THE BUSH AND OBAMA ADMINISTRATIONS' INVOCATION OF THE STATE SECRET PRIVILEGE IN NATIONAL SECURITY LITIGATION: A PROPOSAL FOR ROBUST JUDICIAL REVIEW

I. INTRODUCTION

The launch of the Global War on Terrorism (GWOT)[1] occasioned a new challenge to the Rule of Law. This challenge manifested itself in a series of legal memoranda[2] and ensuing positions adopted by the George W. Bush administration in response to the capture and imprisonment of those suspected of carrying out the September 11, 2001 terrorist attacks.[3] Many of the political policy formulations adopted by the Bush administration generated intensive debate over their merits,[4] legality,[5] and political viability.[6] Among the most controversial policies are

1. The Obama administration has discarded usage of the phrase "GWOT" and has instead opted to use the phrase "overseas contingency operations." *See* Scott Wilson and Al Kamen, *"Global War on Terror" is Given New Name*, WASH. POST, Mar. 25, 2009, http://www.washingtonpost.com/wp-yn/content/article/2009/03/24/AR2009032402818.html.

2. *See, e.g.*, Memorandum from John Yoo, Deputy Assistant Att'y Gen., on Military Interrogation of Alien Unlawful Combatants Held Outside the United States to William J. Haynes II, Gen. Counsel of the Dep't of Def. (Mar. 14, 2003), *available at* http://www.aclu.org/safefree/torture/34745res20030314.html (advising the State Department that any federal statute must be construed as inapplicable to interrogations undertaken pursuant to the Presidential Commander-in-Chief power); *see also* Dawn E. Johnsen, *What's a President to Do? Interpreting the Constitution in the Wake of Bush Administration Abuses*, 88 B.U. L. REV. 395, 400–01 (2008) (discussing the Bush administration's decision not to comply with some federal statutes); Jules Lobel, *Conflicts Between the Commander in Chief and Congress: Concurrent Power Over the Conduct of War*, 69 OHIO ST. L.J. 391, 391–92 (2008) (pointing out the Bush administration's practice of overriding Congress).

3. I have explored these policies in depth elsewhere in the context of traditional political theory. *See* Ahmad Chehab, *The Unitary Executive and the Jurisprudence of Carl Schmitt: Theoretical Implications for the "War on Terrorism"* (2007), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1746966.

4. Jeremy Waldron, *Torture and Positive Law: Jurisprudence for the White House*, 105 COLUM. L. REV. 1681, 1708 (2005) (analyzing the Bush administration's legal arguments advanced in several Dept. of Justice memos and concluding that the quality of legal work reflected therein "is a disgrace").

5. For an extended discussion, see Jordan J. Paust, *Above the Law: Unlawful Executive Authorizations Regarding Detainee Treatment, Secret Renditions, Domestic Spying, and Claims to Unchecked Executive Power*, 2007 UTAH L. REV. 345 (2007); *see also* Jose E. Alvarez, *Torturing the Law*, 37 CASE W. RES. J. INT'L L. 175 (2006).

6. Positive global perception of the United States had declined throughout the past eight years under the Bush administration, caused in significant part by what was widely perceived as its unilateral approach to foreign policy. *Global Public Opinion in the Bush*

waterboarding and other "enhanced interrogation" techniques applied against foreign nationals detained abroad and at Guantanamo Bay;[7] the practice of "extraordinary rendition";[8] the National Security Agency (NSA) eavesdropping program without prior court approval;[9] the self-proclaimed right to unilaterally launch pre-emptive war;[10] enactment of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 ("PATRIOT Act");[11] the usage of signing statements to evade congressional intent;[12]

Years (2001-2008), THE PEW GLOBAL ATTITUDES PROJECT (Dec. 18, 2008), *available at* http://pewglobal.org/reports/display.php?ReportID=263.

7. *See* THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB (Karen J. Greenberg & Joshua L. Dratel eds., 2005); Jan Crawford Greenburg et al., *Sources: Top Bush Advisors Approved 'Enhanced Interrogation'*, ABCNEWS.COM, Apr. 9, 2008, http://abcnews.go.com/TheLaw/LawPolitics/story?id=4583256&page=1 (describing how senior Bush administration officials discussed and approved "enhanced interrogation techniques" to be used against "important" detainees).

8. *See* Dana Priest, *CIA Holds Terror Suspects in Secret Prisons*, WASH. POST (Nov. 2, 2005), http://www.washingtonpost.com/wpdyn/content/article/2005/11/01/AR2005110101644.html.

9. *See, e.g.*, James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES (Dec. 16, 2005), *available at* http://www.nytimes.com/2005/12/16/politics/16program.html. *See infra* section II.

10. The concept of preemptive war gained the most attention—and controversy—during the lead-up to the March 2003 Iraq War. Justifications for preemptive war primarily centered on a peculiar reading of the constitutional grants of power vested within the office of the executive branch. *See* Robert J. Delahunty & John Yoo, *The "Bush Doctrine": Can Preventive War Be Justified?* 32 HARV. J. L. & PUB. POL'Y 843, 854-61 (2009) (detailing the historical emergence of the idea of preventive war, and arguing that the Bush Doctrine, far from an aberration, is merely a continuation of previous presidential foreign policy positions).

11. Many critics have argued that the PATRIOT Act has resulted in an erosion of American civil rights and liberties, as well as increasing the level of covert governmental surveillance. *See, e.g.*, Rachel S. Martin, *Watch What You Type: As the FBI Records Your Keystrokes, the Fourth Amendment Develops Carpal Tunnel Syndrome*, 40 AM. CRIM. L. REV. 1271, 1279 (2003) (criticizing Section 216 authority under the Act to collect any "dialing, routing, addressing, or signaling" information under the procedures governing acquisition of telephone numbers); *see also* Patricia Mell, *Big Brother at the Door: Balancing National Security with Privacy Under the USA PATRIOT Act*, 80 DENV. U. L. REV. 375, 406-26 (2002) (discussing expansions in the federal government's authority to conduct secret surveillance and implications for constitutional privacy rights).

12. *See* Charlie Savage, *Bush Challenges Hundreds of Laws*, BOSTON GLOBE (Apr. 30, 2006), *available at* http://www.commondreams.org/headlines06/0430-01.htm. ("President Bush has quietly claimed the authority to disobey more than 750 laws enacted since he took office, asserting that he has the power to set aside any statute passed by Congress when it conflicts with his interpretation of the Constitution"). For a more in-depth overview, *see* Phillip J. Cooper, *George W. Bush, Edgar Allan Poe, and the Use and Abuse of Presidential Signing Statements*, 35 PRESIDENTIAL STUD. Q. 515, 520 (2005), *available at*

capturing and designating those suspected of Al-Qaida activity as "enemy combatants" without affording sufficient due process rights;[13] and, more broadly, disregarding unfavorable congressional legislation,[14] among numerous others.[15] Many of these initiatives sought to effectively liberate the presidency of George W. Bush from governmental review and thereby place him above the reach of the law.[16]

In addition, the Justice Department under the Bush administration repeatedly invoked the State Secrets Privilege (SSP) in high-profile national security litigation cases challenging many of these same controversial practices initiated by the Bush White House in the context

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http://www.mead354.org/uploaded/faculty/pkautzman/APUIV/C13_The_Presidency/Signing_Statements_by_Cooper.pdf ("The administration of George W. Bush has quietly, systematically, and effectively developed the presidential signing statement to regularly revise legislation and pursue its goal of building the unified executive.").

13. The practice of designating those captured in Afghanistan (and elsewhere) as enemy combatants has been widely criticized as ambiguous, amorphous, and overly broad. *See* Neal K. Katyal & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 YALE L.J. 1259, 1263-66 (2002) (arguing that the November 2001 Military Orders on determining enemy combatant status is replete with "vagueness [that] invites arbitrary and potentially discriminatory determinations" and "installs the executive branch as lawgiver as well as law-enforcer, law-interpreter, and law-applier" and thus "authorize[s] a decisive departure from the legal status quo").

14. Constitutional avoidance in the executive context has been used to mean that the President can "avoid" a constitutional dispute by asserting his own view of his constitutional obligations any time Congress purportedly transgresses onto the constitutional right of the executive to exert its decision-making primacy in certain areas, such as in the conduct of war or the function of its internal hiring and firing process. *See* Trevor W. Morrison, *Constitutional Avoidance in the Executive Branch*, 106 COLUM. L. REV. 1189, 1218-19 (2006) (critiquing the Office of Legal Counsel's (OLC) use of constitutional avoidance in an attempt to seize greater extra-legal authority to conduct GWOT operations). Congress continues to attempt to legislate its way around executive branch avoidance. *See* OLC Reporting Act of 2008, S. 3501, 110th Cong. (2008) (introduced by Sens. Feingold and Feinstein); Office of Legal Counsel Reporting Act of 2008, H.R. 6929, 110th Cong. (2008) (introduced by Rep. Miller). Both bills propose amendments to 28 U.S.C. § 503(D) to oblige the Attorney General to report to Congress on non-enforcement of statutes based on OLC opinions claiming constitutional avoidance based on the OLC's reading of presidential power under Article II of the United States Constitution. *See* Anthony Vitarelli, *Constitutional Avoidance Step Zero*, 119 YALE L.J. 837, 837-39 (2010).

15. *See, e.g.*, Beth Stephens, *Upsetting Checks and Balances: The Bush Administration's Efforts to Limit Human Rights Litigation*, 17 HARV. HUM. RTS. J. 169, 182 (2004) (documenting the attempts by the Bush presidency to curtail judicial review in cases of alleged human rights violations by the U.S. government).

16. JACK GOLDSMITH, THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION 89 (2007) ("Cheney and the President told top aides at the outset of the first term that past presidents had 'eroded' presidential power, and that they wanted 'to restore' it so that they could 'hand off a much more powerful presidency' to their successors").

of waging the GWOT.[17] In many instances the Bush administration employed the privilege in a qualitatively different and more sweeping manner than its predecessors.[18] Furthermore, in all national security-related litigation still pending from the Bush administration era and in newly developed cases, the Obama administration has, to the dismay of many, declined to reverse this policy.[19] Despite initial moves by the

17. Michael D. Ramsey, *Torturing Executive Power*, 93 GEO. L.J. 1213 (2005) (discussing the method by which the Bush administration invoked the executive authority under Article II of the Constitution to violate important statutory restraints in the waging of the "War on Terrorism").

18. Amanda Frost, *The State Secrets Privilege and Separation of Powers*, 75 FORDHAM L. REV. 1931, 1939 (2007) (noting that the Bush administration has raised the privilege in twenty-eight percent more cases per year than in the previous decade, and has sought dismissal in ninety-two percent more cases per year than in the previous decade). As a survey of a litany of cases from the Bush administration era demonstrate, the SSP has been used to dismiss entire lawsuits in advance based on a claim that any judicial adjudication would harm national security, however defined and however understood. Moreover, the Bush administration did this not merely when a state secret was incidental to some unrelated complaint, but when the government itself, through one of its controversially covert programs, was the target of the suit. *See, e.g.*, El-Masri v. United States, 479 F.3d 296, 310-11 (4th Cir. 2007) (discussed *infra* Part II.A.2) (affirming pre-discovery dismissal); Crater Corp. v. Lucent Techs., Inc., 423 F.3d 1260, 1262 (Fed. Cir. 2005) (affirming the government's argument for dismissal on SSP grounds); Sterling v. Tenet, 416 F.3d 338, 348-49 (4th Cir. 2005) (affirming pre-discovery dismissal on state secrets grounds of suit against the CIA for race discrimination under Title VII); Terkel v. AT&T Corp., 441 F. Supp. 2d 899, 917 (N.D. Ill. 2006) (dismissing before discovery challenge to National Security Agency's warrantless wiretapping program on state secrets grounds); Edmonds v. U.S. Dep't of Justice, 323 F. Supp. 2d 65, 81-82 (D.D.C. 2004) (suit by former FBI employee for alleged wrongful termination after "blowing the whistle" on FBI failures related to the terrorist attacks of September 11, 2001 dismissed after the government invoked the state secrets privilege), *aff'd* 161 F. App'x 6 (D.C. Cir. 2005); Crater Corp. v. Lucent Tech., Inc., 423 F.3d 1260 (Fed. Cir. 2005); Tenenbaum v. Simonini, 372 F.3d 776, 777-78 (6th Cir. 2004) (affirming summary judgment because no defense was available without resort to privileged state secrets); McDonnell Douglas Corp. v. United States, 323 F.3d 1006, 1020-21 (Fed. Cir. 2003) (upholding the claim of state secrets privilege); Darby v. United States Dep't of Def., 74 F. App'x. 813, 813-14 (9th Cir. 2003) (affirming the District Court's recognition of a legitimate SSP defense to the Plaintiff's First and Fifth Amendment claims against the Department of Defense); McDonnell Douglas Corp. v. United States, 323 F.3d 1006, 1021-22 (Fed. Cir. 2003); DTM Research, LLC v. AT&T Corp., 245 F.3d 327, 329 (4th Cir. 2001) (upholding claim of state secrets privilege and quashing a subpoena for government's information on data mining); United States ex rel. Schwartz v. TRW, Inc., 211 F.R.D. 388, 393-94 (C.D. Cal. 2002).

