THE CHAMBER OF SECRETS: THE DEATH OF JUDICIAL REVIEW OF STATE SECRETS

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The United States Supreme Court recently decided a case involving a man nearly tortured to death at the hands of the United States government. For years, the executive branch made pronouncements that it must keep information from litigants due to state secrets. The Court has always scrutinized these pronouncements. Until now. In the *Zubaydah* case, the Court dismissed a torture survivor's quest for justice. But it did not stop there. The opinion followed years of cases dismissed based on the state secrets privilege and effectively announced that the courts will not review claims made by the executive in certain situations.

Despite the compelling needs of the litigant, the Court instead walked in lockstep with the executive branch and dismissed the claim entirely. This action is akin to the invocation of the Crown Privilege as it existed in England from the 15th Century until 1968.[1] This decision will undoubtedly cause executive branch overreach. Without the judicial check on the unilateral actions of the Central Intelligence Agency and other secretive departments within our government, abuse will continue. Americans require a transparent view of their government for effective democracy. The State Secrets Protection Act previously introduced in Congress is a critical fix to remedy the Court's acquiescence to executive branch decision making.

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1. The Crown Privilege began at the time of the formation of the Courts of Chancery in the 15th Century, and the first recorded case that attempted to define the limits of the Crown Privilege was *Beatson v. Skene* in 1860. Gerry Molnar, *Crown Privilege*, 42 SASK. L. REV. 173, 174 (1977). The privilege remained until its dramatic limitation in Conway v. Rimmer [1968] 1 All ER 874 (HL) (appeal taken from Eng.). *See infra* note 29 and accompanying text.

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INTRODUCTION

In 2002, the Central Intelligence Agency (CIA) incorrectly believed that Abu Zubaydah was "one of the highest ranking members of the al Qaeda terrorist organization."[2] He was brutally tortured by the CIA for information under techniques created by two independent contractors hired by the government.[3] In a procedurally complicated case involving investigations and court proceedings in Poland, France, and the United States, Abu Zubaydah sought information through discovery in a case filed in the United States District Court for the Eastern District of Washington.[4] In 2017, Abu Zubaydah sought an *ex parte* application for discovery under 28 U.S.C. § 1782 to depose the contractors, and the United States intervened and asserted the state secrets privilege.[5] In 2022, the U.S. Supreme Court

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2. Memorandum from Jay S. Bybee, Assistant Att'y Gen. of the U.S. Dep't of Justice, to John Rizzo, Acting Gen. Counsel of the Cent. Intelligence Agency, (Aug. 1, 2002), https://www.justice.gov/sites/default/files/olc/legacy/2010/08/05/memo-bybee2002.pdf [https://perma.cc/227X-GHHF]; S. SELECT COM. ON INTEL., COMMITTEE STUDY OF THE CENTRAL INTELLIGENCE AGENCY'S DETENTION AND INTERROGATION PROGRAM, S. REP. NO. 113-288, at xiv (2014), https://www.intelligence.senate.gov/sites/default/files/publications/CRPT-113srpt288.pdf [https://perma.cc/9NQH-SNXH]; *see also* Abigail Covington, *Abu Zubaydah Was the First High-Level Detainee Tortured by the C.I.A. Will He Ever Get Out of Guantanamo?*, ESQUIRE (Dec. 7, 2021), https://www.esquire.com/entertainment/tv/a38444930/abu-zubaydah-forever-prisoner-where-is-he-now/ [https://perma.cc/CM7F-FGGS] (noting that Abu Zubaydah's given name is Zayn al-Abidin Muhammad Husayn); Editorial, *The Guantánamo Bay Prison Persists. Here's How to End the Shame.*, WASH. POST (Feb. 16, 2023), https://www.washingtonpost.com/opinions/2023/02/16/guantanamo-bay-prison-facility-detainees/, [https://perma.cc/FZ69-X9NG] (stating that the Guantánamo Bay Detention Camp took in its last prisoner in 2008). Because the Ninth Circuit has stated that "Abu Zubaydah's birth name was Zayn al-Abidin Muhammad Husayn, but he is known as Abu Zubaydah in litigation and public records," I will refer to him as Abu Zubaydah throughout this Article. Husayn v. Mitchell, 938 F.3d 1123, 1125 n.1 (9th Cir. 2019), *rev'd and remanded sub nom.* United States v. Zubaydah, 595 U.S. 195 (2022).

3. United States v. Zubaydah, 595 U.S. 195, 200–01 (2022); *Id.* at 238–39 (Gorsuch, J., dissenting); *see also* Carol Rosenberg, *Psychologist Who Waterboarded for C.I.A. to Testify at Guantánamo*, N.Y. TIMES (Jan. 20, 2020), https://www.nytimes.com/2020/01/20/us/politics/911-trial-psychologists.html (on file with the *Columbia Human Rights Law Review*) (discussing the role of the two contractors, Drs. James E. Mitchell and John Bruce Jensen, in the CIA's "enhanced interrogation" program).

4. Alana Mattei, *Privilege in Peril:* U.S. v. Zubaydah *and the State Secrets Privilege*, 17 DUKE J. OF CONST. L. & PUB. POL'Y 195, 196–97 (2022).

5. *Husayn*, 938 F.3d at 1126; *see also* 28 U.S.C. § 1782(a) ("The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or

decided *United States v. Zubaydah*.[6] In a fractured opinion, the Supreme Court reversed the Ninth Circuit's ruling and ordered the case dismissed.[7] The Ninth Circuit had ruled that Abu Zubaydah was entitled to an *in camera* review of the documents.[8] The Supreme Court held otherwise.[9]

The case is one of very few within American jurisprudence on the state secrets privilege.[10] Privileges apply at all stages of a proceeding, from discovery through sentencing.[11] If a privilege applies, it is absolute.[12] The state secrets privilege is a common law privilege that protects "information vital to the nation's security or diplomatic relations."[13] It does not have an expiration date.[14] When the government successfully asserts the privilege on the basis of state secrets, the pertinent evidence is excluded.[15] The case is to proceed without the evidence. Because privileges "blockade the quest for truth," they are to be very narrowly construed.[16] Privileges only apply when necessary to achieve their purpose and within the narrowest possible

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international tribunal, including criminal investigations conducted before formal accusation.").

6. *Zubaydah*, 595 U.S. at 195.

7. *Id.* at 214.

8. *Husayn*, 938 F.3d at 1137.

9. *Zubaydah*, 595 U.S. at 214.

10. *See infra* Section I.C.1–2.

11. FED. R. EVID. 1101(c).

12. Edward J. Imwinkelried, *Questioning the Behavioral Assumption Underlying Wigmorean Absolutism in the Law of Evidentiary Privileges*, 65 U. PITT. L. REV. 145, 146–49 (2004). One scholar disagrees that it is absolute. Louis Fisher, *The State Secrets Privilege: Relying on Reynolds*, 122 POL. SCI. Q. 385, 408 (2007).

13. Northrop Corp. v. McDonnell Douglas Corp., 751 F.2d 395, 399 (D.C. Cir. 1984).

14. *In re* Terrorist Attacks on September 11, 2001, 523 F. Supp. 3d 478, 497 (S.D.N.Y. 2021).

15. Mohamed v. Jeppesen Dataplan, Inc., 614 F.3d 1070, 1082 (9th Cir. 2010); Rebecca Reeves, F.B.I. v. Fazaga: *The Secret of the State-Secrets Privilege*, 17 DUKE J. CONST. L. & PUB. POL'Y SIDEBAR 267, 270 (2021–2022).

