only to the extent
necessary to safeguard those interests.").

5. See Brief for the United States at 51-52, Gen. Dynamics Corp. v. United
States, Nos. 09-1298, 09-130 (U.S. Dec. 13, 2010) (arguing that state secrets
privilege should preclude a government contractor from bringing suit against
the government); Opposition to Plaintiff's Motion for Preliminary Injunction
and Memorandum in Support of Defendants' Motion to Dismiss at 43-59, Al-
Since the Court’s last meaningful articulation of the privilege’s scope sixty years ago, the emergence of multi-national terrorist organizations and online whistleblowers have significantly altered the nature and scope of the government’s secrets. In the aftermath of the terrorist attacks of September 11, 2001, the government launched a series of aggressive counter-terrorism measures characterized by extraordinary stealth and secrecy. Not surprisingly, the government defended many of these controversial clandestine operations by relying upon the privilege. While many of these secret programs have been substantially curtailed, the recent release of diplomatic cables by WikiLeaks has reinvigorated calls for legal reforms to safeguard confidential governmental information. Yet, despite these noteworthy developments and numerous opportunities, the Supreme Court has consistently declined to update the outdated standards used to scrutinize governmental assertions of secrecy. Without clear

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7. Within six days of the attacks, President Bush signed a secret executive order authorizing “extraordinary rendition”; the transfer of terrorist suspects to countries that are known to use torture as an interrogation tactic. Beginning in March 2002, the CIA opened numerous hidden detention centers to hold hundreds of terrorist suspects. Congress also expanded the government’s ability to engage in surveillance through the passage of the USA Patriot Act. FREDERICK A.O. SCHWARZ, JR. AND AZIZ Z. HUQ, UNCHECKED AND UNBALANCED: PRESIDENTIAL POWER IN A TIME OF TERROR 97, 101, 125 (The New Press 2008).

8. Shortly after the WikiLeaks release, Congress began consideration of a bill to amend the Espionage Act of 1917 to criminalize the knowing dissemination of “any classified information... concerning the human intelligence activities” that would be “prejudicial to the safety or interest of the United States.” Securing Human Intelligence and Enforcing Lawful Dissemination Act, H.R. 6506, 111th Cong. (2010).

9. In May 2011, the Supreme Court declined to hear the appeal of a
guidance on the proper procedures and benchmarks for assessing the privilege's impact upon litigation, uncertainty is likely to prevail in the growing field of litigation involving allegedly secret governmental information.

The recent transformation of the privilege from a rarely-asserted response to a specific discovery request into a frequently-invoked doctrine of governmental immunity at the onset of litigation raises serious concerns relating to the division of authority between co-equal branches of government. Even at the height of the Cold War—characterized by massive covert military operations—the privilege occupied a relatively minor role in governmental legal defenses. Today, the privilege is invoked regularly, often foreclosing all relief for plaintiffs alleging injury sustained from private or governmental actors. With an outdated

narrowly decided Ninth Circuit Court of Appeals decision involving the privilege. *Mohamed v. Jeppesen Dataplan, Inc.*, 579 F.3d 943 (9th Cir. 2009), cert. denied, 131 S. Ct. 2442 (2011). Although another recent case presented an opportunity for the Supreme Court to clarify acceptable procedures and standards for evaluating the privilege, the Court refrained from doing so. *See Gen. Dynamics Corp. v. United States*, 131 S. Ct. 1900 (2011) (No. 09-1298) (holding that when a plaintiff's civil case against the government would disclose state secrets, the claim may not be heard by the court). A quote from Justice Antonin Scalia in the oral argument for that case illustrates the Supreme Court's deferential approach towards governmental assertions of the privilege. "We don't know what the state-secrets thing is. The government is entitled to—to make that determination, so we don't know who's in the right here." Transcript of Oral Argument at 21 *Gen. Dynamics Corp. v. United States*, 131 S. Ct. 1900 (2011) (No. 09-1298).

10. *See, e.g.*, LOUIS FISHER, IN THE NAME OF NATIONAL SECURITY: UNCHECKED PRESIDENTIAL POWER AND THE REYNOLDS CASE 262 (University Press of Kansas 2006) (describing the author's concern that the judiciary's response to state secrets issues suggest that judges are either intimidated by these issues or favor the executive branch); Amanda Frost, *The State Secrets Privilege and Separation of Powers*, 75 FORDHAM L. REV. 1931 (2007) (arguing that the judiciary should ensure the executive branch is being held accountable for all challenged conduct before deferring to the political branches); William G. Weaver & Robert M. Pallitto, *State Secrets and Executive Power*, 120 POL. SCI. Q. 85, 90 (2005) (describing how judicial oversight of executive action is difficult and how the state secrets privilege was asserted in several cases).

11. From 1953 until 1976 the government only invoked the privilege four times in reported decisions. Weaver & Pallitto, *supra* note 10, at 101. Between 1977 and 2001 courts made decisions on the state secrets privilege in fifty-one reported cases. *Id.* A search of publicized court records via Westlaw indicates that the government has maintained a historically high reliance upon the privilege under a new administration—invoking the privilege in at least seven cases since the Obama administration took office two years ago. *See supra* note 5 and accompanying text.

12. *See, e.g.*, El-Masri v. United States, 479 F.3d 296, 313 (4th Cir. 2007) (holding that dismissal of a litigant's complaint under the Fifth Amendment and the Alien Tort Statute (ATS) was proper because it could not be litigated without threatening the disclosure of state secrets); Terkel v. AT&T Corp., 441
test for assessing the privilege's impact upon a cause of action, and faced with the daunting prospect of overstepping separations of constitutionally-delegated powers, courts have adopted unpredictable and ad hoc responses. Although there have been various suggested legal reforms to prevent future misapplications of the privilege, the most practical solution has already been considered twice by both houses of Congress. Congress must reconsider and pass the State Secrets Protection Act (SSPA) to provide necessary clarification to federal courts seeking to determine the proper limitations of a seemingly limitless defense.

Part II discusses the privilege's purpose and a host of policy considerations supporting procedures requiring the privilege to be applied more narrowly. Part III examines the need for reform in light of the substantial confusion amongst the lower courts and the government's increased reliance upon the privilege. Part IV demonstrates why proposed and extant internal administrative mechanisms are insufficient to prevent future misapplications of the privilege and why Congress is uniquely poised to offer

F. Supp. 2d 899, 920 (N.D. Ill. 2006) (holding that dismissal of litigants' complaint alleging that a telephone company violated the Electronic Communications Privacy Act was proper because the litigants could not prove real or immediate threat of immediate or repeated injury without disclosures by the defendant which were prohibited by the privilege).

13. In recognizing the privilege, at least one court has cited great deference to the President's Article II authority. El-Masri, 479 F.3d at 312 ("But we would be guilty of excess... if we were to disregard settled legal principles in order to reach the merits of an executive action that would not otherwise be before us—especially when the challenged action pertains to military or foreign policy.").

14. Accordingly, one authority on the privilege has recognized that the privilege has become "the subject of considerable uncertainty." Robert M. Chesney, State Secrets and the Limits of National Security Litigation, 75 GEO. WASH. L. REV. 1249, 1270 (2007).