19. *See, e.g.*, Jake Tapper & Ariane de Vogue, *Obama Administration Maintains Bush Position on 'Extraordinary Rendition' Lawsuit*, ABCNEWS.COM (Feb. 9, 2009, 2:44 PM), http://blogs.abcnews.com/politicalpunch/2009/02/obama-administr.html (quoting ACLU Staff Attorney Ben Wizner: "We are shocked and deeply disappointed that the Justice Department has chosen to continue the Bush administration's practice of dodging judicial scrutiny of extraordinary rendition and torture. This was an opportunity for the

Obama administration in an attempt to reverse several unpopular positions,[20] the policies of the Bush administration continue to present perplexing political and legal problems. From litigation challenging the practice of extraordinary rendition[21] to the issue of wiretapping U.S.

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new administration to act on its condemnation of torture and rendition, but instead it has chosen to stay the course."). To be fair, the Obama administration did announce that it would implement new administrative mechanisms to reform the state secrets privilege. *See generally* Memorandum from Eric Holder, Attorney Gen., to Heads of Executive Dep'ts and Agencies and Heads of Dep't Components (Sept. 23, 2009), *available at* http://www.usdoj.gov/opa/documents/state-secret-privilieges.pdf [hereinafter *Memorandum*]. This announcement was met with criticism from congressional leaders and civil liberties advocates who argue that "real reform" of the privilege requires external oversight by the judiciary. Press Release, ACLU, Proposed State Secrets Guidelines Don't Relieve Need for Real Reform (Sept. 23, 2009), *available at* http://www.aclu.org/safefree/general/41124prs20090923.html?s_src=RSS ("Real reform of the state secrets privilege must affirm the power of the courts"). *See also* Michael Scherer, *Barack Obama's New State Secrets Policy: The Question of Court Review*, SWAMPLAND.TIME.COM (Sept. 23, 2009), http://swampland.time.com/2009/09/23/barack-obamas-new-state-secrets-policy-the-question-of-court-review/ (quoting Sen. Russ Feingold, "[Obama's] new policy is disappointing because it still amounts to an approach of 'just trust us.' Independent court review of the government's use of the state secrets privilege is essential.").

20. Peter Finn, *Guantanamo Closure Called Obama Priority*, WASH. POST (Nov. 12, 2008), *available at* http://www.washingtonpost.com/wpyn/content/article/2008/11/11/AR2008111102865.html.

21. *See generally* Margaret L. Satterthwaite, *Rendered Meaningless: Extraordinary Rendition and the Rule of Law*, 75 GEO. WASH. L. REV. 1333 (2007). The Obama administration has decided to carry on the practice of the Bush administration's invocation of the SSP in, among other practices, the extraordinary rendition program. Take, for example, the case of *Mohamed v. Jeppesen Dataplan, Inc.* in which five foreign nationals from the Middle East brought suit under the Alien Tort Statute, 28 U.S.C. §1350, claiming that Jeppesen Dataplan, a subsidiary of the airline Boeing Company, was liable for actively participating in their forcible and arbitrary abduction, and conspiring in their torture in the Bush administration's extraordinary rendition program. 539 F. Supp. 2d 1128 (N.D. Cal. 2007). The U.S. District Court for the Northern District of California granted the government's motions to intervene and to dismiss the case under the SSP. *Id.* at 1133. On appeal, the Ninth Circuit held that the fact that certain documents had been classified did not compel finding that the documents were subject to the SSP. 563 F.3d 992 (9th Cir. 2008). Because it could not affirm grant of motion to dismiss pursuant to the government's Fed. R. Civ. P. 12(b)(6) on the ground that there was "no possibility" that foreign nationals could establish prima facie case without using privileged information, the grant of the SSP constituted reversible error. *Id.* at 1008. On October 27, 2009, however, the Ninth Circuit *sua sponte* voted to rehear the case *en banc* and held that the earlier opinion of the court could not be cited as precedent, thereby effectively vacating the earlier three-judge panel opinion. *See Jeppesen*, 586 F.3d 1108 (rehearing *en banc* granted). The en banc panel later held that the government's "valid assertion of the state secrets privilege warrants dismissal of the litigation," and went on to affirm the judgment of the district court." Mohamed v. Jeppesen Dataplan, Inc., 614 F.3d 1070,

citizens without judicial approval,[22] the Obama Justice Department has continued to invoke the SSP on similar grounds, concluding that any legal challenges against national security-related programs would necessitate disclosure of high-secret discovery materials.[23] This argument proceeds from the assumption that any litigation involving "state secrets" could potentially jeopardize American national security.[24] Although an

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1093 (9th Cir. 2010) (*en banc*). The Obama administration represented the government in the *Jeppesen* litigation, fully supporting the State Secret Privilege invocation in that case, despite purportedly campaigning for transparency and political accountability. *Id.* at 1077; *see also, e.g.*, Nick Bauman, *"State Secrets" Trump Justice Again*, MOTHERJONES.COM (Sept. 8, 2010), http://motherjones.com/mojo/2010/09/jeppesen-dataplan-binyam-mohamed-case-dismissed.

More recently in, Al-Aulaqi v. Obama, 727 F. Supp. 2d 1, 53-54 (D.C.C. 2010), the Government advanced a theory upon which the district court should dismiss a claim brought by a plaintiff claiming that defendants, the President, and various other officials, unlawfully authorized the targeted killing of his son. *Id.* at 8. The plaintiff's son was a dual U.S.-Yemeni citizen hiding in Yemen who had alleged ties to a terrorist organization (in violation of the Constitution and international law). *Id. See also*, Jewel v. Nat'l Sec. Agency, No. C 06-1791 VRW, 2010 WL 235075 (N.D. Cal. Jan. 21, 2010) (accepting the government's invocation of the SSP in a challenge to the wiretapping program); United States v. Haji Juma Khan, No. 08 Cr 621(NRB), 2010 WL 330241, at *3-4 (S.D.N.Y. Jan. 20, 2010) (accepting government invocation of the SSP); Akiko Ohata White v. Raytheon Co., No. 07-10222-RGS, 2008 WL 5273290, at *1-2 (D. Mass. Dec. 17, 2008) (Secretary of Army under Obama administration asserting SSP).

22. Congress enacted FISA in 1978 "to establish procedures for the use of electronic surveillance in gathering foreign intelligence information." Matter of Kevork, 788 F.2d 566, 569 (9th Cir. 1986). The government generally must obtain judicial approval before it engages in such surveillance. United States v. Cavanagh, 807 F.2d 787, 788 (9th Cir. 1987). A specially constituted court, the United States Foreign Surveillance Court (USFSC), hears the government's application. 50 U.S.C. § 1803. The Chief Justice of the Supreme Court designates seven United States District Court judges to serve on the court. *Id.*

23. The Obama administration did issue a codified approach to help systematize SSP invocations. *See Memorandum*, *supra* note 19; *see also* Horn v. Huddle, 699 F. Supp. 2d 236, 241-43 (D.D.C. 2010) In *Huddle*, the court denied the government's assertion of the SSP and a motion for entry of a protective order. *Id.* at 243. Paragraph A of the Attorney General's memorandum provides that the D.O.J. "will defend an assertion of the [SSP] in litigation when a government department or agency seeking to assert the privilege makes a sufficient showing that assertion of the privilege 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." The memo also announced that the DOJ "policy is that the privilege should be invoked only to the extent necessary to protect against the risk of significant harm to national security. The Department will seek to dismiss a litigant's claim or case on the basis of the state secrets privilege only when doing so is necessary to protect against the risk of significant harm to national security." *Huddle*, 699 F. Supp. 2d at 240-41.

24. The standard articulation by courts of when a dismissal pursuant to an invocation of the SSP is required is two-fold: first, evidence is privileged pursuant to the state secrets doctrine if, and dismissal required, where under all the circumstances of the case, "there

assertion of the SSP has been invoked by virtually every president in the post-World War Two era, the Bush administration's invocations were markedly different. From 2001 through 2006, both the number of invocations of the privilege and the occasions on which the Bush administration sought to dismiss a case in its entirety increased significantly.[25]

Professor Robert Chesney has argued that invocation of the SSP has not really changed under the Bush administration, either in terms of the frequency with which the SSP is invoked or in the ways in which it is being used.[26] To highlight this point, Professor Chesney claims that the SSP was invoked twenty-two times from 1980 to 1989, twenty-two times between 2000 and 2006, and twenty-five times from 1990 to 1999.[27]

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is a reasonable danger that [its disclosure] will expose military [or diplomatic or intelligence] matters which, in the interest of national security, should not be divulged." *Reynolds*, 345 U.S. at 10. Second, a proceeding in which the state secrets privilege is successfully interposed must be dismissed if the circumstances make clear that privileged information will be so central to the litigation that any attempt to proceed will threaten that information's disclosure. *Id.* at 9. Sometimes, courts will simply excise the portion deemed privileged and permit the plaintiff to proceed without the benefit of discovery of claimed state secrets by the government in litigation. In *In re Sealed Case,* for example, a former Drug Enforcement Agency (DEA) employee brought a lawsuit action against a State Department official and against an unnamed federal agent allegedly affiliated with Central Intelligence Agency (CIA), asserting Fourth Amendment violations. 494 F.3d 139, 141 (D.C. 2007). The United States District Court for the District of Columbia granted the government's motion to dismiss. *Id.* On appeal, the U.S. Court of Appeals for the District of Columbia reversed, holding that in the action alleging that the State Department official had illegally wiretapped his telephone, exclusion under state secrets privilege of portions of internal investigations conducted by agency inspectors general did not deprive the official of "valid" defense, so as to compel dismissal of the lawsuit, as the government had so claimed in invoking the SSP. *Id.* at 154 The fact that the defendant had possible defenses that he could not pursue without resort to privileged materials did not render those defenses meritorious, and the defense that official did assert, that he had learned contents of conversation in question via other means, was unprivileged. *Id.* 141-149.

25. Frost, *supra* note 18.

26. Robert M. Chesney, *State Secrets and the Limits of National Security Litigation,* 75 GEO. WAS. L. REV. 1249, 1271-83, 1252 (2007) (contending that "recent assertions of the privilege are not different in kind from the practice of other administrations" in terms of types of information protected, process judges apply, or remedies sought). Chesney also argues that there is no strong evidence suggesting that the Bush administration has asserted the privilege more frequently than past administrations. *Id.* at 1301. Nor is there evidence that it has sought dismissal more often than other administrations. *Id.* at 1306-07.

27. *Id.* at 1302 n.290. This data demonstrates that the Bush administration sought dismissal in 92% more cases per year than in the previous decade. By comparison, the government responded to lawsuits brought in the 1970s and 1980s challenging its warrantless surveillance programs by seeking to limit discovery, and only rarely filed motions to dismiss the entire litigation.