16. "Blockades the quest for truth" terminology courtesy of Professor Edward W. Cleary (1907–1990). Professor Cleary was appointed by Chief Justice Earl Warren as the reporter to the advisory committee to draft uniform rules of evidence. John E. Cribbet, *Tribute to Professor Edward W. Cleary*, 21 ARIZ. ST. L.J. 845, 845 (1989); *see also* United States v. Woodall, 438 F.3d 1317, 1325, n.3 (5th Cir. 1971) ("All privileges are blockades to the ascertainment of the truth and should be conservatively and reluctantly granted." (quoting The Advisory Committee's notes to Proposed Rules of Evidence for the United States District Courts and Magistrates (Preliminary Draft 1969) R. 5-11, 46 F.R.D. 161, 280 (1969)); Green v. Superior Court, 220 Cal.App.2d 121, 126 (Cal. 1963) ("Since the protection against privileged communications often leads to a suppression of the truth and to a defeat of justice, the tendency of the courts is toward a strict construction of such statutes." (quoting Samish v. Superior Court, 28 Cal.App.2d 685, 695 (Cal. 1938)); Ballew v. State, 640 S.W.2d 237, 245 n.2 (Tex. Crim. App. 1982) (Clinton, J., concurring) (using the "blockade" language to argue for narrowly construing the doctor-patient privilege).

limits.[17] The U.S. Supreme Court has cited to the "ancient proposition of law" that the public has a right to "every man's evidence."[18] Privileges are not lightly created nor expansively construed.[19] Nevertheless, the Court in *Zubaydah* found that the state secrets privilege applied and dismissed the case. The Court not only found that the state secrets privilege was applicable, but it also refused to allow any *in camera* review of the claimed privileged information.[20] An *in camera* review is done in chambers by a court to determine the merits of a claimed privilege.[21] It does not destroy the privilege itself.[22]

In this Article, I explore the state secrets privilege from its origin in England as an unreviewable bar to discoverable evidence when the Crown raised a privilege—a shield—until today in the United States.[23] In England the Crown Privilege underwent a significant change in *Conway v. Rimmer* in 1968. The House of Lords decided that the Crown's assertions of privilege were reviewable by the judiciary.[24] The U.S. law held similarly.[25] However, in the recent past, the U.S. Government has used the privilege aggressively to dismiss cases at the pre-discovery phase, as a sword and not merely as a shield.[26] The state secrets privilege has evolved slowly into a tool used by the executive branch to prevent litigation in certain areas, particularly in

17. *In re* Horowitz, 482 F.2d 72, 81 (2d Cir. 1973), *cert. denied* 414 U.S. 867 (1973).

18. United States v. Nixon, 418 U.S. 683, 709 (1974); United States v. Bryan, 339 U.S. 323, 331 (1950).

19. *Nixon*, 418 U.S. at 709.

20. United States v. Zubaydah, 595 U.S. 195, 212–14 (2022).

21. United States v. Zolin, 491 U.S. 554, 568–69 (1989).

22. *Id.*

23. Molnar, *supra* note 1, at 175.

Conway v. Rimmer [1968] 1 All ER 874, 882 (HL) (appeal taken from Eng.) ("However wide the power of the court may be held to be, cases would be very rare in which it could be proper to question the view of the responsible Minister that it would be contrary to the public interest to make public the contents of a particular document.").

25. *See, e.g.*, Ellsberg v. Mitchell, 709 F.2d 51, 59 n.37 (D.C. Cir. 1983) (collecting cases holding that the U.S. government's assertions of privilege could be reviewed by the judiciary).

26. D.A. Jeremy Telman, *Our Very Privileged Executive: Why the Judiciary Can (And Should) Fix the State Secrets Privilege*, 80 TEMP. L. REV. 499, 500 (2007); Sudha Setty, *Judicial Formalism and the State Secrets Privilege*, 38 WM. MITCHELL L. REV. 1629, 1629 (2012) (noting the "emergence of a pattern of the administration seeking dismissals of lawsuits during the pleadings stage, even when the suits dealt with allegations of gross human rights violations and last resort attempts of gravely injured individuals to vindicate their rights") (footnote omitted); Christina E. Wells, *State Secrets and Executive Accountability*, 26 CONST. COMMENT. 625, 626 (2010) ("Bush officials sought dismissal of entire lawsuits claiming that the subject matter of the lawsuit was itself a state secret.").

cases involving the "war on terror."[27] This creates a blockade for each petitioner, but also keeps certain government activity shielded from public view. This Article is divided into four parts.

In Part I, I examine the history of the privilege. The idea of secrets of the state began many centuries ago. In common law, which the U.S. adopted from England, there was a Crown Privilege, where litigants were barred from seeking information from the King, even when the government was not a party in the case.[28] It was not simply an idea that the government protected information, it was the belief that a King could do no wrong. There was no sense in requesting information; a person could not fight the Crown. I argue that in *Zubaydah*, the Court brought back to life the Crown Privilege as it existed in England up until 1968.[29] In the words of a 1974 song, "everything old is new again."[30] In England, however, the House of Lords, in accordance with the Courts of Scotland and other Commonwealth countries, decided to abandon the Crown Privilege in 1968.[31]

In Part II, I highlight the trend towards dismissal of cases outright, as happened in *Zubaydah*. This is the result of two separate doctrines, one based on *United States v. Reynolds*[32] and the other based on *Totten v. United States*,[33] becoming combined.[34] As the law now stands, post-*Zubaydah*, if the executive branch claims the privilege, the courts look no further and, in most instances, dismiss the case. This is dangerous to democracy because there is effectively no check on the government's claim of the state secrets

27. Terminology of the "war on terror" was created by President George W. Bush. *Global War on Terror*, GEORGE W. BUSH PRESIDENTIAL LIBRARY, https://www.georgewbushlibrary.gov/research/topic-guides/global-war-terror [https://perma.cc/6RPD-DHQ2]; *War on Terrorism*, GLOBAL POLICY FORUM, https://archive.globalpolicy.org/war-on-terrorism.html [https://perma.cc/MM68-JMJ3].

28. Molnar, *supra* note 1, at 173 ("Crown privilege can arise in a case between two private litigants where official or Crown documents are required for proof.").

29. Conway v. Rimmer [1968] 1 All ER 874 (HL) (appeal taken from Eng.).

30. PETER ALLEN & CAROLE BAYER SAGER, *Everything Old Is New Again, on* CONTINENTAL AMERICAN (Irving Music, Inc., et al. 1974).

31. *Conway*, 1 All E.R. at 916; *see also* Matthew Russell, *A Privilege of the State*, 2 IRISH JURIST (N.S.) 88, 88–99 (1967) (analyzing the historical development of state privileges).

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

33. Totten v. United States, 92 U.S. 105 (1875).

34. *Compare Reynolds*, 345 U.S. at 11 (urging a balancing approach between the necessity of compelling disclosure and the level of secrets at stake), *with Totten*, 92 U.S. at 107 (dismissing the case outright because "public policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential"); *see also* Reeves, *supra* note 15, at 269–70 (explaining that the Supreme Court treated the state secrets privilege established in *Reynolds* and the secrecy required by government contracts explained in *Totten* as two distinct doctrines).

privilege.[35] This absolute block to evidence leads to abuse. I describe abuses in the use of the state secrets privilege and show the abuses will continue.

In Part III, I review Congress's attempt to remedy the effect of the privilege. From 2008 to 2016, senators and representatives proposed bills to steer the courts in the right direction, to examine the claims of the executive more effectively.[36] Because the Supreme Court in *Zubaydah,* effectively abdicated its power to review the executive, Congress must step in to restore a balance between the three branches of government. Congressional action calling for actual judicial review is needed now more than ever.

Finally, in Part IV, I summarize the history and growth of the privilege, and congressional tools to ensure the executive branch does not exceed its authority in safeguarding only what is absolutely necessary to ensure national security.

I. HISTORY OF THE STATE SECRETS PRIVILEGE

State secrets have been in use since at least 678 C.E. in Constantinople.[37] One could go all the way back to 300 B.C.E. and Sun Tzu, who proclaimed the following in *The Art of War*: "[T]he formation and procedure used by the military should not be divulged beforehand."[38] Intelligence services are "not a modern invention," but instead "can be traced very far back into the past, almost to the beginnings of the first organizations of human beings, organizations which bore a resemblance to what can be called states."[39] The use of secrets in military matters continues to this day. State secrets is a common law doctrine that allows the executive

35. Claire Finkelstein, Opinion, *How the State Secrets Doctrine Undermines Democracy,* BLOOMBERG LAW (March 28, 2022), https://news.bloomberglaw.com/us-law-week/how-the-state-secrets-doctrine-undermines-democracy (on file with the *Columbia Human Rights Law Review*).

36. S. 2533, 110th Cong (2008); H.R. 5607, 110th Cong (2008); S. 417, 111th Cong. (2009); H.R. 984, 111th Cong. (2009); H.R. 5956, 112th Cong. (2012); H.R. 3332, 113th Cong (2013); H.R. 4767, 114th Cong (2016).