15. Compare Frost, supra note 10, at 1958-62 (suggesting that courts should request Congress to decide the legal question if the state secrets privilege renders the dispute irresolvable in a judicial forum), and J. Steven Gardner, The State Secret Privilege Invoked in Civil Litigation: A Proposal for Statutory Relief, 29 WAKE FOREST L. REV. 567, 602 (1994) (suggesting a statutory compensatory scheme for plaintiffs who have claims dismissed or substantially affected by the privilege's invocation), and Beth George, Note, An Administrative Law Approach to Reforming the State Secrets Privilege, 84 N.Y.U L. REV. 1691 (2009) (arguing in favor of administrative-law based reforms over increased judicial scrutiny of the privilege).

16. Two similar versions of the SSPA were previously considered by the Committee on the Judiciary. State Secrets Protection Act, S. 417, 111th Cong. (2009); State Secret Protection Act of 2009, H.R. 984, 111th Cong. (2009). The Senate version was referred to committee but never voted upon while the House version was reported by committee but never voted upon by the full House. Substantially identical versions of the SSPA were also considered in 2008. State Secrets Protection Act, S. 2533, 110th Cong. (2008); State Secret Protection Act of 2008, H.R. 5807, 110th Cong. (2008).
guidance to the courts. Part V examines the SSPA as an effective tool which offers necessary procedural guidance to courts reviewing the privilege’s invocation. Part VI applies the SSPA to an actual case to demonstrate how improved court procedures would have conserved substantial court resources while undermining the government’s ability to use the privilege as a means of denying relief to injured litigants. The Article concludes that without Congressional intervention, the executive’s reliance upon the privilege will likely continue to grow at the expense of judicial review.

II. THE PRIVILEGE’S PURPOSE

Although the precise origins of the state secrets privilege in American jurisprudence are unclear, the most important cases dealing with the privilege have all recognized its common-law roots. Subsequent cases and the Federal Rules of Evidence further support common-law limitations to the privilege’s applications. The privilege has historically assumed two forms—as a narrow bar to actions seeking governmental performance of secret agreements made pursuant to valid exercises of governmental power and as a limited evidentiary privilege.

A. Totten’s General Principle: No Lawsuits to Enforce Secret Government Contracts

Although the Court first acknowledged the privilege in dicta as far back as Chief Justice Marshall's tenure, Totten v. United States demonstrates its potential use as a means of dismissing specific forms of litigation against the government. At issue in the case was whether a secret contract for espionage between the

17. See, e.g., Halkin v. Helms, 598 F.2d 1, 9 (D.C. Cir. 1978) (citing United States v. Nixon, 418 U.S. 683, 710 (1974) as recognizing the privilege's basis in the President's commander in chief and foreign affairs responsibilities while citing Reynolds, 345 U.S. at 6 n.9 as recognizing the privilege's basis in the separation of powers).
19. "The state secrets privilege 'is a common law evidentiary rule that protects information from discovery when disclosure would be inimical to the national security.'" In re Sealed Case, 494 F.3d 139, 142 (D.C. Cir. 2007) (quoting In re United States, 872 F.2d 472, 474 (D.C. Cir. 1989)).
20. "Except as otherwise required by the Constitution or provided by an 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 is governed by the principles of the common law as they are interpreted by the courts of the United States in the light of reason and experience." Fed. R. EVID. 501 (emphasis added).
executive branch and a plaintiff was judicially enforceable. In a pithy, three-page decision, the Court outlined the "general principle" which justified the dismissal of the action:

It may be stated as a general principle, that public policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential, and respecting which it will not allow the confidence to be violated.23

Although this principle has been cited by numerous courts as a basis for categorically barring actions that might disclose a wide range of governmental secrets, several distinguishing features of the case limit the intent of this "general principle." First, the Court explicitly recognized that the need for secrecy was predicated on a valid exercise of Executive authority:

We have no difficulty as to the authority of the President in the matter. He was undoubtedly authorized during the war, as commander-in-chief of the armies of the United States, to employ secret agents to enter the rebel lines and obtain information respecting the strength, resources, and movements of the enemy; and contracts to compensate such agents are so far binding upon the government as to render it lawful for the President to direct payment of the amount stipulated out of the contingent fund under his control.24

It is doubtful whether the Totten Court could have anticipated that the dismissal of a case involving Executive authority to form a contract for espionage would later be used to dismiss suits alleging torture, kidnapping, or unauthorized wiretaps. Although the President's ability to form agreements with spies falls squarely within Article II powers, the very exercise of recently challenged executive actions stand at the outer parameters of constitutionally delegated authority.

Second, in its denial of relief, the Court cited the secret contractual relationship existing between the plaintiff and the government. Noting the "underst[anding]" that "the lips of the other [party] were to be for ever [sic] sealed respecting the relation," the Court held that "the existence of a contract of that kind is itself a fact not to be disclosed."25 Plaintiffs who have not voluntarily entered into secret contractual relations with the government have not assumed an analogous understanding of confidentiality and accordingly bear no analogous risk of injury. It is not difficult to see why the court would intend to limit its three-page decision to plaintiffs seeking enforcement of secret

23. Id. at 107.
24. Id. at 106.
25. Id. at 106-07.
governmental contracts. The alleged harm resulting from the government's alleged breach was relatively limited; a denial of compensation for services rendered. Yet, the government has since cited Totten's "general principle" as a means of dismissing actions which allege a wide range of injuries, some of which constitutes per se violations of constitutional or human rights law. Guidance is sorely needed to ensure that while establishing a non-justiciability bar for claims brought by plaintiffs seeking enforcement of secret governmental contracts, Totten's "general principle" does not serve as a basis for barring lawsuits from non-contracting parties.

Third, the Court's use of its "general principle" to justify the dismissal of other lawsuits demonstrates the privilege's descent from common law rather than the Constitution. The Court explicitly reasoned that similar motivations guided other forms of common-law evidentiary privileges. "On this principle, suits cannot be maintained which would require a disclosure of the confidence of the confessional, or those between husband and wife, or of communications by a client to his counsel for professional advice, or a patient to his physician for a similar purpose." Thus, the very case which first recognized the privilege's most expansive form was careful to justify the dismissal of lawsuits as a necessary consequence of a limited evidentiary privilege rather than Constitutional doctrine.