However, Professor Chesney's quantitative study is misleading for a number of reasons. Most significantly, it ignores the fact that in litigation challenging Bush administration policies relating to the waging of the war on terrorism, the SSP has been used to circumvent judicial review of the scope of executive power, engendering a peculiarly more dangerous and troubling aspect of that privilege than witnessed from invocations under prior presidential administrations.[28] In addition, the survey conducted by Professor Chesney involves a small number of cases, and it appears too difficult to draw conclusions from published decisions alone.[29]

The SSP raises a whole range of difficult problems, for it pits the role of the judiciary's mission for equitably resolving cases and the rights of a plaintiff to seek redress for purported constitutional violations against the President's duty to maintain American national security and ensure that highly sensitive information is not leaked.[30] The need for robust judicial review is thus in tension with the President's superior position to appreciate the risks of publicly producing evidence that might reveal highly classified information.[31] In addition to this fundamental tension, the problems presented with the SSP are further compounded

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28. J. Steven Gardner, *The State Secret Privilege Invoked in Civil Litigation: A Proposal for Statutory Relief*, 29 WAKE FOREST L. REV. 567, 587 (1994) (noting that the "most forceful" criticism of the SSP is that it "violates the constitutionally mandated separation of powers").

29. Chesney, *supra* note 26, at 1301-02 (admitting the limitation of the study).

30. *See* Hamdi v. Rumsfeld, 542 U.S. 507, 583 (2004) (Thomas, J., dissenting) (arguing that the judicial system lacks information and expertise to challenge presidential decisions relating to foreign affairs and national security); El-Masri v. Tenet, 437 F. Supp. 2d 530, 536 (E.D. Va. 2006) (admonishing courts to "bear in mind" the executive branch's authority over military and diplomatic affairs and its expertise in predicting the effect of disclosure on national security). United States v. U.S. Dist. Court (Keith), 407 U.S. 297, 320 (1972); *but see* Hepting v. AT&T Corp., 439 F. Supp. 2d 974, 995 (N.D. Cal. 2006) (recognizing and respecting an executive's duty "to protect the nation from threats" but refusing to abdicate the court's duty to adjudicate disputes in face of blanket assertions of secrecy).

31. In *Al-Haramain Islamic Found., Inc. v. Bush*, the Ninth Circuit discussed judicial deference in the state secrets privilege context using language strikingly different from that used by other circuits: "We take very seriously our obligation to review the documents with a very careful, indeed a skeptical, eye, and not to accept at face value the government's claim or justification of privilege." *Al-Haramain*, 507 F.3d 1190, 1203 (9th Cir. 2007). In the same passage, however, the court qualified this standard: "That said, we acknowledge the need to defer to the Executive on matters of foreign policy and national security and surely cannot legitimately find ourselves second guessing the Executive in this arena." *Id.* The Ninth Circuit went on to endorse a considerably hands-off deferential approach to the President, and instructed the district court to consider whether the plaintiff could sufficiently allege information from non-classified documents to establish standing to sue. *Id.* at 1193.

when one considers two basic assumptions underlying its invocation by the Bush and Obama administrations.

The first presumption is that the President is in a better position than the judiciary to assess national security-related threats. The reasoning behind this presumption is unpersuasive. It is a non-sequitur to assert that because the President's ability to render judgments more quickly than the judiciary exists in the context of dispatching the military or authorizing strategic decisions, a district judge adjudicating a claim dealing with national security issues should mechanically defer to the President's factual judgment, such as a retrospective determination that a suspected terrorist did in fact work with Al-Qaeda and must thus be designated as an "enemy combatant." The advantages the Executive Branch possesses have little to no bearing in the national security context when the SSP is invoked, insofar as that setting presupposes that the President has already rendered his decision and that the particular issue has now come before a court in a litigation posture.

Consider the enemy combatant scenario, in which the Presidential position to act and know what is taking place is purportedly at its highest. Even in this context, the argument does not follow that deference to the President is mandated. Indeed, it did not persuade the Supreme Court in *Hamdi v. Rumsfeld* to defer to the government's factual judgment,[32] nor did it do so in the 2008 decision in *Boumediene v. Bush* dealing with noncitizen detainees held at Guantanamo Bay where the Court struck down certain laws that were in tension with the constitutional right of habeas corpus.[33] Thus, even when the Executive Branch raises a legitimate concern in support of a fact deference argument, it does not follow automatically that deference is the only mechanism by which the judiciary can accommodate that concern.

The second presumption is that when the President invokes the privilege, he does so exclusively with the interest of the American public in mind. If, however, either of these presumptions turns out to be incorrect, or less correct than is typically presumed, the deference that a judge grants for the governmental invocation of the SSP would be unwarranted.

This paper critiques some of the arguments advanced for how to reform the privilege, and instead argues that the proper basis for reformation should come from the judiciary itself.[34] The conventional

32. Hamdi v. Rumsfeld, 542 U.S. 507, 583 (2004).

33. 553 U.S. 723 (2008).

34. *See, e.g.*, *Reform of the State Secrets Privilege, Hearing Before the Subcomm. on the Constitution, Civil Right, and Civil Liberties of the H. Comm. on the Judiciary*, 110th Cong. 56 (2008), *available at*

default deference given to the Executive Branch should be dramatically curtailed in favor of a more robust procedural guarantee of judicial review.[35] This argument stands against proposed reform from Congress, and instead focuses on ways in which federal judges can better police presidential assertions of privileged information in national security litigation.

Part I describes the evolution and nature of the SSP. Part II considers several high-profile cases in which the Bush and Obama administrations invoked the SSP in an attempt to dismiss claims challenging a number of politically-charged programs. The Justice Department in the post-9/11 era has consistently sought a blanket dismissal of any case challenging the constitutionality of specific, ongoing government programs. In addition, based on an examination of the Bush presidency and in the early federal court dispositions under the Obama administration, the assertion of the SSP has come at a much earlier, pre-discovery stage of the trial process, and has been invoked at an unprecedented level.[36] Rather than attempting to limit discovery, the Justice Department in both administrations has sought to aggressively dismiss the entire complaint, even when complaints filed allege serious and grave constitutional deprivations at the hands of official (albeit secret) governmental policy.

The Bush administration has invoked the SSP privilege in every case challenging two particularly controversial programs. First, the administration invoked the SSP in response to a challenge to its use of extraordinary rendition. Under extraordinary rendition, the United States ships foreigners suspected of having ties to terrorist organizations to foreign countries for interrogation, and members of the CIA actively engage in torture.[37] Secondly, it invoked the SSP with respect to the NSA's warrantless wiretapping program, under which the NSA eavesdropped on electronic communications of U.S. citizens without prior judicial approval, as constitutionally and statutorily mandated.[38] In

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http://judiciary.house.gov/hearings/printers/110th/40454.pdf (statement of William H. Webster) (arguing that "[j]udges are well-qualified to review evidence purportedly subject to the privilege and make appropriate decisions as to whether disclosure of such information is likely to harm our national security").

35. Frank Askin, *Secret Justice and the Adversary System*, 18 HASTINGS CONST. L. Q. 745, 760 (1991) (noting that judicial deference in the context of governmental invocations for secrecy is "unjustified").

36. *See, e.g.*, Scott Shane, *Invoking State Secrets Privilege Becomes a More Popular Legal Tactic by the U.S.*, N.Y. TIMES, June 4, 2006, http://www.nytimes.com/2006/06/04/washington/04secrets.html.

37. *See Fact Sheet: Extraordinary Rendition*, ACLU (Dec. 6, 2005), http://www.aclu.org/national-security/fact-sheet-extraordinary-rendition.

38. Amanda Frost & Justin Florence, *Reforming the State Secrets Privilege*, ADVANCE: THE JOURNAL OF ACS ISSUE BRIEFS, 111, 114 (2009).

these cases, both the Bush and Obama administrations have invoked the SSP, not just on grounds for keeping particular evidence suppressed and undiscoverable, but as a starting point for having all litigation challenging these two programs dismissed with prejudice prior to discovery.[39] Both Justice Departments under the current and previous administration made almost identical arguments regarding the need for dismissal in each of the extraordinary rendition and NSA warrantless wiretapping cases. Part III examines the congressional response to the SSP invocations by the Bush administration in an attempt to limit and codify its reach.

Part IV proposes several possible methods of examining the reliability and merit of SSP usage in national security litigation. Steering clear of the overly deferential approach often afforded to presidential invocations of purported privilege, this Note argues for a judicial balancing test that affords greater consideration to the interests of the plaintiffs. The central argument is that the SSP should not be able to shield constitutionally troubling presidential actions from public accountability and judicial redress.[40] Federal judges should not assume that the Executive Branch holds an advantage over the judiciary with respect to information access; the possibility that information can be passed through to the judge, combined with the potential for new information to emerge in the adversarial process, renders this inquiry manageable in many if not most instances. Special expertise is more likely to matter in the context of predictive policy or political strategic decisions than in the context of retrospective fact-finding adjudication, which is often the context in which national security litigation appears. In litigation in which the SSP is invoked, federal courts are often called on to adjudicate how a specific governmental policy that is widely acknowledged to exist has resulted in some sort of concrete damage toward a particular litigant or class of litigants.

Prominent professors, including Eric Posner and Adrian Vermeule,[41] as well as judges such as Justice Clarence Thomas[42] have argued that courts should simply defer to presidential determinations that the benefits of wartime action outweigh the costs to liberty, and thus not engage in purported "second guessing" of controversial political policies that deal

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39. *Id.*

40. Jeremy Telman, *Our Very Privileged Executive: Why the Judiciary Can (And Should) Fix the State Secrets Privilege*, 80 TEMP. L. REV. 499, 500 (2007) (stating that the privilege has been transformed into a form of "executive immunity").

41. *See* ERIC A. POSNER & ADRIAN VERMEULE, TERROR IN THE BALANCE: SECURITY, LIBERTY, AND THE COURTS 15–18 (2007).

42. Hamdi v. Rumsfeld, 542 U.S. 547, 579–84 (2004) (Thomas, J., dissenting).

with national security-related issues. In addition to allowing for fewer checks and balances, this uniquely deferential approach does not fit with precedent. It would be particularly difficult to distinguish, for example, the *Youngstown* decision during the Korean War,[43] the Pentagon Papers[44] decision during the Vietnam War, and the *Hamdan* decision during the GWOT,[45] none of which deferred to the executive's unilateral claim to unfettered discretion, from a claim by those favoring a strong "hands off" approach by the judiciary.

II. THE ORIGINS AND MODERN APPLICATION OF THE SSP

The United States currently has no "State Secrets Act," but rather only a "state secrets privilege," a "rule that allows the government to withhold information from discovery when disclosure would be inimical to national security."[46] Under this common law evidentiary doctrine,[47] the United States may prevent the disclosure of information in a judicial proceeding if "there is a reasonable danger" that such disclosure "will expose military matters which, in the interest of national security, should not be divulged."[48] As a practical matter, an invocation of the SSP in a litigation setting often ends the case.[49]

The seminal case on the SSP, *United States v. Reynolds*, dates back to 1953.[50] In *Reynolds*, the plaintiff sought U.S. Air Force official accident investigation reports during the discovery phase.[51] The United

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43. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

44. N.Y. Times Co. v. United States, 403 U.S. 713 (1971).

45. Hamdan v. Rumsfeld, 548 U.S. 557 (2006).

46. Zuckerbraun v. General Dynamics Corp., 935 F.2d 544, 546 (2d Cir. 1991).

47. Matthew Silverman, Comment, *National Security and the First Amendment: A Judicial Role in Maximizing Public Access to Information*, 78 IND. L.J. 1101, 1103-04 (2003) (discussing the origins of the state-secrets privilege at common law).

48. United States v. Reynolds, 345 U.S. 1, 10 (1953).

49. It should be noted that the SSP as formulated is an evidentiary privilege, not a justiciability doctrine. Indeed, the *Reynolds* Court was sure to distinguish this evidentiary privilege holding from that articulated in *Totten v. United States*, 92 U.S. 105 (1875), in which the litigation was dismissed at the pleading stage for an action to enforce a secret espionage contract, because the government could neither confirm nor deny the contract's existence. *Reynolds*, 345 U.S. at 11 n.21. The *Totten* Court held that entering into a covert contract with the government entails no possible legal relief in federal courts, because the very essence of the agreement is secret. *Id.* The *Totten* rule hence has been described as "unique and categorical . . . a rule designed not merely to defeat the asserted claims, but to preclude judicial inquiry." Tenet v. Doe, 544 U.S. 1 n.4. By contrast, the Court described the state secrets privilege as dealing strictly with evidence, not justiciability. *Id.* at 9-10.