37. Alex Roland, *Secrecy, Technology, and War: Greek Fire and the Defense of Byzantium,* 678–1204, 33 TECH. & CULTURE 655, 656 (1992) ("The composition and use of Greek fire was a state secret that died with the Byzantine empire, in fact disappeared long before Byzantium ran its course.")

38. SUN TZU, THE ART OF WAR: COMPLETE TEXTS AND COMMENTARIES 55 (Thomas Cleary trans., Shambala 2003).

39. FRANCIS DVORNIK, THE ORIGINS OF INTELLIGENCE SERVICES 3 (1974).

branch to refuse to disclose evidence to a private party.[40] The grounds for the refusal are that divulging this information could endanger national security and/or foreign relations.[41]

A. The Crown Privilege in England

The American legal system of privilege is rooted in English common law.[42] The English common law recognized a privilege for military and state secrets.[43] Written evidence laws in the United States can be traced back to the year 1789.[44] The first American edition of an evidence treatise was published by Thomas Starkie in 1826.[45] In Starkie's treatise, he refers to "instances in which particular evidence is excluded on grounds of policy, where the disclosure might be prejudicial to the community."[46] In the margin of his papers, he adds, "on grounds of state policy."[47]

Our federal courts initially drew from English law when making evidentiary rulings in our country's early years.[48] The English law was cited in *United States v. Reynolds*, a foundational U.S. case interpreting our state secrets privilege.[49] By way of background, the English system was one of official secrecy with no exceptions.[50] This flowed from the belief that the

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40. *FAQ: What are State Secrets*, CENTER FOR CONSTITUTIONAL RIGHTS (Oct. 17, 2007), https://ccrjustice.org/home/get-involved/tools-resources/fact-sheets-and-faqs/faqs-what-are-state-secrets (on file with the *Columbia Human Rights Law Review*).

41. *Id.*

42. Kenneth R. Tucker, *Did Congress Err in Failing to Set Forth Codified Rules Governing Privileged Relationships and Resulting Communications?*, 72 U. DET. MERCY L. REV. 181, 184 (1994); *see also* The Robbins Collection, *The Common Law and Civil Law Traditions*, BERKELEY LAW, https://www.law.berkeley.edu/research/the-robbins-collection/exhibitions/common-law-civil-law-traditions/ [https://perma.cc/7UPV-LHSD] (noting that "the terminology and process of our [American] legal system . . . [are] based on English common law").

43. *In re* Under Seal, 945 F.2d 1285, 1287 n.2 (4th Cir. 1991) (citing CHARLES TILFORD MCCORMICK ET AL., MCCORMICK ON EVIDENCE § 107 (3d ed. 1984)).

44. 21 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 5001 (2d ed. 1987).

45. THOMAS STARKIE, A PRACTICAL TREATISE ON THE LAW OF EVIDENCE, AND DIGEST OF PROOFS, IN CIVIL AND CRIMINAL PROCEEDINGS WITH REFERENCE TO AMERICAN DECISIONS BY THERON METCALF (Boston, Wells and Lilly 1826).

46. *Id.* at 106.

47. *Id.*

48. *See, e.g.*, Withaup v. United States, 127 F. 530, 533 (8th Cir. 1903) ("For the law of evidence in this country, like our other laws, being founded upon the ancient common law in England, the decisions of its courts show what is our own common law upon the subject . . . ." (quoting United States v. Reid, 53 U.S. 361, 366 (1851)).

49. United States v. Reynolds, 345 U.S. 1, 7 (1953); *see infra* Section I.C.1.

50. Beatson v. Skene (1860) 157 Eng. Rep. 1415, 1418.

King could do no wrong.[51] In a "state prosecution," a witness was prohibited from disclosing information the Crown deemed secret to magistrates or those concerned in the administration of government.[52] In one case, an officer from the Tower of London was protected from examination about the plan of the Tower.[53] The case involved an alleged conspiracy to overthrow the British government.[54] The government introduced into evidence a map of the Tower of London found with one of the conspirators.[55] The Tower was one of the alleged targets in the plot. The defense sought to introduce a map freely available at a London shop and to question a long-time employee of the Tower about the map's accuracy. The Court refused to allow the questioning, as it might cause "public mischief," and be against public policy.[56] In another case, orders given to a military officer by the governor of a British colony were not subject to production.[57] At issue were instructions given by the governor of the British colony of Sierra Leone to a British officer. Again, the Court concluded that the information, the actual instructions, should not be disclosed because it was against public policy.[58] Incidentally, the parties could proceed on the merits without the evidence, and the plaintiff—an American subject unlawfully arrested under the orders in question—prevailed.[59] The plaintiff was allowed to prove what was done to him by order of the governor without the actual instructions.

The "Crown Privilege" asserted in court existed in England beginning in the 18th century.[60] It applied to the protection afforded

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51. *See* 1 WILLIAM BLACKSTONE, COMMENTARIES *246 ("Besides the attribute of sovereignty, the law also ascribes to the king, in his political capacity, absolute *perfection*. The king can do no wrong." (emphasis in original)); *see also* Herbert Barry, *The King Can Do No Wrong*, 11 VA. L. REV. 349, 353 (1925) ("[I]t seems certain that thereafter the principle became fully established that the King could not be made a defendant in any court without his own consent, and was not subject to the writs and process of the courts."); *see also* Janelle Greenberg, *Our Grand Maxim of State, 'The King Can Do No Wrong.'* 12 HISTORY OF POLITICAL THOUGHT 209, 212 (1991) ("As God's viceregent and hence the earthly source of political authority, the king, it was said, could do no wrong in the same sense that God could not sin.").

52. STARKIE, *supra* note 45, at 106.

53. Rex v. Watson (1817) 171 Eng. Rep. 591, 604 (KB).

54. Robert M. Chesney, *State Secrets and the Limits of National Security Litigation*, 75 GEO. WASH. L. REV. 1249, 1274–75 (2007).

55. *Id.*

56. *Id.*

57. Cooke v. Maxwell (1817) 171 Eng. Rep. 614, 615.

58. *Id.*

59. *Id.*

60. Russell L. Weaver & James T.R. Jones, *The Deliberative Process Privilege*, 54 MO. L. REV. 279, 283 (1989).

military reports and other papers of the English monarchy.[61] At common law, the Crown could refuse to produce documents, and this was absolute and binding on the courts of England until 1968.[62] The exclusion of evidence was mandatory.[63] In *Beatson v. Skene*, the Courts of Exchequer and Exchequer Chamber concluded that the question of the production of documents must be determined "not by the Judge but by the head of the department having the custody of the paper."[64] This case was decided just after treaties were executed ending the Second Opium War waged by the British and French Empires against the Qing Dynasty.[65] Undoubtedly, a court will be more concerned with state secrets during and just following an active war.[66]

By 1953, members of the judiciary and those in academic circles became uneasy with the denial of litigants' information.[67] Nevertheless, the *Beatson* holding was reiterated in an English case decided during World War II, *Duncan v. Cammell, Laird, & Co., Ltd.*[68] The House of Lords' Viscount Simon declared that the Admiralty Minister's determination on what exactly was secret was conclusive.[69] Disclosure was denied even to members of the judiciary.[70] This opinion was criticized by academics but welcomed by civil servants.[71] Debates over the merits of Crown Privilege

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61. Sudha Setty, *Litigating Secrets: Comparative Perspectives on the State Secrets Privilege*, 75 BROOK. L. REV. 201, 228–29 (2009).

62. Conway v. Rimmer [1968] 1 All ER 874 (HL) 910–11 (appeal taken from Eng.).

63. Edward Koroway, *Confidentiality in the Law of Evidence*, 16 OSGOODE HALL L.J. 361, 365 (1978).

64. Beatson v. Skene (1860) 157 Eng. Rep. 1415, 1421.

65. *The Opening to China Part II: The Second Opium War, the United States, and the Treaty of Tianjin, 1857–1859*, UNITED STATES DEPARTMENT OF STATE, OFFICE OF THE HISTORIAN, https://history.state.gov/milestones/1830-1860/china-2 [https://perma.cc/PKT2-US2D].

66. For example, in the United States, the war on terror led to a sharp increase in government assertions of the state secrets privilege. *See* Beatrix Geaghan-Breiner, *Rethinking the State Secrets Privilege After the War on Terror*, COLUM. UNDERGRAD. L. REV. (June 20, 2022), https://www.culawreview.org/journal/rethinking-the-state-secrets-privilege-after-the-war-on-terror [https://perma.cc/8LGP-XHKR].