B. Reynolds: An Outdated and Ineffective Benchmark

The Supreme Court's leading case on the privilege, United States v. Reynolds, confirms the privilege as a limited evidentiary restriction to be used sparingly rather than a frequently-cited doctrine of wholesale executive immunity, but establishes inadequate procedures and guidance for assessing its use. In the case, the spouses of three civilians who had perished in a B-29 airplane accident filed a wrongful death action against the government under the Torts Claim Act. In response to the plaintiffs' discovery requests for the results of an official accident

26. The Supreme Court has reaffirmed the application of Totten's "general principle" to suits involving covert espionage agreements. Tenet v. Doe, 544 U.S. 1, 3 (2005). Furthermore, in the most recent case involving the privilege, the Supreme Court has distinguished its authority for resolving disputes involving contractual arrangements implicating alleged governmental secrets from other disputes involving alleged governmental secrets. In the former, the Court relies upon its "common-law authority to fashion contractual remedies in Government-contracting disputes" and "not [its] power to determine the procedural rules of evidence ...." Gen. Dynamics Corp., 131 S. Ct. at 1906.
27. Totten, 92 U.S. at 105.
28. Id. at 107.
30. Id. at 2-3.
report conducted by the Air Force, the Secretary of the Air Force filed a formal Claim of Privilege to oppose this request "for the reason that the aircraft in question, together with the personnel on board, were engaged in a highly secret mission of the Air Force."31 Specifically, the government alleged that the plane was being flown for the purposes of testing secret electronic equipment at the time of the crash.32 Although the Court acknowledged a "reasonable danger"33 that the accident report contained references to the secret equipment, the Court nonetheless denied the government's request to dismiss the case. Noting that "[t]here is nothing to suggest that the electronic equipment, in this case, had any causal connection with the accident"34 and that it "should be possible for respondents to adduce the essential facts as to causation without resort to material touching upon military secrets"35 by examining surviving crew members, the Court permitted the case to continue while denying the plaintiff's access to the allegedly privileged information.36 Notwithstanding the Court's unwillingness to grant complete dismissal of the case, the infamous subsequent history of the case in which the contested documents were declassified revealing the negligence of the B-29 crew members but no references to secret equipment, is illustrative of the privilege's potential perils.37

The Reynolds Court established the judiciary's important role as an independent evaluator of the Executive branch's assertion of the privilege. Even in the face of a governmental invocation of the privilege, the Court sought to sustain the litigation through an "available alternative,"38 which would not compromise state secrets. The Court noted that "[j]udicial control over the evidence in a case cannot be abdicated to the caprice of executive officers."39 Further, the Court stated that "[the privilege] is not to be lightly invoked."40

Although the Court provided clear procedural guidance to the government for the proper invocation of the privilege,41 it gave trial
courts scant substantive benchmarks for independently evaluating the merit of such claims. Provided that the trial judge determines there is "a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged,"[42] the Court found that a judge was not required to personally examine the allegedly privileged information.[43] In determining how far courts must probe to determine if the asserted privilege is valid, the Court said that judges should examine the strength of the government's claim that the information is necessary for the litigation to proceed. "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."[44]

In the fifty-seven years since the Supreme Court first recognized the existence of a governmental privilege which could theoretically bar the justiciability of every civil case against the government, it has refrained from further clarifying the process and standards by which courts must assess its invocation. The Court's ambiguously-worded "reasonable danger" test has served as a justification for the complete termination of litigation without even a review of the allegedly secret evidence.[45]

C. Ellsberg: Policy Concerns to Inform Procedural Guidance

A subsequent judgment issued by the District of Columbia Circuit Court demonstrates why—within the context of the privilege—"whenever possible, sensitive information must be disentangled from nonsensitive information to allow for the release of the latter."[46] In Ellsberg v. Mitchell,[47] a group of defendants and their attorneys in the "Pentagon Papers" criminal prosecution asserted that they were the subjects of warrantless wiretaps conducted by the government. Although the district court dismissed their case without providing the plaintiffs an opportunity to contest the governmental claim that litigation

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42. Id. at 10.
43. Id.
44. Id. at 11.
45. See, e.g., Sterling v. Tenet, 416 F.3d 338, 344 (4th Cir. 2005) (determining that in camera review of the evidence is not required on the basis of affidavits or declarations from the government); Black v. United States, 62 F.3d 1115, 1119 (8th Cir. 1995) (affirming dismissal only on the basis of governmental declarations alleging the privilege); Kasza v. Browner, 133 F.3d 1159, 1170 (9th Cir. 1998) (affirming dismissal on state secrets grounds when only considering governmental declarations).
47. Ellsberg, 709 F.2d 51.
would disclose state secrets, the judgment was reversed on appeal. In the absence of the government's explanation of how the identities of the attorneys general who authorized the wiretaps was related to "national security," the circuit court held that a complete dismissal of the case was unjustified.\textsuperscript{48}

In its articulation of the proper procedural protocol to follow when reviewing the government's assertion of the privilege, the circuit court noted the "absence of controlling precedent" and considered "judicial experience in related fields. . . ."\textsuperscript{49} Like the \textit{Totten} Court, the circuit court looked to other limited evidentiary privileges in its analysis of the privilege. To determine the proper procedure for handling an assertion of state secrets, the \textit{Ellsberg} Court noted the procedural requirements of the "law enforcement evidentiary privilege," which required that the government submit:

\begin{quote}
[A]n index correlating indexed items with particular claims of privilege . . . [along with] an analysis containing descriptions specific enough to identify the basis of the particular claim or claims. After the plaintiff had been afforded an opportunity to see this analysis and take issue with its conclusions, the court could examine the materials themselves \textit{in camera} and make its final determination.\textsuperscript{50}
\end{quote}

The Court described the practical benefits of procedures favoring transparency and debate between the government and the plaintiff in the face of the asserted privilege:

\begin{quote}
The more specific the public explanation, the greater the ability of the opposing party to contest it. The ensuing arguments assist the judge in assessing the risk of harm posed by dissemination of the information in question. This kind of focused debate is of particular aid to the judge when fulfilling his duty to disentangle privileged from non-privileged materials—to ensure that no more is shielded than is necessary to avoid the anticipated injuries.\textsuperscript{51}
\end{quote}

If the district court had provided the plaintiffs an opportunity for a "public debate over the basis and scope of a privilege claim" prior to the in camera proceedings and "an opportunity to contest a detailed justification for the government's claim," it would have avoided the need for an appeal, thereby saving "considerable time and resources."\textsuperscript{52} The \textit{Ellsberg} Court conceded that such close scrutiny of governmental claims was "partially offset" by two opposing considerations: the need to not disclose "the very thing the privilege is designed to protect" and the desire to not constrain

\begin{footnotes}
48. \textit{Id.} at 60.
49. \textit{Id.} at 62.
50. \textit{Id.} (internal quotations omitted).
51. \textit{Id.} at 63.
52. \textit{Id.}
\end{footnotes}
district courts in designing appropriate procedures for specific cases. After discussing the underlying policy concerns, the court articulated procedural guidance for trial courts confronted with the government's invocation of the privilege:

[T]he trial judge should insist (1) that the formal claim of privilege be made on the public record and (2) that the government either (a) publicly explain in detail the kinds of injury to national security it seeks to avoid and the reason those harms would result from revelation of the requested information or (b) indicate why such an explanation would itself endanger national security.

Ellsberg's value lies not just in its useful procedural guidance for courts "in the absence of controlling precedent," but in its distillation of the essential policy concerns that should inform a court's consideration of the defense. According to the Ellsberg Court, a judge errs not by deferring to the government's claim of the privilege, but instead by doing so in a fashion that precludes any meaningful way for the plaintiff to contest its necessity. Without procedural rules which favor open debate and ensure for detailed governmental explanations linking the privilege to each piece of allegedly secret evidence, courts run the substantial risk of denying justice to deserving plaintiffs, wasting valuable judicial resources and unnecessarily consuming the time of both plaintiff and defendant. To avoid such serious foreclosures of justice and "needless delay in the prosecution of the suit," the court should consider and import applicable court procedure from analogous evidentiary privileges.