50. *Id.* at 6.

51. *Reynolds*, 345 U.S. at 3-4.

States government refused, arguing that any order to produce such documents could not be provided "without seriously hampering national security, flying safety and the development of highly technical and secret military equipment."[52] The *Reynolds* Court agreed and accepted the government's representations about the classified nature of the materials and refused to require their disclosure.[53] Justice Fredrick Vinson, writing for the majority, expressed hesitancy because of the inherent separations-of-powers sensitivity involved in the case, warning that "judicial control over the evidence in a case cannot be abdicated to the caprice of executive officers."[54] The Court thus framed the inquiry in terms of the government's obligation "to satisfy the court" that disclosure might harm security.[55] But the Court then went on to state that "where necessity is dubious" a mere "formal claim of privilege . . . will have to prevail," thus implying that judges should afford strong deference to a presidential assertion of the SSP in at least some contexts.[56] Ironically, *Reynolds* turns out to be an example of the inherent dangers accompanying the invocation of the SSP. Indeed, the information that the Air Force had fought to withhold from disclosure in *Reynolds* was not a military secret at all; the document later turned out to have contained no reference to secret equipment whatsoever.[57] Moreover, the report detailed a number of mistakes that had been made with the plane and by the crew.[58]

The practical effect of the SSP has three distinct possibilities. One possibility is that in the face of a government invocation that litigation would involve disclosure of state secrets, a plaintiff will simply proceed with his lawsuit without the benefit of "privileged" material. In *Reynolds*, the Court took this path, concluding that the privilege only limited sources of evidence and thus remanded to allow plaintiffs to take discovery and attempt to prove their case without the barred material.[59]

Secondly, if a federal court does not allow a plaintiff access to "privileged" information, then the defendant (presumably the government) can easily move for a motion to dismiss pursuant to Fed. R.

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52. LOUIS FISHER, IN THE NAME OF NATIONAL SECURITY: UNCHECKED PRESIDENTIAL POWER AND THE REYNOLDS CASE 256 (2006).

53. *Reynolds*, 345 U.S. at 10-12.

54. *Id.* at 9-10.

55. *Id.* at 10.

56. *Id.* at 11.

57. FISHER, *supra* note 52, at xi. The accident report was eventually declassified and, according to Louis Fisher, "revealed serious negligence by the government" but "contained nothing that could be called state secrets." *Id.*

58. *Id.* at xi-xii.

59. *Id.*

Civ. P. 12(b)(6), or, if discovery proceedings occur, summary judgment pursuant to Fed. R. Civ. P. 56(c).

Thirdly, "notwithstanding the plaintiff's ability to produce non-privileged evidence, if the 'very subject matter of the action' is a state secret, then the court should dismiss the plaintiff's action based solely on the invocation of the state secrets privilege."[60] The latter option is certainly the most powerful option, for it essentially dismisses a claim entirely with prejudice because the suit would purportedly touch upon intrinsically national-security-related information that cannot be disclosed or litigated without potential harm to the national security of the United States.

By focusing solely on national security interests, the *Reynolds* standard "forces the judge to rule in a vacuum."[61] It is incredibly difficult to task a federal court with balancing the interests of a claimant's need for the material sought from the government without a minimum appreciation of what the actual evidence being suppressed in an SSP invocation actually contains.[62] At oral argument in *Hepting v. AT&T*, a civil suit alleging that the telecommunications industry assisted the National Security Agency in conducting illegal surveillance in the United States, the Ninth Circuit attempted to grapple with the precise contours of this powerful privilege:

> Judge Harry Pregerson: Well, who decides whether . . . something's a state secret or not?
>
> Deputy Solicitor General Gregory Garre: Ultimately, the courts do, Your Honor . . . . And they . . . apply the utmost deference to the assertion of the privilege and the judgments of the people whose job it is to make predictive assessments of foreign—
>
> Pregerson: Are you saying the courts are to rubberstamp the determination that the Executive makes that there's a state secret?
>
> Garre: We are not, Your Honor, and we think that the courts play an important role—
>
> Pregerson: What is our job?

60. Kasza v. Browner, 133 F.3d 1159, 1166 (9th Cir. 1998) (quoting *Reynolds*, 345 U.S. at 11 n.26).

61. James Zagel, *The State Secret Privilege*, 50 MINN. L. REV. 875, 899 (1966).

62. *Id.* at 895-96.

> Garre: Your job is to determine whether or not the requirements of the privilege have been properly met. And that includes the declaration, the sworn declaration of the head of the agency asserting the privilege, and the assertion that that individual asserting it has personal knowledge of the matter [at hand].
>
> Pregerson: So we just have to take the word of the members of the Executive Branch that tell us it's a state secret.
>
> Garre: We don't—
>
> Pregerson: . . . that's what you're saying, isn't it?
>
> Garre: No, Your Honor, what this Court's precedents say is the court has to give the utmost deference to the assertion, and the second part of the—
>
> Pregerson: But what does "utmost deference" mean? We just bow to it?
>
> Judge Michael D. Hawkins: It doesn't mean abdication, does it?
>
> Garre: It does not mean abdication, Your Honor, but it means the court gives great deference to the judgments of the individuals whose job it is to assess whether or not the disclosure or non-disclosure of particular information would harm national security . . . .[63]

The painfully confusing and circular reasoning of the Deputy Solicitor General is representative of the tough situation confronting federal judges in the context of SSP invocations by the government in national security litigation. This has led many lower federal courts to simply defer to a presidential claim for dismissing a case because it involves a "state secret."[64] However, the path toward blanket deference in the judicial setting has the potential to raise serious problems with the American democratic system that extols the values of transparency and

63. Transcript of Oral Argument at 5-6, Hepting v. AT&T Corp., 539 F.3d 1157 (9th Cir. 2008) *available at* http://www.eff.org/files/filenode/att/hepting_9th_circuit_hearing_transcript_08152007.pdf.

64. *See, e.g., Hepting,* 539 F.3d 1157.

accountability.[65] Plaintiffs, including those discussed in the next section who have suffered measurable harm, should be permitted judicial recourse to redress the alleged constitutional violations against them.

III. STATE SECRET PRIVILEGE INVOCATIONS

A. Extraordinary Rendition

The extent to which both the Bush and Obama administrations have invoked the SSP to ensure that lawsuits are dismissed was starkly manifested in the context of the controversial practice of what has been dubbed "extraordinary rendition." That policy involved the arbitrary and systematic transfer of Arab and Muslim foreign nationals abroad for detention and interrogation in a foreign land.[66] According to many accounts, suspects were blindfolded, shackled, and sedated before being transported by jet to the destination country, where upon arrival they endured prolonged detentions, humiliating interrogations, torture, and for some, even death.[67]

This practice, largely run by the Central Intelligence Agency (CIA), with cooperation from other intelligence agencies abroad, has been extensively criticized for violating U.S. obligations under international law.[68] The controversy over the program has even inspired a major motion picture, *Rendition*, which questions the underlying constitutional

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65. Governmental accountability and transparency are two of the hallmarks of democratic nations operating under the rule of law. *See generally* Michel Rosenfeld, *The Rule of Law and the Legitimacy of Constitutional Democracy*, 74 S. CAL. L. REV. 1307 (2001). These two values are threatened by an uncritical and unwavering acceptance of the SSP by our federal judiciary.

66. Lila Rajiva, *The CIA's Rendition Flights to Secret Prisons: The Torture-Go-Round*, COUNTERPUNCH.ORG, (Dec. 5, 2005), *available at* http://www.counterpunch.org/rajiva12052005.html. The most common destination is apparently Egypt, although renditions have occurred involving Jordan, Syria, Morocco and Uzbekistan as well. In the words of one former CIA agent: "If you want a serious interrogation, you send a prisoner to Jordan. If you want them to be tortured, you send them to Syria. If you want someone to disappear—never to see them again—you send them to Egypt." Stephen Grey, *America's Gulag*, THE NEW STATESMAN (May 17, 2004), *available at* http://www.newstatesman.com/200405170016.

67. Jane Mayer, *Outsourcing Torture: The Secret History of America's 'Extraordinary Rendition' Program*, THE NEW YORKER (Feb. 14, 2005), *available at* http://www.newyorker.com/archive/2005/02/14/050214fa_fact6.

68. *See* Leila Nadya Sadat, *Extraordinary Rendition, Torture, and Other Nightmares From the 'War on Terror'*, 75 GEO. WASH. L. REV. 1200 (2007).

and ethical bases of the extraordinary rendition practice initiated by the Bush administration.[69]

1. Arar v. Ashcroft

The legal saga of Maher Arar is a stark example of the extraordinary rendition process and demonstrates the power that an SSP invocation can have on a lawsuit seeking compensatory or injunctive relief against government programs that have constitutionally troublesome practices.[70]

In September 2002, Canadian national Maher Arar was detained at John F. Kennedy Airport.[71] On October 7, 2002, J. Scott Blackman, then the U.S. Immigration and Naturalization Service (INS) Regional Director for the Eastern Region, determined, based on a review of classified and unclassified information, that Arar was a member of Al Qaeda and therefore inadmissible to the United States.[72] Pursuant to this determination, Blackman signed an order authorizing Arar to be removed to Syria.[73]

Upon arrival in Syria, Arar claimed that he was imprisoned for a year in a small jail cell where he was beaten and tortured by Syrian government agents.[74] Arar also asserted that his Syrian interrogators worked with U.S. officials.[75] After being released on October 5, 2003, Arar filed suit in the Eastern District of New York claiming that his removal from the United States violated his Fifth Amendment rights, as well as the Torture Victims Protection Act and other treaties.[76] Naming in the suit then-Attorney General John Ashcroft and other senior Bush administration officials, Arar sought monetary relief pursuant to *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*,[77] which

69. RENDITION (New Line Cinema 2007), *trailer available at* http://www.youtube.com/watch?v=Ezn67DJ5ZAw.

70. The case went up for en banc review at the United States Court of Appeals for the Second Circuit. Arar v. Ashcroft, 532 F.3d 157, 164 (2d Cir. 2008), *vacated and superseded by*, Arar v. Ashcroft, 585 F.3d 559 (2d Cir. 2009) (en banc).

71. *Id.*

72. Arar v. Ashcroft, 414 F.Supp.2d 250, 253. (E.D. N.Y. 2006).

73. *Id* at 254.

74. *Id.*

75. *Id.* at 389.

76. *Id.*

77. 403 U.S. 388 (1971). The plaintiff in *Bivens* had been subjected to an unlawful, warrantless search which resulted in his arrest. *Id.* at 389. The Supreme Court allowed him to state a cause of action for money damages directly under the Fourth Amendment, thereby giving rise to a judicially-created remedy stemming directly from the Constitution itself. *Id.* at 397.

provides a federal cause of action for money damages based on a deprivation of constitutional rights.[78]

Prior to discovery, the Justice Department sought a blanket dismissal, asserting that the very subject matter of the case concerned the details of a program that was secret, and further argued that in no way could the case proceed beyond discovery without compromising the national security of the United States.[79] The district court granted the government's motion to dismiss in full.[80] On appeal, the U.S Court of Appeals for the Second Circuit affirmed, although in a fractured majority.[81]

After convening in a rare *en banc* rehearing, the Second Circuit affirmed the District Court's grant of dismissal, accompanied with a scathing dissent from Judge Guido A. Calabresi.[82] Charging the majority with engaging in "extraordinary judicial activism," Calabresi forcefully argued that the Court should not have ruled on such broad grounds so as to deny Arar judicial relief.[83] Instead, he blasted the majority for failing to recognize the profound implications of its decision.[84] Despite admitting the conduct alleged by Arar was repulsive, Calabresi saw the majority opinion as essentially holding that the practice of extraordinary

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78. For a more extensive treatment of the subject, including *Bivens* case law and scholarship, see generally RICHARD FALLON, JR. ET AL., HART AND WESCHLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 726–42 (6th ed. 2009). In the summer of 2009, the United States District Court for the Northern District of California refused to dismiss a lawsuit by Jose Padilla against John Yoo alleging that Mr. Yoo's work on the "Torture Memos" while at the Office of Legal Council in the Justice Department violated Padilla's First, Fifth, Sixth, and Eight Amendment rights, seeking *Bivens*-style damages. *See* Padilla v. Yoo, 633 F. Supp. 2d 1005, 1016–17 (N.D. Cal. 2009). The Government submitted an amicus brief arguing that "special factors counseling hesitation" should preclude a *Bivens* claim against *any* executive-branch lawyer providing national security advice. *See* Brief of the United States as Amicus Curiae, Padilla v. Yoo, No. 09-16478 (9th Cir. Dec. 3, 2009), *available at* http://www.harpers.org/media/image/blogs/misc/doj_amicus.pdf. While Yoo did not assert the state secrets privilege, the district court analogized Yoo's assertion that the discovery process would be harmful to national security as amounting to an assertion of the privilege. *Padilla,* 633 F. Supp. 2d at 1028. Pointing out that Yoo could not assert the privilege as a private citizen, the district court stated that it would address any concerns regarding the privilege when and if they arose. *Id.* For a critique of the district court's opinion on the merits, see Peter H. Schuck, *Immunity, Not Impunity*, LAW.YALE.EDU (Dec. 10, 2009), *available at* http://www.law.yale.edu/news/10798.htm.