67. Maureen Spencer & John Spencer, *Coping with* Conway v. Rimmer *[1968] AC 910: How Civil Servants Control Access to Justice*, 37 J.L. & SOC'Y 387, 395 (2010); *see also* H. Luntz, *Evidence Excluded on Grounds of State Interest*, 82 S. AFR. L.J. 395, 395 (1965) (referring to Ellis v. Home Office [1953] 2 (QB) 135).

68. Duncan v. Cammell, Laird, & Co., Ltd., [1942] AC 624 (HL) 642–43 (appeal taken from Eng.).

69. *Id.*

70. Mauro Cappelletti & C.J. Golden, Jr., *Crown Privilege and Executive Privilege: A British Response to an American Controversy*, 25 STAN. L. REV. 836, 840 (1973). The English law as it existed in 1953 partially formed the basis of the *Reynolds* case discussed *infra*. United States v. Reynolds, 345 U.S. 1, 7 (1953).

71. Spencer & Spencer, *supra* note 67, at 395.

waged on in the following years. In 1956, there was a debate in the House of Commons about the Crown Privilege and its effect on the public.[72] In 1964, members of the U.K. Parliament questioned Prime Minister Alec Douglas-Home about the Crown Privilege.[73] The Members indicated the privilege had long been criticized by judges and academics.

For years, British law was that the King could do no wrong and accordingly, the courts followed the Crown's decisions on withholding information without question. This all changed in the 1960s. In 1968, the House of Lords overruled the long line of English decisions that gave the Crown the unimpeded right to withhold documents.[74] In *Conway v. Rimmer*, Conway, a constable—police officer—was hired on a two-year probationary term.[75] During that period, another probationary constable reported that his flashlight was lost, and he found it in Conway's locker. Conway's superior, Superintendent Rimmer, told Conway that his probationary reports were adverse and urged him to resign.[76] Conway refused. Superintendent Rimmer was instrumental in bringing theft charges against Conway, but Conway was found not guilty, although he was still dismissed from his job shortly thereafter. Conway then brought a malicious prosecution case against Rimmer.[77] There were five reports prepared on Conway, and both Conway and Rimmer wanted the reports disclosed.[78] One of Her Majesty's Principal Secretaries of State claimed the Crown Privilege and refused to release the reports.

The Lords reasoned that if they followed their earlier *Duncan v. Cammell, Laird* case, the answer was clear.[79] They would rule for the Crown without any consideration of the merits of the claim.[80] In *Conway*, however, the Lords ruled that things ought to change, and they overruled *Duncan*. One of the dramatic changes the House of Lords considered when coming to their decision was that the Scottish court had ruled that the Crown Privilege was not in fact conclusive.[81] The Lords reasoned in *Conway* that there were

72. HC Deb (26 Oct. 1956) (558) cols. 947–48 ("The court before whom the claim [of Crown Privilege] is made cannot itself inquire whether the public interest is really prejudiced, or whether such prejudice may be quite insubstantial compared with the injury which is suffered by the litigant in the withholding of the evidence.").

73. HC Deb (25 Feb. 1964) (690) cols. 232–34.

74. Conway v. Rimmer [1968] AC 910 (HL) (appeal taken from Eng.).

75. *Id.* at 912.

76. *Id.*

77. *Id.*

78. *Id.* at 912–13.

79. *Id.* at 938.

80. Duncan v. Cammell, Laird, & Co., Ltd., [1942] AC 624 (HL) 642–43 (appeal taken from Eng.).

81. Glasgow Corporation v. Central Land Board (1956) SC (HL) 1 (Scot.).

times when differences between Scottish law and English law were reasonable, even though both are part of the United Kingdom.[82] This was not such a case because it concerned public policy.[83]

The Lords decided that there were two types of public policy. One was the public policy of holding things secret to protect the safety of the country. The other was the public policy of the proper administration of justice.[84] The Lords held that there must be a proper balancing between the two. They held that courts were essential to that balancing.

In accordance with this balancing, the Lords determined that the privilege had been read too broadly and that some type of review over the government's claim of secrecy was essential.[85] The House of Lords unanimously overruled its earlier *Duncan* case.[86] The Lords held that finding a minister's privilege claim conclusive was at odds with the prevailing wisdom of most common law countries, including the United States.[87] They also announced that judges must have the final decision, with Lord Upjohn stating the following:

> [T]he claim of privilege by the Crown, while entitled to the greatest weight, is only a claim and the decision whether the court should accede to the claim lies within the discretion of the judge; and it is a real discretion.[88]

In his concurring opinion, Lord Morris stated that one of the main court functions is to weigh competing interests; due to their independence, courts are in a better position than the executive to weigh the public interest against the needs of a particular government department.[89]

The rationale behind the House of Lords' decision continues to serve a role in shaping judicial thinking regarding governmental privileges. Comparative law expert Professor Mauro Cappelletti found the reasoning in *Conway v. Rimmer* similar to the later U.S. District Court Judge John J. Sirica's reasoning in his Nixon subpoena case order.[90] After the Watergate

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82. *Conway*, [1968] AC at 938.

83. *Id.*

84. *Id.* at 940.

85. *Id.* at 951–52; *see also* Julius Stone, *1966 and All That! Loosing the Chains of Precedent*, 69 COLUM. L. REV. 1162, 1183 (1969) ("Thus encouraged to narrow the rule of *Duncan's Case*, the Law Lords demonstrated, even through a certain looseness of language, a perceptive awareness of the traps of thought which often surround such weighing of interests.").

86. GARY SLAPPER & DAVID KELLY, THE ENGLISH LEGAL SYSTEM 107 (10th ed. 2009).

87. *Conway,* [1968] AC at 992.

88. *Id.*

89. *Id.* at 956–57.

90. Cappelletti & Golden, 70, at 836 (citing *In re* Subpoena to Nixon, 360 F. Supp. 1 (D.D.C. 1973)). Mauro Cappelletti (1927–2004) "was one of the giants of 20th Century

break-in, a grand jury was empaneled in June 1972 to investigate.[91] In July 1973, the special prosecutor, acting on behalf of the grand jury, issued a *subpoena duces tecum* to President Richard Nixon.[92] Nixon refused to fully comply with the subpoena.[93] Judge Sirica determined that President Nixon was compelled to answer the subpoena, despite the President's assertion of a privilege. Sirica stated, "[a] search of the Constitution and the history of its creation reveals a general disfavor of government privileges, or at least uncontrolled privileges."[94] Sirica emphasized that privileges are not subject to executive fiat.[95]

B. Early U.S. State Secrets Privilege Law

The parameters of just what may remain secret are difficult to ascertain. The areas are exceptionally broad. A litigant needs certain evidence to bring their case, but the government may block the disclosure by invoking the state secrets privilege.[96] Until very recently (see *Zubaydah*, *infra*), the courts were the final arbiter of what may or must not be disclosed.[97] Remarkably, the number of state secrets privilege cases is shockingly low. In fact, the number of significant cases on the topic could be counted on one hand.[98] Between *Totten v. United States.*, discussed *infra*, and the attacks of 9/11, the state secrets doctrine was rarely even raised.[99] But post-9/11, use of the state secrets privilege rose dramatically.[100]

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comparative law." *Mauro Cappelletti and Neil MacCormick Fellowships*, NYU LAW, https://www.law.nyu.edu/global/globalvisitorsprogram/globalresearchfellows/maurocappellettiglobalfellowincomparativelaw [https://perma.cc/Q9J5-NVFH].

91. Grand Jury Presentment at 1, *In re* Subpoena to Nixon, 360 F. Supp. 1 (D.D.C. 1973) (No. 70105876).

92. *In re Subpoena to Nixon*, 360 F. Supp. at 3.

93. *Id.*

94. *Id.* at 4.

95. *Id.* at 6. Fiat is defined by the Cambridge Dictionary as "the giving of orders by someone who has complete authority." *Fiat*, CAMBRIDGE DICTIONARY (4th ed. 2013).

96. Setty, *supra* note 61, at 201.

97. *In re* Under Seal, 945 F.2d 1285, 1288 (4th Cir. 1991).