III. Confusion Within the Lower Courts Has Resulted in Dramatic Expansion of the Privilege In Recent Years

Notwithstanding the Ellsberg Court's recognition of the policies that should inform court procedures to handle the privilege, subsequent disagreement among the lower courts has resulted in profound inconsistencies over the most elementary of procedural matters. One notable source of disagreement is whether a court may properly dismiss an entire cause of action based on the government's invocation of the privilege at the pleading stage without allowing the plaintiff an opportunity to state a cause of action absent the allegedly secret information. Some courts have cited the privilege as a basis for dismissing claims at the onset of litigation, while others have explicitly

53. Id.
54. Id. at 63-64.
55. Id. at 63.
56. See El-Masri, 479 F.3d at 306, 311 (dismissing suit alleging torture and wrongful detention at pleading stage); Zuckerbraun v. Gen. Dynamics Corp.,
refused to do so. Another constant source of confusion is whether Reynolds's incarnation of the privilege bars the disclosure of the evidence or—like other forms of evidentiary privileges—still permits a litigant to demonstrate the veracity of factual information contained within the privileged evidence through non-privileged evidence. The lack of clarity has caused unpredictable results and confusion amongst litigants, and resulted in the very waste of resources and time that Ellsberg sought to avoid.

The lack of consensus among the lower courts has resulted in more aggressive uses for a limited evidentiary privilege. Despite its historically limited use, the government's reliance upon the privilege has expanded dramatically in recent years, demonstrating the potential for abuse and the need for attentive judicial scrutiny. The new use for the privilege began with novel legal arguments that highlighted a purported constitutional basis instead of a common-law foundation. Under the Bush Administration, Department of Justice lawyers offered a constitutional basis for why the dismissal of cases which implicate a state secret was appropriate at the pleading stage. The justification, which cited the need for presidential autonomy in handling foreign and military affairs, was accepted by the court. Under the Obama administration, Department of Justice lawyers have continued to advance the previous administration's theory for the privilege's constitutional basis notwithstanding the judicial

935 F.2d 544, 547 (2d Cir. 1991) (noting Totten's applicability to a suit involving a secret weapons system rendered discovery "a waste of time and resources."); Bareford v. Gen. Dynamics Corp., 973 F.2d 1138, 1144 (5th Cir. 1992) (holding that a case which "would inevitably lead to a significant risk" of a state secret must be dismissed at pleading stage).

57. See DTM Research, L.L.C. v. AT&T Corp., 245 F.3d 327, 334 (4th Cir. 2001) ("[I]n the proper case, a court, using 'creativity and care,' could devise 'procedures which [would] protect the privilege and yet allow the merits of the controversy to be decided in some form.'") (citation omitted); Hepting v. AT&T Corp., 439 F. Supp. 2d 974, 994 (N.D. Cal. 2006) (citing the approach of the courts in Halkin and Ellsberg as a basis for not dismissing a case "at the outset but allow[ing] them to proceed to discovery sufficiently to assess the state secrets privilege in light of the facts.").

58. For example, a claim which can only be proven by disclosing a conversation which is protected under the attorney client privilege is obviously barred as non-justiciable. However, a court does not bar the introduction of otherwise admissible evidence merely because it was also the topic of discussion between an attorney and a client. Such an expansive interpretation of the attorney client privilege would render nearly every claim non-justiciable.

59. See El-Masri, 479 F.3d at 303-04.

60. Id. at 303 ("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.").

61. Government Defendants' Memorandum in Support of Motion to Dismiss
branch's countervailing constitutional responsibility to adjudicate disputes.62

In addition to advancing powerful new arguments on behalf of the privilege, one commentator has found that the Bush administration invoked the privilege in twenty-eight percent more cases per year than in the previous decade.63 The Obama administration continues to assert the privilege at a historically high rate,64 standardizing the use of a previously rarely-invoked defense. Even when advancing alternative legal defenses and recognizing that the privilege should be invoked no more often or extensively than necessary, Department of Justice lawyers have liberally cited the privilege as a safe-guard basis for dismissing claims.65 More recently, the government has argued that it may even invoke the privilege in a civil suit against a defendant when doing so deprives the defendant of an otherwise valid legal defense.66

Critics offer insufficient counterarguments for why the government's increased reliance upon the privilege does not demonstrate a need to curb its use. One has argued that the government's increased reliance upon the privilege is without meaning because "the rate of assertion of the privilege relative to the amount of litigation implicating classified national security programs is little changed."67 But this is simply a restatement of the problem. While it is reasonable to anticipate that new threats posed by terrorists might require greater reliance upon national

62. [I]t is important to note that even the state secrets privilege has its limits. While the court recognizes and respects the executive's constitutional duty to protect the nation from threats, the court also takes seriously its constitutional duty to adjudicate the disputes that come before it. . . . To defer to a blanket assertion of secrecy here would be to abdicate that duty . . . .

Hunting, 439 F. Supp. 2d at 995.


64. See text accompanying note 11.

65. See Brief for Defendant at 23-30, Al-Aulaqi v. Obama, No. 10-cv-1469 (D.D.C. Oct. 18, 2010) (arguing that, while the privilege need not be reached, it should nonetheless serve as a basis for dismissal).


security programs, increased alleged harm stemming from covert governmental action necessarily implicates a growing, not reduced, need for closer judicial scrutiny of such actions. Another criticism charges that since cases of the government's misuse of the privilege are more likely to be appealed and therefore published than cases in which the government correctly invokes the privilege, it remains undetermined if the privilege is actually being misused at an increasing rate. For this criticism to be persuasive, one must assume that plaintiffs appeal every case in which the privilege is improperly used. But appealing a case requires significant financial resources and time that not every deserving litigant has. Finally, it has been argued that the historical context of a recent "war on terror" necessitates the government's increased reliance upon the privilege. But unlike other wars, the "war on terror" is likely to endure for many lifetimes. While the dismissal of claims surrounding an armed engagement of limited scope and finite duration might be tolerable, allegations of wrongdoing stemming from governmental actions of indeterminate scope and indefinite duration raise more compelling concerns.

It is increasingly common for the government to invoke the privilege at earlier stages in the litigation and for greater effect. The Bush administration sought dismissal in ninety-two percent more cases per year than in the previous decade. The government has also increasingly invoked the privilege to dismiss cases before the plaintiff even has an opportunity to request evidence through discovery.