79. *Arar*, 414 F. Supp. 2d at 287-88.

80. *Id.* at 267.

81. Arar v. Ashcroft, 532 F.3d 157 (2nd Cir. 2008).

82. Arar v. Ashcroft, 585 F.3d 559 (2nd Cir. 2009) (en banc).

83. *Arar,* 414 F. Supp. 2d at 287-88.

84. *See Arar*, 585 F.3d at 630-39.

rendition does not rise to the level of being *constitutionally* repulsive.[85] He chided the majority for assuming that the legal significance of his case should be left to the political process, thereby implicitly commenting on the merits of the case.[86] Despite being shut out from the US judicial system for a claim of damages, Canada has since cleared Arar of any sort of wrongdoing, and has indeed apologized to him.[87]

2. Al-Masri v. Tenet

The legal saga of the *Al-Masri* case closely parallels that of Mr. Arar. Khaled El-Masri, a German citizen of Lebanese descent, asserted that on New Year's Eve 2003 he was seized by Macedonian authorities while crossing the border between Serbia and Macedonia.[88] El-Masri alleges that he was imprisoned in a Skopje hotel for twenty-three days, where he was repeatedly questioned about his associations with al Qaeda by U.S. officials.[89] Despite his vehement denials of any association with al Qaeda, El-Masri claimed that at various times during his detention he was beaten, drugged, bound and blindfolded, confined in unsanitary conditions, repeatedly interrogated, and prohibited from communicating with his family, the German government, or anyone else other than his captors.[90] El-Masri further asserted that the U.S. government then flew him to Kabul, Afghanistan, where he remained until May 28, 2004, when he was taken to an abandoned road in Albania and released.[91]

Alleging harsh interrogation amounting to torture, as well as being the victim of the government's illegal extraordinary rendition program, El-Masri filed suit in the U.S. District Court for the Eastern District of Virginia naming as defendants various senior Bush administration officials, including then-CIA director George Tenet.[92] El-Masri's complaint asserted three causes of action.[93] First, he brought a *Bivens* claim against Tenet and unknown CIA agents for violations of his Fifth Amendment right not to be deprived of his liberty without due process

85. *See id.*

86. *See id.*

87. COMMISSION OF INQUIRY INTO THE ACTIONS OF CANADIAN OFFICIALS IN RELATION TO MAHER ARAR (Oct. 14. 2005), *available at* www.abdullahalmalki.ca/ToopeReport_final.pdf. *See also* Scott Shane, *Torture Victim Had No Terror Link*, Canada Told U.S., N.Y. TIMES (Sept. 25, 2006), *available at* http://www.nytimes.com/2006/09/25/world/americas/25arar.html?pagewanted=print.

88. El-Masri v. Tenet, 437 F. Supp. 2d 530, 532 (E.D. Va. 2006).

89. *Id.* at 532-33.

90. *Id.* at 533.

91. *Id.* at 534.

92. *Id.* at 534.

93. *Id.* at 534-35.

and not to be subject to treatment that "shocks the conscience."[94] Second, El-Masri brought a claim "pursuant to the Alien Tort Statute (ATS) for violations of international legal norms prohibiting prolonged, arbitrary detention."[95] Third, he brought an additional claim "pursuant to the Alien Tort Statute for each defendant's violation of international legal norms prohibiting cruel, inhuman, and degrading treatment."[96]

The government intervened in the suit, filing a *Memorandum of Points and Authorities in Support of the Motion by Intervenor United States to Dismiss or, in the Alternative, for Summary Judgment.*[97]

The government asserted that "the plaintiff's claim in this case plainly seeks to place at issue alleged clandestine foreign intelligence activity that may neither be confirmed nor denied in the broader national interest," but could not give more details about the potential damage because "even stating precisely the harm that may result from further proceedings in this case is contrary to the national interest."[98]

In granting the government's motion to dismiss, the court concluded that "El-Masri's private interests must give way to the national interest in preserving state secrets."[99] The Court concluded that El-Masri's lawsuit must be dismissed because any response to his claims of abduction, detention, and torture as part of the United States' extraordinary rendition program would inevitably reveal "specific details" about that program.[100] Moreover, the District Court concluded that protective procedures, such as providing defense counsel with clearance to review classified documents, would be "plainly ineffective" because the "entire aim of the suit is to prove the existence of state secrets."[101]

Although "courts must not blindly accept the Executive Branch's assertion [of the privilege], but must instead independently and carefully determine whether, in the circumstances, the claimed secrets deserve the protection of the privilege[,]" the District Court nevertheless qualified this statement by emphasizing that "courts must also bear in mind the Executive Branch's preeminent authority over military and diplomatic

94. El-Masri v. Tenet, 437 F. Supp. 2d 530, 534-35 (E.D. Va. 2006).

95. *Id.* at 535.

96. *Id.*

97. *Memorandum of Points and Authorities in Support of the Motion by Intervenor United States to Dismiss or, in the Alternative, for Summary Judgment* at, *El-Masri*, 437 F. Supp. 2d 530 (No. 01417).

98. *Id.* at 11-12.

99. *El-Masri*, 437 F. Supp. 2d at 540.

100. *Id.* at 538.

101. *Id.* at 539.

matters and its greater expertise relative to the judicial branch in predicting the effect of a particular disclosure on national security."[102]

On appeal, the U.S Court of Appeals for the Fourth Circuit affirmed, concluding that although the SSP has traditionally been understood as a common law evidentiary privilege, it has attained "constitutional significance"[103] such that "in certain circumstances a court may conclude that an explanation by the Executive of why a question cannot be answered would itself create an unacceptable danger of injurious disclosure."[104] In these situations, the Fourth Circuit added, "a court is obliged to accept the Executive Branch's claim of privilege without further demand."[105]

The Fourth Circuit's reasoning is a bit suspect. For one thing, by the time El-Masri's case had been reviewed on appeal, the CIA's extraordinary rendition program had become widely known.[106] Indeed, the Council of Europe conducted its own independent investigation on CIA renditions and released a report substantiating and accepting the veracity of El-Masri's allegations.[107] Moreover, President Bush publicly disclosed the existence of the CIA program of rendition.[108] "The court should have recognized that once the CIA rendition program became public information, the case could have proceeded with *ex parte* and *in camera* protection of legitimate state secrets. By prematurely invoking the SSP to deny a judicial forum, the Fourth Circuit" unnecessarily blocked any possible legal relief and "unjustifiably transformed an evidentiary privilege into a rule of nonjusticiability."[109] Most glaringly, the Fourth Circuit failed to recognize that once the CIA rendition program became widely acknowledged, ex *parte* and *in camera* review

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102. *Id.* at 536.

103. El-Masri v. United States, 479 F.3d 296, 304 (4th Cir. 2007) (noting that the state secrets privilege has a "firm foundation in the Constitution").

104. *Id.* at 310.

105. *Id.* at 306.

106. Scott Shane, Stephen Grey & Margot Williams, *C.I.A. Expanding Terror Battle Under Guise of Charter Flights,* N.Y. TIMES, May 31, 2005, *available at* http://www.nytimes.com/2005/05/31/national/31planes.html. *See also* Dana Priest, *CIA's Assurances On Transferred Suspects Doubted,* WASH. POST (Mar. 17, 2005), *available at* http://www.washingtonpost.com/wp-dyn/articles/A42072-2005Mar16.html.

107. COMM. ON LEGAL AFF. AND HUM. RTS., Doc. 10957: ALLEGED SECRET DETENTIONS AND UNLAWFUL INTER-STATE TRANSFERS INVOLVING COUNCIL OF EUROPE MEMBER STATES, COUNS. EUR., 26-27 (2006). *available at* http://assembly.coe.int/Documents/WorkingDocs/doc06/edoc10957.pdf.

108. *Bush Admits to Secret CIA Prisons,* BBC NEWS, *available at* http://news.bbc.co.uk/2/hi/americas/5321606.stm (last updated Sep. 7, 2006).

109. Sean M. Ward, *The State Secrets Protection Act (SSPA): Statutory Reform of the State Secrets Privilege*, 7 GEO. J.L. & PUB. POL'Y 681, 690-691 (2009).

of the evidence sought by the Plaintiffs should have been conducted. The dismissal on SSP grounds converted that evidentiary privilege into an additional justiciability doctrine *sua sponte*.[110]

The remarks by the District Court and the Fourth Circuit in *El-Masri* imply that in national security matters the federal judiciary lacks the competence to independently judge the merits of SSP invocations. There are several reasons to question this broad assertion. Most importantly, the allegations of El-Masri (and likewise Arar) are very grave. Both claim to have been secretly and illegally seized, interrogated through torture and other cruel, inhumane and degrading treatment, and denied due process of law by programs authorized and condoned by the U.S. government. Where wrongdoing of such magnitude is alleged, the injustice caused by denying litigants the opportunity to obtain redress or even to adjudicate their cases on the merits is particularly magnified. The generalized justification for secrecy advanced by the Bush and Obama administration in such litigation implies that any past or future victim of extraordinary rendition will be denied a forum to litigate on identical grounds.

B. NSA Wiretapping

The SSP invocation has also played a pivotal role in high-profile litigation challenging the controversial NSA warrantless wiretapping program.[111]

1. ACLU v. NSA

In *ACLU v. NSA*, a group of journalists, academics, attorneys, and nonprofit organizations brought suit in the U.S. District Court for the Eastern District of Michigan.[112] Challenging the surveillance program as a violation of their collective First and Fourth Amendment rights, the separation of powers doctrine, and the Foreign Intelligence Surveillance Act (FISA), they sought declaratory and injunctive relief that would prevent the NSA from eavesdropping on domestic communication without a warrant, as constitutionally mandated by the Fourth

110. *Id.* at 691.

111. The Bush administration authorized the NSA to intercept communications for which there were "reasonable grounds to believe that (1) the communication originated or terminated outside the United States, and (2) a party to such communication is a member of al Qaeda, a member of a group affiliated with al Qaeda, or an agent of al Qaeda or its affiliates." ACLU v. Nat'l Sec. Agency, 438 F. Supp. 2d 754, 782 n.20 (E.D. Mich. 2006).

112. *Id.* at 755-56.