98. *Id.*; *see also* United States v. Reynolds, 345 U.S. 1, 7 n.11 (1953) (collecting cases); Archibald Cox, *Executive Privilege,* 122 U. PA. L. REV. 1383, 1409 (1974) (noting that "[t]he precedents are not numerous").

99. Daniel R. Cassman, *Keep It Secret, Keep It Safe: An Empirical Analysis of the State Secrets Doctrine*, 67 STAN. L. REV. 1173, 1184 (2015).

100. *Id.*; *see also* Chesney, 54, at 1299 ("[W]hen the particular methods of pursuing this strategic priority [of counterterrorism] in the wake of 9/11 came to include such covert measures as extraordinary rendition and warrantless surveillance, it also was inevitable that the state secrets privilege would become a prominent litigation issue . . . .").

It is important to note from the outset that the state secrets privilege is different from asserting a national security exemption, known as Exemption 1, to a Freedom of Information Act (FOIA) request.[101] The state secrets privilege is an evidentiary privilege, whereas FOIA is federal legislation, enacted in 1966, which created a statutory right for members of the public to access executive branch information.[102] Every executive branch agency must make records promptly available to any person, unless those records fall within an exemption to FOIA.[103] A state secrets privilege case may follow a FOIA case, but they are not the same.[104] If a national security exemption is raised to a FOIA request under Exemption 1, the analysis is analogous to the state secrets privilege.[105] Nevertheless, courts occasionally confuse the two.[106] In fact, in *Zubaydah*, a state secrets case, Justice Breyer discussed FOIA because the government cited the Act in its brief.[107] Breyer indicated that FOIA provides some support for the state secrets privilege; however, only Chief Justice Roberts and Justice Kagan joined this part of the plurality opinion.[108]

The state secrets privilege, which is the executive's ability to protect information from disclosure as part of discovery, dates back to the time of the independence of the United States. The Founding Fathers were generally opposed to government secrets.[109] Historian Henry Steele Commager declared the following:

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101. The Freedom of Information Act (FOIA) was passed in 1966 to provide the public with access to government records. U.S. Dep't of Just., *What is FOIA?*, FOIA.GOV, https://www.foia.gov/about.html, [https://perma.cc/H3TD-R364]. Subsection (b)(1)(A) of the current Act exempts from forced disclosure matters that are "specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy" and "are in fact properly classified pursuant to such Executive order." 5 U.S.C. § 552(b)(1)(A).

102. 5 U.S.C. § 552; General Dynamics Corp. v. United States, 563 U.S. 478, 485 (2011); Long v. United States Internal Revenue Service, 349 F. Supp. 871, 875 (W.D. Wash. 1972).

103. U.S. Dep't of Just. V. Reps. Comm. for Freedom of the Press, 489 U.S. 749, 754–55 (1989).

104. For example, ACLU v. Dep't of Just., 681 F.3d 61 (2d Cir. 2012), a FOIA case involving a photograph of Abu Zubaydah, was followed by United States v. Zubaydah, 595 U.S. 195 (2022), a state secrets case involving Abu Zubaydah.

105. Halkin v. Helms, 598 F.2d 1, 9 (D.C. Cir. 1978).

106. Carrie Newton Lyons, *The State Secrets Privilege: Expanding its Scope Through Government Misuse*, 11 LEWIS & CLARK L. REV. 99, 108 (2007).

107. *Zubaydah*, 595 U.S. at 210 ("However, the principles underlying the FOIA rule provide at least some support for the Government's position here.").

108. *Id.* at 197, 210.

109. *See* N.Y. Times Co. v. United States, 403 U.S. 713, 719 (1971) (Black, J., concurring) ("The Framers of the First Amendment, fully aware of both the need to defend a new nation and the abuses of the English and Colonial Governments, sought to

> The generation that made the nation thought secrecy in government one of the instruments of Old-World tyranny and committed itself to the principle that a democracy cannot function unless the people are permitted to know what their government is up to.[110]

The country rejected "all royal authority and the incidents thereof."[111] Benjamin Franklin himself leaked sensitive government letters primarily authored by the Loyalist Governor of the Province of Massachusetts Bay, Thomas Hutchinson, to the Speaker of the Massachusetts Assembly run by the Colonists.[112] This was in 1772, three years prior to the Revolutionary War.[113] Franklin was living in London at the time and had been appointed Postmaster of the Thirteen Colonies by Britain.[114]

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give this new society strength and security by providing that freedom of speech, press, religion, and assembly should not be abridged."); *see also State Secret* [sic] *Protection Act of 2009: Hearing on H.R. 984 Before the Subcomm. on the Const., C.R., & C.L. of the H. Comm. on the Judiciary*, 111th Cong. 3 (2009) (statement of Jerrold Nadler, Chairman, Subcomm. on the Const., C.R., & C.L. of the H. Comm. on the Judiciary) ("[I]n the words of the Ninth Circuit in the recent Jeppesen decision, 'The executive cannot be its own judge.' To allow that—and these are now my words—to allow that is to abandon all the protections against tyranny that our Founding Fathers established."). On the other hand, our founders kept their own proceedings secret, and indeed General Washington kept secrets from his colleagues and even his troops. Stephen F. Knott, *America Was Founded on Secrets and Lies*, FOREIGN POLICY (Feb. 15, 2016), https://foreignpolicy.com/2016/02/15/george-washington-spies-lies-executive-power/ [https://perma.cc/2AT7-KGXQ].

110. DORSEN & GILLERS, NONE OF YOUR BUSINESS: GOVERNMENT SECRECY IN AMERICA vi (1st ed. 1974). Justice Douglas cited this in his dissent in EPA v. Mink, 410 U.S. 73, 80 (1973) (Douglas, J., dissenting), and it has since been cited in the majority opinion in U.S. Dep't of Just. v. Reps. Comm. for Freedom of the Press, 489 U.S. 749, 772–73 (1989).

111. Barry, *supra* note 51, at 358.

112. John L. Smith, Jr., *Benjamin Franklin: America's First Whistleblower*, J. OF AM. REVOLUTION (Dec. 19, 2013), https://allthingsliberty.com/2013/12/benjamin-franklin-americas-first-whistleblower/ [https://perma.cc/PNN8-N8XB]. The letters "bewailing the weakening of British control over Massachusetts and suggesting remedies, created a great stir in the province and had important influence on the movement toward revolution there." Bernhard Knollenberg, *Benjamin Franklin and the Hutchinson and Oliver Letters*, 47 YALE UNIV. LIBR. GAZETTE 1, 1 (1972).

113. Connor Brownfield, *The 11 Largest National Security Leaks in American History*, THE SATURDAY EVENING POST (Sept. 13, 2022), https://www.saturdayeveningpost.com/2022/09/the-11-largest-national-security-leaks-in-american-history/ [https://perma.cc/5EBH-TZPS].

114. Nancy Pope, *Benjamin Franklin: Philadelphia's Postmaster*, THE SMITHSONIAN NAT'L POSTAL MUSEUM BLOG (June 6, 2017), https://postalmuseum.si.edu/benjamin-franklin-philadelphia%E2%80%99s-postmaster [https://perma.cc/C65W-J2RC]; *See also Franklin in London,* BENJAMIN FRANKLIN HOUSE

On the other hand, the government sometimes needs to keep secrets, particularly in matters of national defense.[115] In 1777, General George Washington stated:

> [T]here are some secrets, on the keeping of which so, depends, oftentimes, the salvation of an Army: secrets which cannot, at least ought not to, be entrusted to paper; nay, which none but the Commander-in-Chief at the time, should be acquainted with.[116]

Washington was very hands-on in his covert operations.[117] He had "elaborately coded communications" which he used for his communications with his spy network.[118] Thomas Jefferson could also be secretive; for example, he asked James Madison if he might know a "secret correspondent" who could scout the New Orleans area before the Louisiana Purchase.[119]

Records of the First Continental Congress in 1774 were kept confidential.[120] A "Secret Committee" was elected of nine members of the Second Continental Congress in 1775 to obtain arms and ammunition for the Continental Army.[121] The proceedings of the Constitutional Convention

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https://benjaminfranklinhouse.org/the-house-benjamin-franklin/franklin-in-london/ [https://perma.cc/2DWV-ZRSS] (providing a timeline of the life of Benjamin Franklin).