The government has significantly widened the scope of what information it claims to be protected as a "state secret." Buttressed by judicial acquiescence, governmental lawyers have successfully argued with increasing frequency for the dismissal of cases on the mere basis that they implicate information which, while harmless

68. Id. at 70.
69. Sean Michael Ward, Comment, The State Secrets Protection Act (SSPA): Statutory Reform of the State Secrets Privilege, 7 GEO. J.L. & PUB. POL'Y 681, 687 (2009) ("Naturally, the government encountered a higher amount of civil litigants seeking classified information than during peaceful times.").
70. Frost, supra note 10, at 1939.
71. See Hepting, 439 F. Supp. 2d at 979-80 (explaining how the lower court prohibited discovery until the government's state secrets privilege claim was considered); Al-Harmain Islamic Found., Inc. v. Bush, 451 F. Supp. 2d. 1215, 1219 (D. Or. 2006) (describing how the government asserted the privilege after the plaintiffs filed a Motion for Order Compelling Discovery); El-Masri v. Tenet, 437 F. Supp. 2d 530, 535 (E.D. Va. 2006) (describing how the government asserted the privilege prior to discovery); Arar v. Ashcroft, 414 F. Supp. 2d 250, 281 (E.D.N.Y. 2006) (reasoning that allowing discovery to proceed in the case would reveal state secrets, which could harm U.S. relations with Canada).
in and of itself, could be used as in a mosaic\(^7\) to reveal a state secret.\(^7\) When left unchecked, this significantly enlarged definition may encompass substantial swaths of evidence, leaving plaintiffs with no legal recourse. The Court’s acceptance of “mosaic theories” is especially problematic in light of Ellsberg’s instruction that “whenever possible, sensitive information must be disentangled from nonsensitive information to allow for the release of the latter.”\(^4\)

The privilege has been successfully cited as a defense to governmental action, which has been widely reported in great detail by domestic and international media, openly condemned by foreign governments, and even officially acknowledged by the President.\(^5\) Although such activities cannot be fairly described as

\(^{72}\) This “mosaic” theory was recognized by the courts in Halkin, 598 F.2d at 8 (“It requires little reflection to understand that the business of foreign intelligence gathering in this age of computer technology is more akin to the construction of a mosaic than it is to the management of a cloak and dagger affair.”).

\(^{73}\) The expanded use for the privilege to defend controversial assertions of Presidential authority against judicial encroachment bolstered a theorized “unitary executive branch.” According to this theory, the President wielded complete control over the entire executive branch, thereby precluding any judicial or congressional interference with department heads. One of the administration’s most outspoken advocates of expansive Presidential powers under a “unitary executive theory” was John Yoo, an attorney at the Office of Legal Counsel (OLC), who helped pen the controversial “Torture Memos.” Yoo has attempted to identify a Constitutional argument based on “separation of powers” underpinning President Jefferson’s refusal to turn over documents subpoenaed by the Supreme Court as requested by Aaron Burr’s defense. See John Yoo, Jefferson and Executive Power, 88 B.U. L. REV. 421, 429 (2008) (explaining President Jefferson’s challenges to the judiciary). Yoo argues that Jefferson’s “success as Chief Executive is closely intertwined with his broad conception of presidential power.” \textit{Id.} at 425.

\(^{74}\) Ellsberg, 709 F.2d at 57.

"secret" various courts have applied the privilege to foreclose claims arising from these actions. Such protection stands at odds with Ellsberg's explicit rejection of the government's use of the privilege when there have already been significant "public disclosures."76

Lastly, as demonstrated in the next part, recent administrations have relied upon the privilege to dismiss allegations of serious wrongdoing arising from executive programs, which are themselves highly controversial because they stand on the outer margins of constitutional authority. Most notably, the privilege has been used to defend a warrantless wiretapping program,77 the use of torture in an extraordinary rendition

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76. Ellsberg, 709 F.2d at 61.
77. Despite Senator Obama's previous publicized dissatisfaction with a provision in the 2008 amendments to FISA, which immunized...
program, and the creation of assassination lists of American citizens residing abroad. These programs are clearly distinguishable from the President's uncontested power to form a secret espionage agreement found in Totten.

IV. CONGRESSIONAL GUIDANCE TO THE COURTS IS WARRANTED BECAUSE INTERNAL OVERSIGHT OF THE PRIVILEGE OFFERS NO SOLUTION

Clarification on the scope and application of what is properly viewed as a common-law evidentiary privilege should come from Congress. Congress's power to regulate the jurisdiction of the federal courts is found in the Constitution. The Supreme Court has confirmed that this power permits Congress to create judicial rules and regulations relating to evidence and procedure. Moreover, Congress has previously used this constitutional authority to enact legislation clarifying specific procedures and standards for judges to handle and critically evaluate privileged information.

Possible counterarguments to oppose Congressional clarification of an unsettled and confusing area of the law are unpersuasive. It has been argued that courts are ill-equipped to evaluate whether divulging information would compromise national security and that they should therefore simply use extreme deference to the Executive branch's invocation. This argument ignores the existing disagreements between various courts regarding the effect of a properly invoked privilege upon a telecommunications companies that had participated in the government's "terrorist surveillance program" (TSP), the government has vigorously called for the categorical dismissal of previous claims relating to warrantless surveillance on the basis of a state secrets privilege. See, e.g., Government's Memorandum in Support of Motion to Dismiss and for Summary Judgment, supra note 61 (praying for the court to dismiss the case because further proceedings would require the government to disclose privileged information).

78. Mohamed, 563 F.3d at 997.
81. “Congress retains the ultimate authority to modify or set aside any judicially created rules of evidence and procedure that are not required by the Constitution.” Dickerson v. United States, 530 U.S. 428, 437 (2000).
83. See Letter from Michael Mukasey, Att'y Gen., to Sen. Patrick Leahy, Chairman, Comm. on the Judiciary (Mar. 31, 2008), available at http://www.justice.gov/archive/olalviews-letters/110-2/03-31-08-ag-ltr-re-s2533-state-secrets.pdf (arguing that the Judicial Branch would have "neither the constitutional authority nor the institutional expertise to assume such functions.").
case’s pleadings. In the absence of any clear guidelines or precedent demonstrating how courts should evaluate a purported state secret, confusion has prevailed. Congressionally imposed guidelines that clearly delineate the proper impact of a properly invoked privilege upon the pleadings would bring needed uniformity and order to conflicting judicial tendencies. Such uniformity would discourage arbitrary and ad hoc determinations, thereby minimizing the chances that a judge or litigant will disclose a secret that could jeopardize the security of the country.

Moreover, since the privilege’s initial creation, courts have demonstrated their ability to evaluate and protect information that could implicate the security of the nation. Provisions within the Foreign Intelligence Surveillance Act (FISA) and the Freedom of Information Act (FOIA) have entrusted the courts to consider highly sensitive information implicating national security, thereby demonstrating the judiciary’s ability to protect confidential information at the highest levels. Moreover, Congress has empowered the courts to deny governmental assertions of privileged information and to create procedures to determine how classified information may be used in a court through the Classified Procedures Act (CIPA). The success of CIPA is a testament to federal courts’ ability to handle and assess allegedly confidential information.

Another possible argument against Congressional action is that such intervention would be recognized as an intrusion into Executive or Judicial authority and would be accordingly struck down by the Supreme Court based on past precedent. This argument overlooks both the notable dearth of consistent case law regarding the privilege’s proper relationship to executive powers and a public invitation for Congressional guidance from a leader of the judiciary and attorneys alike.


86. 18 U.S.C. app. 3 § 4.