Amendment.[113] The plaintiffs at the time were communicating with individuals from the Middle East whom the government might have suspected of being affiliated with al-Qaeda.[114] They argued that they had a reasonable belief that their telephone calls and Internet communications would fall within the scope of the NSA's warrantless wiretapping program.[115] The plaintiffs further alleged that even the possibility that the government is eavesdropping on their calls has a chilling effect on their communications and thus disrupts their ability to talk to clients, sources, witnesses, and generally engage in advocacy and scholarship.[116]

On August 17, 2006, U.S. District Judge Anna Diggs Taylor issued an opinion rejecting the government's claim that the case should be dismissed on state secrets grounds, instead finding the NSA's warrantless wiretapping program to be unconstitutional.[117] On appeal, the U.S Court of Appeals for the Sixth Circuit vacated and remanded with instructions to the District Court to dismiss the case for a lack of subject matter jurisdiction because the plaintiffs failed to demonstrate sufficient "standing" to bring suit.[118] The issue of standing has previously posed serious problems for litigants challenging the constitutionality of the NSA program.[119]

The Sixth Circuit held that because the SSP essentially foreclosed any possibility of plaintiff's being able to demonstrate that any of their own communications had been intercepted by the NSA without warrants, their complaint simply rested on a (purportedly) "well founded belief."[120] Well-founded belief, however, was insufficient because although it might be a reasonable belief, an equally plausible explanation was the possibility that the NSA was not intercepting, "and might *never* actually

113. *Id.*

114. *Id.*

115. *Id.* at 758.

116. *Id.* at 768.

117. *ACLU*, 438 F. Supp. 2d at 775 ("The wiretapping program here in litigation has undisputedly been continued for at least five years, it has undisputedly been implemented without regard to FISA and of course the more stringent standards of Title III, and obviously in violation of the Fourth Amendment.").

118. ACLU v. Nat'l Sec. Agency, 493 F.3d 644, 648 (6th Cir. 2007).

119. In *Terkel v. AT&T Corp.*, 441 F. Supp. 2d 899 (N.D. Ill. 2006), the plaintiffs alleged that AT&T provided information regarding their telephone calls and internet communications to the NSA and thus violated their constitutional right to privacy. *Id.* at 900. The district court dismissed the case because the SSP made it impossible for the plaintiffs to establish standing. *Id.* at 920.

120. *ACLU*, 493 F.3d at 656.

intercept, any communication by any of the plaintiffs named in this lawsuit."[121]

Because the majority opinion did not specifically address the merits, but rather simply ducked the issue by holding that the question of the wiretapping program was non-justiciable, dissenting Judge Ronald Gilman wrote a scathing rebuke of the government's position on the merits.[122] Gilman argued, "when faced with the clear wording of FISA and Title III that these statutes provide the 'exclusive means' for the government to engage in electronic surveillance within the United States for foreign intelligence purposes, the conclusion becomes inescapable that the TSP was unlawful."[123] Gilman also took issue with the Panel's examination of whether the plaintiffs had sufficiently alleged concretized injury and causation for purposes of demonstrating standing.[124] Specifically, Gilman argued that the majority erred in construing the factual predicates of the complaint.[125] Far from conclusory, a cursory examination of the plaintiffs' complaint would have revealed that the Bush administration engaged in a systematic wiretapping program directed against the communications that the Plaintiffs had with their counterparts in the Middle East, and that such interference caused a breakdown in their ability to effectively represent their overseas clients in a professional relationship and to adequately ensure their respective privacy concerns.[126]

2. In Re: NSA Telecommunications Records Litigation

In *Hepting v. AT&T Corp.*, a group of customers brought suit, alleging that AT&T Corporation was collaborating with the NSA in its warrantless surveillance program, which illegally tracked the domestic and foreign communications and communication records of millions of Americans.[127] Invoking the SSP, the Bush administration intervened and moved that the case be dismissed.[128] Before applying the privilege to the plaintiffs' claims, the district court first examined the information that had already been exposed to the public, which was essentially the same information that had been revealed in the instant case. District Court Judge Vaughn Walker found that the government had admitted:

121. *Id.* at 656.
122. *Id.* at 693, (Gilman, J., dissenting).
123. *Id.* at 720.
124. *Id.* at 694.
125. *Id.* at 703.
126. *ACLU*, 493 F.3d at 703.
127. Hepting v. AT&T Corp., 439 F. Supp. 2d 974 (N.D. Cal. 2006).
128. *Id.* at 979.

> it monitors contents of communications where one party to the communication is outside the United States and the government has a reasonable basis to conclude that one party to the communication is a member of al Qaeda, affiliated with al Qaeda, or a member of an organization affiliated with al Qaeda, or working in support of al Qaeda.[129]

Accordingly, the District Court held that "[b]ased on these public disclosures, [it could not] conclude that the existence of a certification regarding the 'communication content' program is a state secret."[130] The district court thus rejected the government's motion to dismiss the case on SSP grounds, which the Bush administration had argued for on the grounds that any court review of the alleged partnership between the federal government and AT&T would have pose a national security risk.[131] On appeal, the government argued the following in an oral argument to the Ninth Circuit:

> Judge Hawkins: [District Court] Judge Walker thought the case could go forward notwithstanding the invocation of the privilege.
>
> Gregory Garr: And with respect to Judge Walker, we think that that's wrong. We think it's wrong for a couple of reasons: first of all, the controlling precedents of the Supreme Court in *Tenet* and this Court in *Kasza* make clear that when the very subject-matter of the action is the existence of a secret espionage relationship with the government, litigation must come to an end. The Supreme Court put it this way in the *Tenet* case on page 10 of the decision: "When the plaintiff's success in the litigation depends on establishing the existence of a secret espionage relationship with the government, the matter cannot be litigated.[132]

On June 3, 2009, the *Hepting* appeal was dismissed due to the retroactive immunity enacted as part of the FISA.[133] Originally, the *Hepting* litigation had been consolidated with the case of an Islamic charity that claimed similar constitutional violations flowing from the NSA wiretapping program.[134] On order of the Ninth Circuit, the case of

129. *Id.* at 996 (internal citations omitted).
130. *Id.*
131. *Id.*
132. *Transcript of Oral Argument*, *supra* note 63.
133. In re Nat'l Sec. Agency Telecomm. Rec. Litig., M:06-CV-01791-VRW (Jun. 3, 2009), *available at* https://www.eff.org/files/filenode/att/orderhepting6309_0.pdf.
134. Hepting v. AT&T Corp., 508 F.3d 898 (9th Cir. 2007).

the Al-Haramain Islamic Foundation has since been severed from *Hepting*.[135] The *Al-Haramain* case spawned complex procedural back and forth reviews and remands with the District Court for the Northern District of California and the Ninth Circuit.[136] In 2004, the Bush administration's Treasury Department designated the Al-Haramain charity a "terrorist" organization affiliated with the international network of al-Qaeda and accordingly proceeded to shut it down.[137] Al-Haramain Foundation filed a lawsuit on February 28, 2006, asserting that the Bush administration had circumvented constitutional procedures in place by instituting the NSA warrantless wiretapping program.[138] During the initial phases of litigation, the government accidentally handed over certain classified information that demonstrated specifically that the plaintiffs were being subjected to the warrantless wiretapping program.[139] In an opinion handed down in November 2007, the Ninth Circuit ruled that the SSP prohibited either the parties or the courts from using the document to establish the fact of the warrantless wiretapping.[140] The case was remanded to the district court to determine whether the plaintiffs could prove, without using classified documents, that they were spied upon.[141] The plaintiffs could not prove this fact until the government made two crucial admissions outside of court. First, on October 22, 2007, in a speech to the American Bankers Association, FBI Deputy Director John Pistole stated that the government had "used ... surveillance" to obtain information against Al-Haramain; incredibly enough, the FBI then posted the text of this speech to its website.[142] Second, members of the Bush administration testified before Congress

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135. *Id.* at 899.

136. *See id*; Hepting v. AT&T Corp., 2006 WL 1581965 (N.D. Cal. June, 6, 2006); Hepting v. AT&T Corp., 439 F. Supp. 2d 974 (N.D. Cal. 2006); Hepting v. AT&T Corp., 539 F.3d 1157 (9th Cir. 2008).

137. Al-Haramain Islamic Found. v. Bush, 451 F. Supp. 2d 1215 (D. Or. 2006); Ctr. for Constitutional Rights v. Bush, No. 06-CV-313 (S.D.N.Y. filed Jan. 17, 2006), *available at* http://www.scribd.com/doc/211432/Alberto-Gonzales-Files-nsa-complaint-dr-9-doc-ccrny-orgnsacomplaintfinal11706.

138. Carol D. Leonnig & Mary B. Sheridan, *Saudi Group Alleges Wiretapping by U.S.*, WASH. POST, (Mar. 2, 2006), *available at* http://www.washingtonpost.com/wp-dyn/content/article/2006/03/01/AR2006030102585.html.

139. *Id.*

140. Al-Haramain Islamic Found., Inc. v. Bush, 507 F.3d 1190 (9th Cir. Cal., 2007).

141. *Id.* at 1205-06. Because the government is the defendant in Al-Haramain, FISA's immunity provision, which applies only to telecommunications providers, does not foreclose the continued pursuit of the suit. *Id.*

142. First Amended Complaint at 10, Al-Haramain Islamic Foundation, Inc. v. Bush, C07-CV-0109-VRW, (Jul. 29, 2008), *available at* http://www.eff.org/files/filenode/att/alharamainupdate72908.pdf

that the government intercepted communications from wire stations located within the United States without obtaining FISA warrants.[143]

Together with evidence of the timing of other action taken against Al-Haramain, District Judge Vaughn Walker found that this was sufficient to establish that the government had in fact spied on them.[144]

In February of 2010, the Justice Department filed an emergency motion in the Ninth Circuit Court of Appeals to assert that the warrantless wiretapping is an SSP program not subject to judicial review.[145] The Ninth Circuit dismissed the interlocutory appeal of the district court's denial of the motion to dismiss sought by the government for lack of jurisdiction over the matter.[146] On remand, Judge Walker held that plaintiffs established sufficient standing to survive a motion for summary judgment and found the government civilly liable to them under Section 1810 of the FISA for eavesdropping on their telephone conversations without a statutory FISA warrant.[147] Because the government did not utilize the procedures set forth in Section 1806(f) to deny that it had conducted electronic surveillance against Al-Haramain without a warrant, Judge Walker ruled in favor of the plaintiffs.[148] The district court noted that the merits of the case were not addressed by the Justice Department briefs, and disparaged the government for only advancing the argument that the SSP should preempt any FISA remedial provision.[149]

IV. CONGRESSIONAL REFORMATION OF THE SSP

While national security litigation has been dominating the headlines, Congress has attempted to rein in and narrow the scope of the SSP

143. In testimony before Congress in 2006 and 2007, top intelligence officials, including Keith B. Alexander, stated that a FISA warrant is required before certain wire communications in the United States can be intercepted. *Id.* In a separate criminal proceeding against Ali al-Timimi in 2005, the government disclosed that it had intercepted communications between al-Timimi and Al-Haramain's director al-Buthi. *Id.*

144. In re NSA Telecomms. Records Litig., 700 F. Supp. 2d 1182, 1201-1202 (N.D. Cal. 2010).

145. *Id.*

146. Al-Haramain Islamic Found., Inc. v. Obama, 2009 U.S. App. LEXIS 13169 (9th Cir. 2009).

147. In Re Nat'l Sec. Telecomm. Records Litig., 700 F. Supp. 2d 1182, 1184 (N.D. Cal 2010). *See also* Charlie Savage & James Risen, *Federal Judge Finds N.S.A. Wiretaps Illegal*, N.Y. TIMES, Mar. 31, 2010, *available at* http://www.nytimes.com/2010/04/01/us/01nsa.html.

148. *Al-Haramain Islamic Foundation, Inc.*, 2009 U.S. App. LEXIS at 1194.

149. *See id.* at 1187.

invocations.[150] Professor Neil Kinkopf has argued for the need for congressional initiatives to check presidential abuse of the SSP, and undoubtedly, congressional authority does exist to alter the privilege in ways that lessen the often harsh effect that plaintiffs face when the government invokes it in national security-related litigation.[151]

Congress has traditionally been wary of confronting the Executive Branch head on. In the aftermath of the White House's failed attempt to cover up presidential wrongdoing in the infamous Watergate scandal, Congress took no action to restrict privileges asserted by the Nixon administration.[152] Similarly, while the Bush White House had been known to authorize surveillance programs[153] that were in tension with the Constitution and with federal statutes, including FISA, Congress nevertheless pressed forward with legislation that would revise FISA so as to provide retroactive legislative approval for the telecommunication companies' violations of the rights of US citizens.[154]

The invocation of the SSP has operated as a form of Executive-style jurisdiction stripping, posing additional constitutional problems.[155]

150. *See, e.g., ACLU Testifies Today Asking Congress to Narrow Scope of State Secret Privilege,* ACLU.ORG (Jul. 31, 2008), http://www.aclu.org/national-security/aclu-testifies-today-asking-congress-narrow-scope-state-secrets-privilege.