115. *See, e.g.*, TODD GARVEY & EDWARD C. LIU, CONG. RSCH. SERV., R41741, THE STATE SECRETS PRIVILEGE: PREVENTING THE DISCLOSURE OF SENSITIVE NATIONAL SECURITY INFORMATION DURING CIVIL LITIGATION (2011), https://sgp.fas.org/crs/secrecy/R41741.pdf [https://perma.cc/852Q-RCUU] (summarizing reasons for the invocation of the state secrets privilege).

116. STEPHEN F. KNOTT, SECRET AND SANCTIONED: COVERT OPERATIONS AND THE AMERICAN PRESIDENCY 13 (1996) (quoting Letter from George Washington to Patrick Henry (Feb. 24, 1777), *in* 7 JOHN C. FITZPATRICK, THE WRITINGS OF GEORGE WASHINGTON FROM THE ORIGINAL MANUSCRIPT SOURCES, 1745–1799, at 199–200 (1931)).

117. *Id.* at 15 (citing JOHN BAKELESS, TURNCOATS, TRAITORS, AND HEROES 227 (1959)).

118. *Id.*

119. *Id.* at 69; Letter from Thomas Jefferson to James Madison (May 27, 1793), https://founders.archives.gov/documents/Jefferson/01-26-02-0121 [https://perma.cc/P4UH-VN3D] ("We want an intelligent prudent native, who will go to reside at N. Orleans as a secret correspondent, for 1000. D. a year. He might do a little business, merely to cover his real office. Do point out such a one.").

120. 1 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789, at 26 (Worthington C. Ford et al. eds., 1904) ("Resolved, that the doors be kept shut during the time of business, and that the members consider themselves under the strongest obligations of honor, to keep the proceedings secret, until the majority shall direct them to be made public.").

121. *Editorial Note on the Secret Committee, 18 September 1775*, FOUNDERS ONLINE https://founders.archives.gov/documents/Franklin/01-22-02-0127 [https://perma.cc/3VEQ-Z7BA]. A "rough secret journal" written by Charles Thomson and George Bond was released from the Department of State to the Library of Congress in 1921. John C. Fitzpatrick, *A Rough Secret Journal of the Continental Congress*, 27 THE AM. HIST. REV. 489 (1922).

held at Independence Hall—then called the Pennsylvania State House—in Philadelphia during the summer of 1787 were also kept private.[122] Indeed, the windows were sealed, and armed sentinels were stationed both inside and outside of the Hall.[123] There was no press coverage.[124] The reason for the secrecy seems most akin to our current-day deliberative process privilege. There were no military operations involved, but instead there was the belief that delegates would be free to change their minds if the proceedings remained clandestine.[125] Surprisingly, James Madison did not even share details about the Convention with his friend Thomas Jefferson.[126] In a humorous anecdote reported by author Catherine Drinker Bowen, Benjamin Franklin was attended to by a "discreet member" of the delegation so that he would not inadvertently give away any secrets.[127]

Madison believed so strongly in the secrecy that he reportedly thought that "no Constitution would ever have been adopted by the convention if the debates had been public."[128] Just prior to the signing of the Constitution on September 17, 1787, the delegates voted to give all of their notes and journals to then-President George Washington to hold until a Congress was formed.[129] Not everyone was pleased that the Convention was

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122. *Constitution of the United States (1787)*, NAT'L ARCHIVES, https://www.archives.gov/milestone-documents/constitution [https://perma.cc/4RKT-ZF4G]. The name change to Independence Hall occurred in approximately 1824, when the Marquis de Lafayette visited Pennsylvania. *Lafayette Returns to Philadelphia*, INDEP. HALL IN AM. HIST., http://www.independencehall-americanmemory.com/documents/marquis-de-lafayette/ [https://perma.cc/MGB8-76QK].

123. JOHN P. KAMINSKI, CTR. FOR STUDY OF AM. CONST., SECRECY AND THE CONSTITUTIONAL CONVENTION 7 (2005), https://csac.history.wisc.edu/wp-content/uploads/sites/281/2017/07/secrecy_essay.pdf [https://perma.cc/9E2N-VJU2].

124. William K. Stevens, *Behind the Scenes in 1787: Secrecy in the Heat*, N.Y. TIMES (May 25, 1987), https://www.nytimes.com/1987/05/25/us/behind-the-scenes-in-1787-secrecy-in-the-heat.html (on file with the *Columbia Human Rights Law Review*).

125. 1 THE LIFE AND WRITINGS OF JARED SPARKS 560–61 (Herbert B. Adams ed., 1893). In a journal entry dated April 19, 1830, Jared Sparks recorded notes of an interview with James Madison. According to Sparks's notes, "It was . . . best for the convention for forming the Constitution to sit with closed doors, because opinions were so various and at first so crude that it was necessary they should be long debated before any uniform system of opinion could be formed." Indeed, "by secret discussion no man felt himself obliged to retain his opinions any longer than he was satisfied of their propriety and truth, and was open to the force of argument."

126. KAMINSKI, *supra* note 123, at 10.

127. Stevens, *supra* note 124 (citing CATHERINE DRINKER BOWEN, MIRACLE AT PHILADELPHIA 22 (1966)).

128. THE LIFE AND WRITINGS OF JARED SPARKS, *supra* note 125, at 561; KAMINSKI, *supra* note 123, at 11.

129. Hilary Parkinson, *Pieces of History: Constitution 225: It Was Secret, But We Know About It*, NAT'L ARCHIVES, (Sept. 20, 2012),

kept under wraps. Thomas Jefferson complained about it to John Adams, calling it an "abominable precedent as that of tying up the tongues" and calling the participants "an assembly of demigods."[130] He stated the following: "Nothing can justify this example but the innocence of their intentions, and ignorance of the value of public discussions."[131]

Despite the secrecy of the Constitutional Convention, this country accepted and expanded the common law right of the people to know what their government was doing. Early U.S. cases cited to the common law right to inspect government books and records.[132] England had a narrower reading of this right, confining it to be held by those individuals who had a litigation need for the material.[133] The courts in the U.S. broadened the right to allow access to anyone who had a public interest in the records.[134]

1. *United States v. Burr*

A case could be made that a glimmer of what is commonly known as the state secrets privilege emerged in *Marbury v. Madison*, but most historians agree that *United States v. Burr* led the way.[135] Early U.S.

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https://prologue.blogs.archives.gov/2012/09/20/constitution-225-it-was-secret-but-we-know-about-it/ [https://perma.cc/V3NJ-T583].

130. Letter from Thomas Jefferson to John Adams (Aug. 30, 1787), https://founders.archives.gov/documents/Jefferson/01-12-02-0075 [https://perma.cc/U353-5YMW].

131. *Id.*

132. *See, e.g.*, HAROLD L. CROSS, PEOPLE'S RIGHT TO KNOW: LEGAL ACCESS TO PUBLIC RECORDS AND PROCEEDINGS 25–29 (1953) (citing *In re* Caswell, 18 R.I. 835 (1893); State *ex rel.* Ferry v. Williams, 41 N.J.L. 332 (1879); Nowack v. Fuller, 243 Mich. 200 (1928)).

133. *Id.* at 25–26.

134. *Id*. at 26–27. This common law right predated the Constitution itself. Judicial Watch v. Schiff, 998 F.3d 989, 993 (D.C. Cir. 2021) (Henderson, J., concurring) (citing United States v. Mitchell, 551 F.2d 1252, 1260 (D.C. Cir. 1976), *rev'd on other grounds sub nom*. Nixon v. Warner Commc'ns, Inc., 435 U.S. 589 (1978)).