87. See State Secret Protection Act of 2009 Hearing, supra note 67, at 56; see also Letter from Michael Mukasey, supra note 83 (arguing that Congress lacks the authority “to alter the state secrets privilege, which is rooted in the Constitution and is not merely a common law privilege.”).


Beth George has argued that the “internal mechanisms” offered by a “self-contained, heavily administrative paradigm like the one that governs FISA[]” offer the most promising solution to the privilege’s potential future abuses. However, a closer examination of FISA’s many problems reveals it to be an undesirable model for resolving issues relating to the privilege.

First, the Foreign Intelligence Surveillance Court (FISC) has adopted an extremely deferential inspection of governmental allegations which is inappropriate for adoption into new legal contexts. Historical data shows that FISC rarely denies governmental requests for surveillance. Of the 20,000 applications for surveillance made to the Foreign Intelligence Surveillance Court (FISC) between 1968 and 1996, the courts have rejected only twenty-eight. Of the 1378 applications to conduct electronic surveillance and physical searches for foreign intelligence purposes in 2009, FISC denied just one application in whole and one in part. Although it may be true that “[r]elative to obtaining a FISA warrant, the government can invoke the state secrets privilege much more easily,” the historical data suggests that FISA’s procedural formalities do not appear to serve as a substantive check upon executive assertions in constitutionally controversial areas.

Creating a separate secret court to assess all governmental assertions of the privilege would also contravene the Ellsberg Court’s explicit disapproval of summarily disposing of a case under ex parte review after the privilege’s invocation. By uniformly foreclosing the possibility for “public debate over the basis and scope of a privilege claim” or “an opportunity to contest a detailed justification for the government’s claim,” FISA’s administrative paradigm would prematurely deny the very dialogue between litigants, which the Court recognized to lie at the heart of judicial efficacy. The adoption of a specialized administrative mechanism such as FISA would effectively authorize the government to evade a legal adversary by the mere invocation of an evidentiary privilege.
FISA also demonstrates the potential pitfalls of adopting an administrative procedure, which favors self-policing and secrecy over the transparent operations of most Article III courts. Receiving only minimal oversight in the form of infrequent Congressional hearings and reports, FISC errors are usually undiscoverable and therefore usually uncorrectable. FISC's only published opinion was the unsettling admission that it had made mistakes in seventy-five cases stemming from inaccurate FBI affidavits.96 Applied to the context of a privilege, which would foreclose the litigation of violations of international law and the Constitution, the damages resulting from a secret tribunal's mistaken application of the privilege are substantial.

Although George argues that the public's participation in such an administrative legal mechanism would be ensured via the contributions of experts and lawmakers in a notice-and-comment type process,97 Congress, not an agency, is best equipped to establish the privilege's parameters through publicized hearings. In June 2009, the Committee on the Judiciary held a public hearing in which legal experts interacted directly with politically accountable lawmakers to discuss the advisability of altering the privilege's form.98 Public hearings, which provide a record of detailed cross-examination of experts by politically accountable leaders, are the proper mechanism for determining what limitations apply to a privilege that has assumed constitutional implications. Although notice-and-comment processes are appropriate for various forms of informal rule making, the size and shape of a defense which has been used for expansive defenses of a broad swath of controversial Executive programs should be publicly approved by members of a rival governmental branch—not delegated to an agency's discretion.

The Department of Justice's Guidelines to constrain the privilege's use demonstrate why self-policing mechanisms are inadequate to prevent future misapplications of the privilege. Notwithstanding President Obama's publicly proclaimed passion for limiting the privilege's impact99 and the potential constraints of

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96. See In re All Matters Submitted to the Foreign Intelligence Surveillance Court, 218 F. Supp. 2d 611, 620 (Foreign Intell. Surv. Ct. 2002).
97. George, supra note 15, at 1722 n.156.
99. Id. at 84 (statement of Ben Wizner, Nat'l Sec. Project Staff Att'y, ACLU), available at http://www.fas.org/sgp/congress/2009/statesec.html ("At a press conference the day after the Ninth Circuit's ruling in the Jeppesen case, President Obama was asked about his Administration's position on state secrets. The President responded, I actually think that the state secrets doctrine should be modified. I think right now it's overbroad. Searching for ways to redact, to carve out certain cases to see what can be done so that a
the Guidelines, the government has maintained its reliance upon expansive invocations of the privilege since the Guidelines have entered into force.

In fact, mere hours after Attorney General Eric Holder publicly announced the Guidelines to “ensure the state secrets privilege is invoked only when necessary and in the narrowest way possible,” the government argued that the risks of exposing state secrets required the dismissal of a complaint relating to the use of the warrantless surveillance program. It took Attorney General Holder just one month after the Guidelines went into effect on October 1, 2009, to personally approve the government’s use of the privilege in a similar case involving warrantless surveillance under the new Guidelines.

At best, the Guidelines offer a solution of indefinite duration and uncertain legal status. Even assuming that the Guidelines have restrained the government’s use of the privilege, there is ample historical evidence to suggest that, lacking oversight, future attorneys general will loosen these nonbinding self-restraints. One noteworthy example is the historical relaxation of strict guidelines for undercover FBI investigations to protect lawful

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100. The Department of Justice is required to periodically explain the government’s use of the privilege to all “appropriate oversight committees of Congress.” Guidelines, supra note 4, at 4. A “State Secrets Review Committee” consisting of a panel of government lawyers will recommend the privilege’s use. Id. at 2-3. The Attorney General must personally approve every use of the privilege. Id. at 3. The privilege may not be used to “(i) conceal violations of the law, inefficiency, or administrative error; (ii) prevent embarrassment to a person, organization, or agency of the United States government; (iii) restrain competition; or (iv) prevent or delay the release of information the release of which would not reasonably be expected to cause significant harm to national security.” Id. at 2.


103. Guidelines, supra note 4, at 1.


105. See generally Government’s Notice of Renewed Motion to Dismiss and for Summary Judgment and Memorandum in Support, Shubert v. United States, 2009 WL 4740741 (Oct. 30, 2009) (motioning for dismissal on the ground that information necessary to plaintiff’s litigation of all claims against defendants is properly subject to, and excluded from use in this case by, the state secrets privilege and related statutory privileges).
First Amendment activities.\textsuperscript{106}

At worst, the new Guidelines simply reiterate that the Executive branch, and not the judiciary, is empowered to evaluate which claims may not be adjudicated. The new Guidelines do not substantially alter or clarify the previously asserted basis for invoking the privilege.\textsuperscript{107} Nor do the Guidelines require the government to provide any supporting evidence to judges who must decide whether to defer to the invoked privilege. Although at least one court has lauded the administration’s attempt to “set[] forth a much more detailed structure for the proper invocation of the state secrets privilege,”\textsuperscript{108} the Guidelines can offer little meaningful procedural assistance to a court charged with the greater task of ensuring the privilege’s proper application.