151. Neil Kinkopf, *The State Secrets Problem: Can Congress Fix It?,* 80 TEMP. L. REV. 489, 498 (2007).

152. Executive privilege refers to the ability of the President to withhold information from the legislative and judicial branches in order to maintain secrecy. In the seminal case of *United States v. Nixon*, 418 U.S. 683 (1974), the Supreme Court rejected the idea advanced by the Nixon Administration that the Executive Branch possesses an unqualified constitutional right to withhold certain information. The Court further held that it is the role of the Judiciary to decide whether the President has executive privilege in a given case and, if so, what is the scope of that privilege. 418 U.S. at 703-05. The Court further cautioned that "the privilege only applies to communications that these advisers and their staff author or solicit and receive in the course of performing their function of advising the President on official government matters." *Id.* at 752. Congress has not legislated in the context of policing the privileged invocations by the President for official communications.

153. In re NSA Telecomm. Records Litig., 483 F. Supp. 2d 934, 937 (N.D. Cal. 2007) (recounting allegations that Verizon Communications, Inc. disclosed telephone records to National Security Agency in violation of California residential customers' privacy rights); *see also* Al-Haramain Islamic Found., Inc. v. Bush, 507 F.3d 1190, 1201 (9th Cir. 2007).

154. Congress voted to provide "retroactive immunity" to any companies participating in the NSA warrantless wiretapping program. *See* Eric Zimmerman, *Dodd Pens Telecom Immunity Repeal*, THE HILL, *available at* http://thehill.com/blogs/blog-briefing-room/news/60589-senators-to-introduce-bill-repealing-telecom-immunity.

155. Professor Frost has argued that the invocation of the Privilege is like a form of jurisdiction stripping by the executive *See* Frost, *supra* note 18, at 1931-32 (acknowledging that the argument that invocation of Privilege to dismiss entire categories of cases involves "an unwarranted usurpation of judicial power").

Article III of the Constitution confers upon Congress the authority to regulate federal jurisdiction, not the President. The Framers granted Congress the authority to regulate appellate jurisdiction of the Supreme Court.[156] Since the SSP has basically prevented a range of lawsuits from proceeding down the normal track of litigation, the Bush and Obama administrations' conception of the SSP encroaches upon congressional powers to confer jurisdiction on the courts because it operates to basically preclude federal courts from adjudicating cases or controversies that would otherwise be within their judicial authority. Given this history of congressional inaction, and notwithstanding the initiatives set forth in the SSPA, there seems little hope for effective congressional regulation of the SSP. [157]

Moreover, the federal judiciary continues to afford the Executive Branch considerable deference, especially in factual determinations.[158] The judicial branch has also abdicated some of its responsibility for asserting its fundamental power of judicial review. In the instances where a district judge is bold enough to challenge assertions of SSP during the past decade, multiple federal appellate courts have been quick to reverse those decisions on appeal.[159] The Supreme Court has also passed up opportunities to restore the SSP to its proper role as an evidentiary privilege.[160]

V. THE STATE SECRETS PROTECTION ACT (SSPA)

Congress has previously not shown signs that it was willing to confront the Executive Branch head on. In 2006 for example, the Senate

156. The so-called "Exceptions Clause" provides in pertinent part: "the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make." U.S. CONST. art. III, § 2, cl. 2; *see generally* Paul R. Dubinsky, *The Essential Function of Federal Courts: The European Union and the United States Compared*, 42 AM. J. COMP. L. 295 (1994) (comparing the traditional view providing authority for Congress to strip federal courts of jurisdiction with the revisionist view that certain categories of judicial adjudication can never be congressionally stripped).

157. Professor Fisher has documented (and critiqued) congressional abdication in a whole host of situations. *See, e.g.*, Louis Fisher, *Unchecked Presidential Wars*, 148 U. PA. L. REV. 1637 (2000).

158. For a thorough explication and critique of the judicial deference doctrine in the context of national security litigation, *see* Robert Chesney, *National Security Fact Deference*, 95 VA. L. REV. 1361 (2009).

159. *See, e.g.*, *ACLU*, 438 F. Supp. 2d 754; *Arar*, 532 F.3d 157; *Jeppesen Dataplan, Inc.*, 539 F. Supp. 2d 1128.

160. El-Masri v. United States, 479 F.3d 296 (4th Cir. 2007), *cert. denied*, 128 S. Ct. 373 (2007); Arar v. Ashcroft, 585 F.3d 559 (2nd Cir. 2009), *cert. denied*, 130 S. Ct. 3409 (2010).

Intelligence Committee voted, strictly along partisan lines, not to conduct an investigation into the NSA wiretapping program[161] that Congress's own legal research center concluded was probably illegal.[162] In addition, in July 2008 Congress passed amendments to the Foreign Intelligence Surveillance Act (FSIA)[163] which stripped jurisdiction over allegations of illegal wiretapping from Article III courts, extended presidential authority to conduct warrantless surveillance and exonerated telephone corporations from liability regarding their assistance to the government during the course of warrantless wiretapping of U.S. citizens.[164]

Nevertheless, Congress did decide to enact a bill to lessen the harsh effect the SSP was having on civil litigation. On January 22, 2008, Senators Kennedy, Leahy, and Specter, along with nine co-sponsors, introduced in the United States Senate the State Secrets Protection Act (SSPA), "[a] bill to enact a safe, fair, and responsible state secrets privilege Act" that would significantly seek to constrain presidential authority in this area.[165] The SSPA as introduced would, inter alia, require any discovery hearing to be conducted *in camera* (unless the court determines that the hearing relates to a question of law and does

161. Scott Shane & David D. Kirkpatrick, *G.O.P. Plan Would Allow Spying Without Warrants,* N.Y. TIMES (Mar. 9, 2006), *available at* http://www.nytimes.com/2006/03/09/politics/09nsa.html.

162. Elizabeth B. Bazan & Jennifer K. Elsea, CONG. RESEARCH SERV., PRESIDENTIAL AUTHORITY TO CONDUCT WARRANTLESS ELECTRONIC SURVEILLANCE TO GATHER FOREIGN INTELLIGENCE INFORMATION (Jan. 5, 2006), http://www.fas.org/sgp/crs/intel/m010506.pdf (concluding that President Bush's legal justification of the NSA program was not legally "well-grounded" and that a court probably would not hold it to be valid). *See also* Carol D. Leonnig, *Report Rebuts Bush on Spying: Domestic Action's Legality Challenged,* WASH. POST (Jan. 7, 2006), *available at* http://www.washingtonpost.com/wp-dyn/content/article/2006/01/06/AR2006010601772.html; Ronald Dworkin et al., *On NSA Spying: A Letter to Congress*, N.Y. REV. OF BOOKS, Feb. 9, 2006, http://www.nybooks.com/articles/18650.

163. The Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. §§ 1801-1811 (1978).

164. Foreign Intelligence Surveillance Act of 1978 Amendments Act of 2008. Pub. L. No. 110-261, 122 Stat. 2436. Title VIII of the Act, Section 802, "Procedures for Implementing Statutory Defenses," established an immunity procedure that retroactively safeguards the telecommunication companies involved in assisting the government wiretapping program. Specifically, section 802 provided that "a civil action may not lie or be maintained in a Federal or State court against any person for providing assistance to an element of the intelligence community, and shall be promptly dismissed," so long as the Attorney General certified either that a defendant provided assistance pursuant to a number of reasons, such as court order or presidential authorization, *see id.* § 802(a)(1)-(4), or certified that "the person did *not* provide the alleged assistance." *Id.* § 802(a)(5) (emphasis added).

165. State Secrets Protection Act (SSPA), S. 2533, 110th Cong. § 4055 (2008).

not risk revealing state secrets)[166] as well as permitting a district court to conduct all or portions of hearings *ex parte* if it determines from its *in camera* review of the evidence that doing so serves "the interests of justice and national security."[167] Oversight also enters into the privilege adjudication process under the SSPA as the Act explicitly mentions that a judge "may not blindly rely upon a government's affidavit"[168] that something is in fact a "state secret."[169] As mentioned in the *El-Masri* case, current practice appears to involve the government proffering an affidavit by a senior official stating that a given lawsuit poses State Secret disclosure problems and mandates dismissal of the suit, without even a consideration of the possibility of *in camera, ex parte* review by the judge. The SSPA changes that by mandating judicial review of the disputed evidence that the government asserts is a State Secret.[170]

In addition, the SSPA would prescribe procedures for determining whether evidence is protected from disclosure by the SSP[171] and limits the ability of federal courts to dismiss a case to only situations where "continuing with litigation of the claim or counterclaim in the absence of the privileged material evidence would substantially impair the ability of a party to pursue a valid defense to the claim or counterclaim."[172] The SSPA adds a dose of adversarial confrontation into the SSP adjudication process by providing for attorney clearances, thereby attempting to ensure the parties' attorneys have some sort of interaction with the discovery process.[173]

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166. *Id.*

167. *Id.* § 4052(b)(2).

168. Ward, *supra* note 109, at 695.

169. SSPA, *supra* note 165, § 4054(e) ("[A]s to each item of evidence that the United States asserts is protected by the state secrets privilege, the court shall review, consistent with the requirements of section 4052, the specific item of evidence to determine whether the claim of the United States is valid"). "Where significant harm to information related 'to national defense or foreign relations' exists, the judge may not order disclosure of the information. The judge must, however, consider whether a non-privileged substitute can be created that would allow the litigation to continue. If a substitute is possible, the government has the choice of producing the substitute or having the court resolve the issue in the plaintiff's favor." Ward, *supra* note 109, at 695 (internal citations omitted).

170. SSPA, *supra* note 165, § 4054(e).

171. *Id.* § 4053(b) ("[A] ruling on a motion to dismiss, or for summary judgment, based on the state secrets privilege shall be deferred pending completion of the discovery and pretrial hearings provided under this chapter.").

172. *Id.* § 4055(3).

173. *See id.* § 4052(c) (providing "A Federal court shall, at the request of the United States, limit participation in hearings conducted under this chapter, or access to motions or affidavits submitted under this chapter, to attorneys with appropriate security clearances, if the court determines that limiting participation in that manner would serve the interests of national security. The court may also appoint a guardian ad litem with the

The 2008 proposed reforms were met with immediate and strong opposition from the Bush administration. In a March 31, 2008 letter to the Senate Judiciary Committee, then-Attorney General Michael Mukasey offered numerous critiques, including arguing that the SSP is constitutionally rooted, as the Fourth Circuit in dicta held in *El-Masri*.[174] This line of reasoning asserts that courts are not the appropriate decision makers regarding national security matters, and that the disclosure procedures of classified information are constitutionally suspect. Muksaey asserted that the SSPA, if passed, would harm national security.[175] Mukasey concludes that courts "have neither the constitutional authority nor the institutional expertise to assume such functions [making national security judgments]."[176] Citing a D.C. Circuit opinion from 1978, Mukasey claims the only role courts have in State Secrets litigation is to afford the President "utmost deference."[177] Mukasey's reasoning is not persuasive for several reasons.

Nothing in *Reynolds* requires that standard and nothing in the Constitution prevents Congress and the courts from adopting a standard that better protects against presidential abuse of the SSP and more properly safeguards the rights of private litigants.[178] In addition, nothing in the Constitution or in the Framers' intent gives the President any plenary authority over national security. The design of the Constitution clearly depends on all three branches and the system of checks and balances to safeguard national security.[179] The SSPA also omits any

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necessary security clearances to represent any party for the purposes of any hearing conducted under this chapter.")