135. *See* Chesney, *supra* note 54, at 1271; *see also* Starkie, *supra* note 45, at 106 n.1 ("So, in Marbury v. Madison, 1 Cranch, 144, it was held that a former secretary of state was not obliged to disclose facts which had been communicated to him in confidence, while in office."). In 1792, the U.S. House of Representatives investigated the defeat of General Arthur St. Clair and requested information from President Washington. He consulted his cabinet and agreed to provide the information. In 1794, the Senate passed a resolution requesting President Washington provide to it correspondence between Thomas Jefferson and Gouverneur Morris (one of the Founding Fathers). Washington provided it with redactions. The Senate accepted the correspondence with the redactions. These are thought to be early uses of what later came to be known as the Executive Privilege. *See* Cong. Requests for Confidential Exec. Branch Info. 13 Op. O.L.C. 153, 155 (1989) (citing to 1 WRITINGS OF THOMAS JEFFERSON 304 (1903)); Scott Ingram, *"[Perhaps] the Principle is Established": The Senate, George Washington, and The Ambiguous Origins of Executive Privilege*, 28 KAN. J.L. & PUB. POL'Y 1, 4 (2018).

jurisprudence on the state secrets privilege began with a dispute between a Founding Father and his former vice president.[136] Former Vice President Aaron Burr, who had an acrimonious relationship with President Thomas Jefferson, was indicted for treason.[137] Interestingly, this was the second time Burr was indicted; the first being for his role in the Hamilton-Burr duel.[138] The second indictment alleged that Burr planned to capture the city of New Orleans by force and lead a military expedition to sever the United States near the Alleghany Mountains.[139] His alleged co-conspirator General James Wilkinson testified before the grand jury.[140]

During his trial, Burr issued a *subpoena duces tecum* to then-President Jefferson.[141] Jefferson refused to honor the subpoena and asserted he was exempt from a subpoena to appear.[142] Jefferson maintained

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136. United States v. Burr, 25 F. Cas. 30 (C.C.D. Va. 1807).

137. Indictment of Aaron Burr for Treason, United States v. Burr, 25 F. Cas. 30 (C.C.D. Va. 1807), https://www.docsteach.org/documents/document/indictment-of-aaron-burr-for-treason [https://perma.cc/562Q-RYU8]. Jefferson despised Burr. Trump v. Vance, 140 S.Ct. 2412, 2421 (2020). The 1800 election caused the acrimony. John Ferling, *Thomas Jefferson, Aaron Burr, and the Election of 1800*, SMITHSONIAN MAG. (Nov. 1, 2004), https://www.smithsonianmag.com/history/thomas-jefferson-aaron-burr-and-the-election-of-1800-131082359/ [https://perma.cc/X3MM-CX4Z]. Although Jefferson and Burr were from the same political party (the Democratic-Republican party), when the votes were tallied, each had an equal number of votes. Instead of accepting the vice presidency, Burr continued to move forward as a candidate for president. Thirty-three ballots were cast by the House of Representatives before Jefferson was declared the winner. *Tally of Electoral Votes for the 1800 Presidential Election*, NAT'L ARCHIVES, https://www.archives.gov/legislative/features/1800-election/1800-election.html [https://perma.cc/6RBJ-MAQJ].

138. *The People v. Aaron Burr, Indictment for Fighting a Duel [14 August 1804]*, FOUNDERS ONLINE, https://founders.archives.gov/documents/Hamilton/01-26-02-0001-0279 [https://perma.cc/4CZR-TWSR]. Burr was still vice president when indicted. *Indicted Vice President Bids Senate Farewell, March 2, 1805*, U.S. SENATE, https://www.senate.gov/about/officers-staff/vice-president/indicted-vice-president-bids-senate-farewell.htm [https://perma.cc/Y64W-ULES].

139. President Thomas Jefferson, Message to the Congress on the Burr Conspiracy (Jan. 22, 1807), *on* Univ. of Cal., Santa Barbara, *Message to the Congress on the Burr Conspiracy*, THE AMERICAN PRESIDENCY PROJECT, https://www.presidency.ucsb.edu/documents/message-congress-the-burr-conspiracy [https://perma.cc/6BK6-265E] [hereinafter Message to Congress]; Suzanne B. Geissler, *A Piece of Epic Action: The Trial of Aaron Burr,* 12 COURIER 4 (1975).

140. Douglas O. Linder, *The Treason Trial of Aaron Burr: An Account,* FAMOUS TRIALS, https://www.famous-trials.com/burr/156-home [https://perma.cc/8EF4-PL77].

141. Subpoena Served on Thomas Jefferson to Testify at Aaron Burr's Trial for Treason, United States v. Burr, 25 F. Cas. 30 (C.C.D. Va. 1807), https://www.loc.gov/resource/mcc.069/?r=-0.202,0.111,0.641,0.391,0 [https://perma.cc/3H7T-M84A].

142. Warren Weaver, Jr., *Presidential Subpoena Upheld in 1807*, N.Y. TIMES, July 25, 1973, at 26.

that the executive is the only branch to decide whether information will become public.[143] Nevertheless, he punted the issue by indicating he no longer had possession of the material Burr sought.[144] It is curious that the author of the Declaration of Independence could advocate such a categorical position. Undoubtedly, his hatred of Burr played a role. Burr sought the alleged letter written by General Wilkinson, Burr's alleged co-conspirator, who later abandoned the idea.[145] Jefferson referred to this letter when he addressed the U.S. Congress in a "Special Message" about the Burr conspiracy.[146]

Certainly, it seems Burr should have been entitled to see this letter. The letter formed the basis of the charge of treason, that Burr had obtained funds to "commence the enterprise" to divide the country.[147] The U.S. Supreme Court, although it never truly considered the issue in depth in *Burr*, seemed to agree.[148] In a *subpoena duces tecum* battle between Burr and Jefferson, Chief Justice Marshall—sitting by designation in the trial court in Richmond, Virginia—issued the subpoena on June 13, 1807, and opined the following: "If it does contain any matter which it would be imprudent to disclose, which it is not the wish of the executive to disclose, such matter, if it be not immediately and essentially applicable to the point, will, of course, be suppressed."[149] This seems to indicate that Chief Justice Marshall would promote release if it were immediately and essentially applicable. Although Chief Justice Marshall was the longest-

143. Letter from Thomas Jefferson to George Hay (June 17, 1807), https://founders.archives.gov/documents/Jefferson/99-01-02-5769 [https://perma.cc/MDB8-UMVU]; *see also* RONALD ZELLAR, A BRAVE MAN STANDS FIRM 152–54 (2011) (excerpting the same letter); ADAM CARLYLE BRECKENRIDGE, THE EXECUTIVE PRIVILEGE 35–36, (1974) ("Jefferson supported his denial for release of some information for the protection of the innocent or because it might possibly compromise those who might later be involved in some judicial action.").

144. Letter from Thomas Jefferson, *supra* note 143.

145. Edwin McDowell, *New View on Burr Treason Case Letter*, N.Y. TIMES, July 11, 1982, at 1. The letter was a cypher (a message written in a secret code).

146. Message to Congress, *supra* note 139.

147. Letter from Aaron Burr to James Wilkinson, July 29, 1806, *on* Douglas O. Linder, *Ciphered Letter of Aaron Burr to General James Wilkinson (July 29, 1806)*, FAMOUS TRIALS, https://www.famous-trials.com/burr/162-letter [https://perma.cc/SEZ5-ELFF].

148. United States v. Burr, 25 F. Cas. 30, 37 (C.C.D. Va. 1807). The court analyzed state secrets (and not particularly as a privilege) in the factual portion of the opinion, not in the legal portion.

149. *Id.* On the other hand, Marshall also indicated that everything would have "its due consideration" on the return of the subpoena, which the Court issued. *Id.*

serving chief justice, he never again had the opportunity to consider state secrets.[150]

Jefferson unadvisedly issued a public statement on January 22, 1807, before the treason trial, that Burr's guilt was "placed beyond question."[151] Jefferson exerted control over the trial through his letters to George Hay, the federal attorney in charge of the prosecution.[152] After three days of oral argument on the matter, Chief Justice John Marshall ruled that Burr was entitled to the *subpoena duces tecum*.[153]

Jefferson was not convinced. On June 17, 1807, Jefferson wrote to George Hay, the then-United States Attorney for the District of Virginia, who also happened to be James Monroe's son-in-law, that in some instances, only the executive should be aware of a covert action.[154] He stated the following:

> [A]ll nations have found it necessary, that for the advantageous conduct of their affairs, some of these proceedings, at least, should remain known to their executive functionary only. He of course, from the nature of the case, must be the *sole judge* of which of them the public interest will permit publication.[155]

Burr wanted the letter Jefferson had referred to in his announcement to Congress about the Burr conspiracy.[156] As will be discussed *infra*, the U.S. Supreme Court later definitively decided that a president must answer a subpoena in *United States v. Nixon*.[157]

The concept of a privilege for government secrets was recognized in *Burr*, but the court indicated that the President had not clearly claimed that privilege. Chief Justice Marshall stated, "[i]f the letter contained state secrets, which it would be inconsistent with the public safety to disclose,

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150. *Life Story: John Marshall (1755-1835)*, SUP. CT. HIST. SOC'Y, https://supremecourthistory.org/supreme-court-civics-resources/life-story-john-marshall/ [https://perma.cc/5FYU-3QAP].