V. THE STATE SECRETS PROTECTION ACT

Having demonstrated why Congress is the appropriate institution to develop guidelines for courts in assessing claims of privilege, the previously proposed State Secrets Protection Act\textsuperscript{109} (SSPA) provides needed procedural direction to judges and litigants who are confronted with the assertion of the privilege. In general, the SSPA replaces the imprecise and outdated balancing test articulated in Reynolds nearly half a century ago with a more concrete framework for evaluating the privilege. As a preliminary matter, the bill recognizes the need to protect information as vital to the security of the country and accordingly continues to empower the judge to allow ex parte submissions according to the “interests of justice and national security.”\textsuperscript{110}

Affirming the narrow scope of Totten’s applicability to suits initiated by plaintiffs harmed by covert formal agreements with the government, the Act explicitly recognizes the privilege’s use as a limited evidentiary privilege instead of a wholly independent

\textsuperscript{106} See Neil A. Lewis, Traces of Terror: The Inquiry; Ashcroft Permits F.B.I. to Monitor Internet and Public Activities, N.Y. TIMES, May 31, 2002, http://www.nytimes.com/2002/05/31/us/traces-terror-inquiry-ashcroft-permits-fbi-monitor-internet-public-activities.html (explaining that restrictions upon how the FBI searches for information when no formal complaint had been filed with the Bureau had been relaxed to the extent that counterterrorism inquiries could be made without approval from headquarters).

\textsuperscript{107} The privilege will be invoked whenever it is “necessary to protect information the unauthorized disclosure of which reasonably could be expected to cause significant harm to the national defense or foreign relations (‘national security’) of the United States.” Guidelines, supra note 4, at 1.

\textsuperscript{108} Horn v. Huddle, 699 F. Supp. 2d 236, 239 (D.C. Cir. 2010).

\textsuperscript{109} Previously, there were substantially similar versions of this bill in each branch of Congress: State Secrets Protection Act, S. 417, 111th Cong. (2009) in the Senate and State Secret Protection Act, H.R. 984, 111th Cong. (2009) in the House of Representatives. Unless otherwise noted, all references will be to the Senate’s version.

\textsuperscript{110} S. 417 § 4652(a)(3).
ground for dismissal of a case or claim. Perhaps more importantly, the SSPA clarifies that the privilege may only be invoked after discovery, when the evidence is before the court, and the privilege is necessarily non-generalized and specific. Instead of permitting judges to accept baseless assertions of the privilege, which led to the wrongful dismissal in Reynolds, the bill would require the government to provide a “factual basis” in an affidavit at the very onset of the case for each piece of allegedly privileged evidence. The requirement for such a specific defense is consistent with Ellsberg’s general principle that “whenever possible, sensitive information must be disentangled from nonsensitive information to allow for the release of the latter.” Even if the court determines that the specific evidence is secret, the court must try to use an evidentiary substitute whenever possible.

As a retired Chief Judge for the U.S. Court of Appeals has observed, the government has inconsistently objected to court techniques for determining whether cases may proceed without threatening national security. If enacted, the bill would consequently minimize governmental appeals by explicitly authorizing courts to use specific techniques such as sampling, the use of indexes, the appointment of “special masters,” and in the House version of the bill, an “adequate substitute, such as a redacted version, summary of the information, or stipulation regarding the relevant facts, if the court deems such a substitute feasible” to allow cases to proceed. Fewer governmental appeals based on legally sanctioned sampling techniques would likely result in the conservation of “considerable time and resources”—recognized by the Ellsberg Court as an important policy consideration when reviewing the privilege. These techniques for evaluating allegedly secret, privileged, or voluminous material are already being used by federal judges in other contexts and will offer welcome assistance in a confused area of law.

Adding to the bill’s appeal, the SSPA has attracted supporters under both republican and democratic presidents and will therefore be relatively immune to charges of political

111. Id. at § 4053(b).
112. Id. at § 4054(d)(e).
113. Id. at § 4053(d).
114. Ellsberg, 709 F.2d at 57.
115. S. 417 § 4054(f).
117. S. 417 § 4054(d)(2).
118. Id. at § 4054(d).
119. Id. at § 4052(f).
120. H.R. 984 § 3(d).
121. Ellsberg, 709 F.2d at 63.
motivations. Unconstrained by FISA's financial burdens for maintaining special tribunals to evaluate secret information, the SSPA could be enacted at little cost. The Congressional Budget Office estimated that implementing H.R. 984 would have "no significant impact on the federal budget." The optimal levels of deference that judges should pay to government experts who assert the privilege remains an important point of difference between the House and Senate versions of the SSPA. The House's version provides that "[t]he court shall weigh testimony from Government experts in the same manner as it does, and along with, any other expert testimony." While the Senate's version contains the same provision, it also requires that "[t]he court shall give substantial weight to an assertion by the United States relating to why public disclosure of an item of evidence would be reasonably likely to cause significant harm to the national defense or foreign relations of the United States." This is the approach of the FOIA, which requires that "a court shall accord substantial weight to an affidavit of an agency concerning the agency's determination" of the classified nature of sought-after information. One commentator has argued that the Senate's version of the SSPA properly recognizes the constitutional deference owed to an executive branch. Although it is true that the Executive branch wields both expertise in matters of national security and constitutional responsibilities to protect the country, which must be respected by other branches, it is likely that the "substantial weight" requirement would likely prove to be a source of further ambiguity and confusion, thereby depriving the SSPA of its broader intent to clearly establish the judiciary's role as a critical evaluator of the privilege. Noting the importance of instituting a "meaningful review," former Chief Judge of the U.S. Court of Appeals for the District of Columbia, Patricia C. Wald, has argued persuasively that the Senate's version "would unfairly tip the scales in favor of executive branch claims before the judge's evaluation occurs, and would undermine the thoroughness of the judge's own review."

122. Although the State Secrets Protection Act, S. 2533, 110th Cong. (2008), was originally proposed during the tenure of President Bush, it was proposed a second time under President Obama.
124. H.R. 984 § 6(c).
125. S. 417 § 4054(e)(3) (emphasis added).
VI. APPLICATION OF THE SSPA TO JEPPESEN DEMONSTRATES ITS UTILITY IN CONSERVING VALUABLE JUDICIAL RESOURCES

A hypothetical application of the SSPA to a recent case in which the government asserted the privilege to dismiss allegations against a third party for knowingly participating in a torture program is a case demonstration of how the statute could provide needed procedural guidance to courts to ensure for more efficient and fair adjudication of claims.

In 2007, Ethiopian national and British citizen Binyam Mohamed and four others filed a claim under the Alien Tort Statute against Jeppesen Dataplan Incorporated, a subsidiary of Boeing and contractor for the government. Mohamed alleged that, after CIA operatives apprehended him in Pakistan in 2002, Jeppesen knowingly transported him to and from various locations where he was tortured before his eventual release in 2009. The government intervened on behalf of Jeppesen and invoked the state secrets privilege at the pleadings stage, demanding that the entire case be dismissed. The District Court for the Northern District of California held that the suit must be dismissed pre-discovery, because its very subject matter concerned a state secret. “In sum, at the core of plaintiffs’ case against Defendant Jeppesen are ‘allegations’ of covert U.S. military or CIA operations in foreign countries against foreign nationals—clearly a subject matter which is a state secret.”