174. Letter from Michael Mukasey, Att'y Gen., to Patrick J. Leahy, Comm. on the Judiciary Chairman (Mar. 31, 2008), *available at* www.justice.gov/archive/ola/views-letters/110-2/03-31-08-ag-ltr-re-s2533-state-secrets.pdf [hereinafter *Mukasey Letter*] (noting "Although the state secrets privilege was developed at common law, it performs a function of constitutional significance . . ."); *El-Masri*, 479 F.3d at 303.

175. *Mukasey Letter*, *supra* note 174.

176. *Id.*

177. *Id.; see also* Halkin v. Helms, 690 F.2d 977 (D.C. Cir. 1982).

178. United States v. Reynolds, 345 U.S. 1 (1953).

179. The bedrock principle of Separation-of-Powers is designed to ensure that no single branch of government could trample on the prerogatives of the other, and to ensure that liberty among citizens is maximized through the diffusion of power. Thus, presidential power is limited by ensuring that the law is "faithfully executed", and that Congress cannot pass laws that are unconstitutional, and so forth. Basic to the constitutional structure established by the Framers was their recognition that "[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny." THE FEDERALIST No. 47 (James Madison). Indeed, to avoid tyranny, the Framers provided that the Federal Government would consist of three distinct Branches, each to exercise one of the governmental

reference to the level of deference federal courts should apply when examining the President's argument that discovery in a lawsuit involving State Secrets would be "reasonably likely to cause significant harm to the national defense or foreign relations of the United States."[180]

VI. THE NEED FOR ROBUST JUDICIAL REVIEW

One important argument advanced in support of national security deference is the idea that the Presidency as an institution has an absolute advantage over the judiciary in terms of broad judgment on national security matters. Much of the existing case law simply assumes the latter contention to be true because the Executive Branch has a daily operation consisting of overseeing an incredible amount of politically sensitive information, and responding to it appropriately.[181] Courts often thus frame SSP invocations in a simplistic manner, with "the executive" and "the judiciary" treated in unrealistically formalistic terms, restricting the functional role of the judiciary as passive and simply adjudicatory, while framing the Executive as an isolated, monolithic entity incapable of being second-guessed in the context of sensitive national security issues,[182] even if fundamental constitutional considerations are at stake.[183] This conceptual framework needs serious revision.

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powers recognized by the Framers as inherently distinct. "The Framers regarded the checks and balances that they had built into the tripartite Federal Government as a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other." Buckley v. Valeo, 424 U.S. 1, 122 (1976).

180. SSPA, *supra* note 165, § 4051. This absence is enormous considering the fact that the amount of deference afforded to Executive assertions of the SSP has produced considerable academic commentary and federal district and appellate case law with no clear guidance from the Supreme Court or Congress.

181. For a classic articulation of the allocation of power argument, some of the language contained in Justice Sutherland's majority opinion in *United States v. Curtiss-Wright Export Corp.*, is often cited: "In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation. He makes treaties with the advice and consent of the senate; but he alone negotiates. Into the field of negotiation the Senate cannot intrude; and Congress itself is powerless to invade it." 299 U.S. 304, 319 (1936). *Curtiss-Wright* also contains the prominent language of the President being the "sole organ" of the federal government in the field of international relations, and, presumably, in our day and age, issues of national security. *Id.* at 320.

182. HAROLD HONGJU KOH, THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR 118–120 (1990) (observing that the structural features of the presidency renders that office "institutionally best suited to initiate government action," and that the president's "decision-making processes can take on degrees of speed, secrecy, flexibility, and efficiency that no other governmental institution can match."); Robert H. Knowles, *American Hegemony and the Foreign Affairs Constitution*, 36 N.Y. UNIV. PUB. LAW AND LEGAL THEORY WORKING PAPERS, PAPER 111 2009,

There often will be weighted accuracy considerations cutting *against* a deferential posture. This is most obviously the case when the factual dispute pertains to the fundamental constitutional rights of a litigant. More generally, the larger interest of society in ensuring that the government complies with the rule of law shows that the balance in the clash of competing weighted interest considerations requires rigorous examination, not passivity.[184] Although the Supreme Court has yet to issue an opinion clarifying the proper procedural and substantive course of review, it has certainly not shied away from policing the excesses of presidential encroachment on the rule of law.[185]

When the President argues for factual deference in the context of invoking the SSP, it is asserting a claim regarding the proper allocation of decision-making authority as between it and the federal judicial system. In other words, the Executive Branch is attempting to point out that some dispositive source of law vests it with authority to resolve a factual dispute. This argument is often supplemented with the functional argument made in favor of having a strong, unchecked Executive authority. But there is simply no specific constitutional provision assigning the Executive Branch exclusive, plenary authority for the determination of factual questions. Moreover, there is no constitutional requirement, either implied or explicit, that mandates unique or special deference in the context of SSP invocations by a president.

Instead of affording unfettered deference to unilateral presidential determinations of the SSP, federal judges should consider employing a

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available *at* http://lsr.nellco.org/cgi/viewcontent.cgi?article=1111&context=nyu_plltwp&seiredir=1#search="American+Hegemony+and+the+Foreign+Affairs+Constitution (describing these features, along with comparative expertise, as "the pillars of special deference" to the President in the realm of foreign politics).

183. *See, e.g.*, Daniel J. Solove, *The Darkest Domain: Deference, Judicial Review, and the Bill of Rights*, 84 IOWA L. REV. 941 (1999) (critiquing the standard view that the judiciary should defer to the purportedly professional expertise of the Executive Branch).

184. Crowell v. Benson, 285 U.S. 22, 60 (1932) ("In cases brought to enforce constitutional rights, the judicial power of the United States necessarily extends to the independent determination of all questions, both of fact and law, necessary to the performance of that supreme function.").

185. *See, e.g.*, Boumediene v. Bush, 128 S. Ct. 2229, 2277 (2008) (in striking down the Bush administration's suspension of habeas corpus as unconstitutional, and affirming the role of the judiciary in determining constitutionality of counterterrorism measures, the Court noted that, "[s]ecurity depends upon a sophisticated intelligence apparatus and the ability of our Armed Forces to act and to interdict. There are further considerations, however. Security subsists, too, in fidelity to freedom's first principles."); Hamdan v. Rumsfeld, 548 U.S. 557 (2006) (striking down as unconstitutional the Bush administration's employment of military commissions as violating the Uniform Code of Military Justice, and Common Article III of the Geneva Convention).

robust balancing test when deciding whether a case ought to go forward at the discovery stage. Despite promising congressional initiative, the most effective and optimal strategy for reforming the SSP lies within the federal judiciary.[186]

In *United States v. Nixon*,[187] the Supreme Court specifically held that the privilege given to correspondences and inter-communications between officials of the Nixon administration was grounded in Article II of the Constitution, but qualified that discussion by stating that the privilege was a qualified one.[188] The balancing approach recognized by the *Nixon* Court should also be used in an SSP context in order to ensure more equitable treatment of litigants and proper understanding of the underlying merits of a claim.

In addition, a federal court should consider appointing a special master to assist in reviewing highly classified information that is particularly specialized and sophisticated information in the context of a governmental invocation of the SSP. Rule 53(b) of the Federal Rules of Civil Procedure allows the district court, in exceptional cases, to refer complicated issues to a special master.[189] Using a special master with a high-level security clearance working closely with a federal judge, without the litigants, would appear to be an effective manner to ensure possibly sensitive national security information would not be disclosed. In addition, it would ensure that plaintiffs would be able to receive discoverable information that would not be harmful to national security.

In addition, if the government believes certain information to be unduly sensitive and should not be subject to disclosure, it should invoke the Freedom of Information Act exemptions of information "specifically authorized under criteria established by an Executive order to be kept

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186. In *United States v. Lindh*, the United States District Court for the Eastern District of Virginia put it appropriately as such: "[i]t is central to the rule of law in our constitutional system that federal courts must, in appropriate circumstances, review or second guess, and *indeed sometimes even trump*, the actions of the other government branches." 212 F. Supp. 2d 541, 555 (E.D. Va. 2002) (emphasis added).

187. 418 U.S. 683 (1974).

188. *Id.* at 707-08. The Court held that where a litigant presents strong evidence of a need for discovery of privileged communications, a court should balance the litigant's need for the information against the presidential right of confidentiality in an *in camera* examination of the material at issue.

189. FED. R. CIV. P. 53 provides "(1) *Scope.* Unless a statute provides otherwise, a court may appoint a master only to: (A) perform duties consented to by the parties; (B) hold trial proceedings and make or recommend findings of fact on issues to be decided without a jury if appointment is warranted by: (i) some exceptional condition; or (ii) the need to perform an accounting or resolve a difficult computation of damages; or (C) address pretrial and post-trial matters that cannot be effectively and timely addressed by an available district judge or magistrate judge of the district."

secret in the interest of national defense or foreign policy and . . . are in fact properly classified pursuant to such Executive order."[190] This could then provide judicial review of the stated claims in federal court, which could be similarly utilized in a SSP invocation context. The DC Circuit has codified five factors in *de novo* review in national security (b)(1) exemption cases,[191] which include: "(1) The government has the burden of establishing an exemption. (2) The court must make a *de novo* determination."[192] (3) Agency affidavits must be accorded substantial weight. (4) The trial court has sound discretion to choose "[w]hether and how to conduct an in camera examination of the [actual] documents . . . "[193] and (5) the trial court should be satisfied that proper classification procedures were followed and the contested item "logically falls" into the category claimed.[194] In addition, the D.C. Circuit has noted "if exemption is claimed on the basis of national security the District Court must, of course, be satisfied that proper procedures have been followed, and that by its sufficient description the contested document logically falls into the category of the exemption indicated."[195]

In addition, a federal court should also be permitted to conduct *in camera* review of documents claimed to be state secrets. "[A] finding of bad faith or contrary evidence is not a prerequisite to *in camera* review; a trial judge may order such an inspection 'on the basis of an uneasiness, on a doubt [the judge] wants satisfied before [taking] responsibility for a de novo determination."[196]

The values inherent in our constitutional democracy should be vindicated when anyone, including non-citizens, has been deprived of the very provisions we believe in so dearly. The legal sagas discussed above, ranging from the humiliating pain endured by Arar as a result of extraordinary rendition, to the illegal wiretapping of confidential discussions with friends, relatives, and clients overseas, are not run-of-the-mill cases that should automatically trigger a deferential approach to Executive decision-making. By questioning the underlying factual merits and legal conclusions often made by the President, the federal judiciary

190. 5 U.S.C. § 552(b)(1) (1966).

191. Ray v. Turner, 587 F.2d 1187, 1194 (1978) (noting legislative history that emphasized that in reaching a *de novo* determination the judge would accord substantial weight to detailed agency affidavits and take into account that the executive had "unique insights into what adverse affects might occur as a result of public disclosure of a particular classified record").

192. *Id.* at 1194.

193. *Id.*

194. *Id.* at 1195.

195. *Id.* (citing Welssman v. CIA, 565 F.2d 692, 697 (1977)).

196. Meeropol v. Meese, 790 F.2d 942, 958 (1986).

is in a unique position to adjudicate claims of deprivation of constitutional rights, and, when appropriate, grant damages or injunctive relief to vindicate the inherent superiority of the rights our Founding Fathers enshrined in the Constitution.[197] Although the SSP does serve legitimate functions in our era, it appears from a considerable number of lower court opinions that the SSP is susceptible to abuse by governmental administrations to cover up wrong-doing or other questionable activity.

In effect, the peculiar deference applied by courts when confronted with SSP invocations is reminiscent of former President Richard M. Nixon, who famously said, "the President can do no wrong."[198] Alas, it is evident that the President can do wrong, and the SSP should not be available to dismiss serious allegations of constitutional deprivations. Those claiming grave constitutional violations should no longer be denied appropriate relief from deprivation of the inalienable rights to life, liberty and due process of law that the Constitution guarantees.[199]

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197. Zagel, *supra* note 61, at 604.

198. Michael Glennon, *Can The President Do No Wrong?* 80 AM. J. INT'L. L. 923 (1986) (citing interview with David Frost (May 19, 1977)).

199. As Supreme Court Justice Robert Jackson once warned, a "[p]residential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system." *Youngstown*, 343 U.S. at 638 (Jackson, J., concurring).