The ensuing history of the case demonstrates both the insufficiency of the Guidelines to restrain future misuses of the privilege and the substantial inefficiencies resulting from confusion surrounding the privilege’s proper scope. Just a few months after a newly-elected President Obama pledged to introduce a new era of accountability and transparency to the White House, Department of Justice attorneys again asserted the state secrets privilege to preclude the appeal of the district court’s decision. A three-judge panel of the Ninth Circuit Court of Appeals reaffirmed Totten’s limited applicability to cases involving secret

128. “A former Jeppesen employee informed THE NEW YORKER that at an internal company meeting, a senior Jeppesen official stated: ‘We do all of the extraordinary rendition flights—you know, the torture flights. Let’s face it, some of these flights end up that way.’” Jane Mayer, The C.I.A.’s Travel Agent, THE NEW YORKER, Oct. 30, 2006, at 34.
129. The horrific nature of the alleged torture, if true, surely constitutes a violation of jus cogens. “Mr. Mohamed was handed over to agents of the Moroccan security services. Over the next 18 months, he was routinely beaten to the point of losing consciousness, and a scalpel was used to make incisions all over his body, including his penis, after which a hot stinging liquid was poured into his open wounds.” Appellate Petition for a Writ of Certiorari at 10 Mohamed v. United States, 579 F.3d 943 (9th Cir. 2009) (No. 10-778).
agreements existing between the President and the plaintiff, and confirmed that the applicable Reynolds standard did not require dismissal to reinstate the case. Rejecting the unlimited scope of the government's interpretation of Totten's general principle, the Ninth Circuit used strong language:

This sweeping characterization of the "very subject matter" bar has no logical limit—it would apply equally to suits by U.S. citizens, not just foreign nationals; and to secret conduct committed on U.S. soil, not just abroad. According to the government's theory, the Judiciary should effectively cordon off all secret government actions from judicial scrutiny, immunizing the CIA and its partners from the demands and limits of the law.

After the Court of Appeals granted the government's petition for en banc review, Department of Justice attorneys reasserted the previous administration's arguments for broad judicial deference to the privilege's invocation with renewed vigor:

No other court of appeals has so restricted the state secrets privilege and the panel's order is directly at odds with the cardinal principle, repeatedly applied by courts of appeals, that a case must be dismissed regardless of its stage if it cannot be litigated further without disclosure of state secrets.

In December 2009, just months after Attorney General Holder's recent Guidelines went into effect, Department of Justice lawyers maintained the previous governmental position that the claims against Jeppesen must be dismissed pursuant to the privilege. In September 2010, the en banc court affirmed the district court's dismissal by six votes to five because there was "no feasible way to litigate Jeppesen's alleged liability without creating an unjustifiable risk of divulging state secrets."

In reaching this determination, the Ninth Circuit "assume[d] without

131. "On facts similar to those in Totten itself, Tenet v. Doe, 544 U.S. 1 (2005), recently confirmed that Totten prohibits only suits that would necessarily reveal 'the plaintiff's [secret] relationship with the Government.' Id. at 10 (emphasis added)," Mohamed, 563 F.3d at 1002.
132. "Successful invocation of the Reynolds privilege does not necessarily require dismissal of the entire suit. Instead, invocation of the privilege requires 'simply that the evidence is unavailable, as though a witness had died [or a document had been destroyed], and the case will proceed accordingly, with no consequences save those resulting from the loss of evidence.' Al-Haramain, 507 F.3d at 1204 (quoting Ellsberg, 709 F.2d at 64)." Mohamed, 563 F.3d at 1001.
133. Id. at 997.
134. Id. at 1003.
deciding that plaintiffs' prima facie case and Jeppesen's defenses may not inevitably depend on privileged evidence."  

Applied to the case, the SSPA would have saved considerable time and resources by requiring the district court to engage in its primary responsibilities as fact-finder. Under the current formula, appellate courts must pour through voluminous court records which have been ignored by the lower court based on the successful assertion of the privilege. After the district court's recognition of the privilege, thirty Ninth Circuit judges have reviewed the nearly 2000 pages of public material evidence submitted by the plaintiff. Although it was better positioned to do so, the district court could not examine the plaintiff's evidence, because it had deferred to the government's pre-discovery invocation of the privilege. The SSPA would prohibit the fact-finder's deference to abstract assertions of the privilege before the plaintiff has been permitted to engage in discovery or demonstrate why the evidence is not secret. Consequently, instead of deferring to a hypothetical governmental assertion that litigation would compromise secrets, a lower court operating under SSPA procedures would have been required to make a factual determination whether the specific evidence actually required by the plaintiff was secret. Second, applying the standard of review of SSPA, the government would have been required to provide a "factual basis" in an affidavit for the claim of privilege for each piece of allegedly privileged evidence at the onset of the case. Such affidavits would ground governmental assertions in specific evidence, minimising the chances that a district court's deference to the privilege's assertion would be generalized, inaccurate, and appealable. At the very least, the fact-finder's piecemeal inspection of such affidavits and the evidence before the court would have saved subsequent appellate courts the time-consuming examinations of extensive amounts of evidence.

Secondly, under SSPA procedures, the district court could not have used Totten's general principle as a basis for foreclosing relief from injuries sustained through a well-documented governmental program. First, the SSPA clearly prohibits the government from invoking the privilege as "grounds for dismissal of a case or claim." However, putting this issue aside, if the district court had actually examined the specific evidence, it could have concluded that much of the allegedly confidential information had already been publicly disclosed through extensive media coverage and government officials' public descriptions of the renditions program. Under the procedural guidance of House Resolution

137. Id.
138. Id. at 1095 n.2 (Hawkins, J., dissenting).
139. S. 417 § 4053(b).
140. See supra text accompanying note 69. In addition to the media
984, which permitted the court to weigh testimony from “other expert testimony” in the same fashion as it does “government experts,” the court could have determined that public disclosures rendered the information beyond the privilege’s protections.

VII. CONCLUSION

Although controversies involving the state secrets privilege have assumed constitutional overtones, the government’s ability to foreclose the admission of evidence based on secrecy is essentially derived from the common law, and should be limited accordingly. Guidance from Congress is appropriate to ensure that “whenever possible, sensitive information must be disentangled from nonsensitive information to allow for the release of the latter.”

In its current form, judges are left alone to navigate the uncertain procedural complexities posed by the privilege’s invocation. Without any systematic direction, judges have exhibited great deference to governmental assertions at early stages of litigation. But this deference has also bred inconsistencies and confusion, unnecessarily increasing litigation and demanding greater and greater allocations of court resources. Procedural guidance for judges who must define the privilege’s scope will bring needed clarity to an ambiguous area of law, limit miscarriages of justice, ensure for uniform standards to protect the nation’s most sensitive information, and minimize judicial inefficiencies.

attention, two foreign governments have already compensated three of the petitioners for the role they played in their torture and renditions. The British government plans on conducting its own inquiry into the role of the British government’s cooperation with the CIA and other foreign organizations in the torture of suspected terrorists. See Ian Cobain, David Cameron Announces Torture Inquiry, THE GUARDIAN (LONDON), July 6, 2010 (noting general inquiry into Britain’s role in torture and rendition).

141. Ellsberg, 709 F.2d at 57.