151. Geissler, *supra* note 139, at 6; Lauren Zazzara, *Secrets of the Serial Set: Aaron Burr's Conspiracy*, HEIN ONLINE BLOG (Aug. 23, 2022), https://home.heinonline.org/blog/2022/08/secrets-of-the-serial-set-aaron-burrs-conspiracy/ [https://perma.cc/ZJ3S-G7HE] (adding context to Jefferson's belief in Burr's guilt).

152. R. Kent Newmyer, *Burr versus Jefferson versus Marshall*, HUMANITIES, May–June 2013, at 24, 26.

153. *Id.* The decision was made on June 13, 1807. *Id.*; *see also* Geissler, *supra* note 139, at 11 (providing an account of Marshall's opinion).

154. Letter from Thomas Jefferson, *supra* note 143.

155. *Id.* (emphasis added); KNOTT, *supra* note 116, at 61.

156. Message to Congress, *supra* note 139.

157. United States v. Nixon, 418 U.S. 683, 703–07 (1974).

the president could say so in the return to the subpoena; but it was not to be assumed until he did say so."[158] The court acknowledged that if disclosure of information would "endanger the public safety," it would be suppressed.[159] On the other hand, Chief Justice Marshall indicated that the need for secrecy must outweigh the needs of the party requesting the information.[160] Ultimately, Burr was acquitted for lack of evidence.[161] Many years passed before another case involving government secrets reached the Supreme Court.

2. *Totten v. United States*

Totten v. United States is not a state secrets case, the U.S. Supreme Court did not mention the term state secrets in *Totten*, and the government did not assert that privilege.[162] And yet, the case is still cited extensively in subsequent cases on the state secrets privilege. The facts are as follows. In 1861, during the Civil War, President Lincoln allegedly entered into a

158. United States v. Burr, 25 F. Cas. 30, 32 (1807).

159. *Id.* at 37.

160. Norman Dorsen & John H.F. Shattuck, *Executive Privilege, the Congress and the Courts*, 35 OH. ST. L.J. 1, 15 n.48 (1974).

161. Linder, *supra* note 140 (showing an image of the verdict form and quoting the form as saying, "[w]e of the jury say that Aaron Burr is not proved to be guilty under this indictment by any evidence submitted to us. We therefore find him not guilty"); Kathleen J. Brett, *Burr: An American Conspiracy* 15 (Mad-Rush Undergraduate Rsch. Conf., 2020), https://commons.lib.jmu.edu/cgi/viewcontent.cgi?article=1142&context=madrush [https://perma.cc/J4ML-LYCB] (also quoting the verdict form); Richard Dean, *The Treason Trial of Aaron Burr*, 47 LITIGATION 1, 9–10 (2021) (noting that the verdict was not "a traditional guilty or not guilty verdict," but that "Marshall let the verdict stand and ordered that an entry of 'not Guilty' be entered into the record"); *see also Images of the 1807 Trial Where Aaron Burr Was Found Not Guilty*, AARON BURR ASS'N, https://www.aaronburrassociation.org/post/images-of-the-1807-trial-where-aaron-burr-was-found-not-guilty [https://perma.cc/Q4J2-MF87] (providing scans of engravings and paintings of the key players and events of the Burr trial). Interestingly, after Burr's acquittal, President Jefferson directed the prosecutor to proceed with a misdemeanor case. That trial was cut short when "it became clear that the prosecution lacked the evidence to convict." Trump v. Vance, 140 S.Ct. 2412, 2423 (2020). In the *Vance* case, the U.S. Supreme Court considered the following question: "whether Article II and the Supremacy Clause categorically preclude, or require a heightened standard for, the issuance of a state criminal subpoena to a sitting President." *Id.* at 2420. In that case, the New York District Attorney issued a subpoena to then-President Trump for financial records, including tax returns. *Id.* Then-President Trump failed to comply, and the Court discussed the *Burr* case at length. *Id.* at 2421–23; *see also* Newmyer, *supra* note 152, at 52 (describing Burr's second trial).

162. D.A. Jeremy Telman, *On the Conflation of the State Secrets Privilege and the Totten Doctrine*, 3 NAT'L SEC. L. BRIEF 1 (2013) (distinguishing the *Totten* doctrine from the state secrets privilege).

contract with William A. Lloyd for Lloyd to spy for the Union.[163] According to Enoch Totten, Lloyd's attorney and later the administrator of his estate, Lloyd was due $200 per month plus expenses for the espionage contract.[164] Lloyd's estate received only his expenses after President Lincoln's death.[165] Totten sued as the administrator to collect the amount owed.[166]

In the Court of Claims, Totten prevailed on the question of fact of whether there was a contract.[167] The Court determined that, having collected and transmitted information about the Confederacy, Lloyd had met the terms of the contract.[168] However, the Court of Claims found that President Lincoln lacked the authority to bind the United States by contract in that way and dismissed the case.[169]

Totten appealed to the U.S. Supreme Court.[170] The Court denied Totten's claim but not on the same basis as the Court of Claims. The Supreme Court concluded that, because "[t]he secrecy which such contracts impose precludes any action for their enforcement," the case had to be dismissed.[171] In fact, the bringing of such a claim would be a breach of contract if the contract were a secret one.[172] For a very short opinion, it has had quite an impact, and the findings reverberate today.[173] The Court, as

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163. Totten v. United States, 92 U.S. 105, 105–06 (1875); *see also* Tianna Mobley, *The Tale of Two White Houses: Espionage During the Civil War,* WHITE HOUSE HIST. ASS'N (Dec. 10, 2021), https://www.whitehousehistory.org/the-tale-of-two-white-houses-espionage-during-the-civil-war [https://perma.cc/AV38-DX6W] ("Lloyd provided many types of information to the president, including maps of Confederate camps and forts, details about supplies in Richmond, and information pertaining to General Robert E. Lee's forces.").

164. *Totten*, 92 U.S. at 106.

165. Sean C. Flynn, *The Totten Doctrine and its Poisoned Progeny*, 25 VT. L. REV. 793, 795 (2001).

166. *Totten*, 92 U.S. at 105–06. Lloyd may never have been a spy for Lincoln. *See* JANE SINGER & JOHN STEWART, LINCOLN'S SECRET SPY: THE CIVIL WAR CASE THAT CHANGED THE FUTURE OF ESPIONAGE 1–8 (2015) (discussing the evidence that Lloyd's claim was fabricated).

167. *Totten,* 92 U.S. at 106.

168. *Id.*

169. *Id.*; *see also* Flynn, *supra*, note 165, at 795 ("The court dismissed the suit on the grounds that the President of the United States lacked the authority to bind the government in contract for secret services.").

170. *Totten,* 92 U.S. at 105.

171. *Id.* at 107.

172. *Id.*; *see also* Daniel L. Pines, *The Continuing Viability of the 1875 Supreme Court Case of Totten v. U.S.*, 53 ADMIN. L. REV. 1273, 1274 (2001) (describing the Court's reasoning as that "any party bringing a claim in a public court concerning an alleged secret contract would be, by definition, barred by the doctrine of unclean hands").

173. Flynn, *supra* note 165, at 801; *see, e.g.*, Gen. Dynamics Corp. v. United States, 563 U.S. 478, 485 (2011) (citing *Totten* in a state secrets case to support dismissal of the

part of its analysis, indicated that both parties had to know that it could never be enforced due to the nature of the contract itself. Justice Field described it as both parties knowing that "the lips of the other were to be for ever [sic] sealed."[174] There was an implied contract that neither would ever speak of it, an "implied covenant of permanent secrecy."[175]

In the *Totten* case, the Court never mentioned the word "privilege." This led to subsequent opinions and commentary about whether the *Totten* Doctrine and the state secrets privilege were one and the same.[176] Eventually, the Supreme Court seemingly resolved the issue, indicating that *Totten* remained good law and was not overruled by the later *Reynolds* case, discussed *infra*.[177]

As it was initially formed, the *Totten* Doctrine held that U.S. courts "lacked jurisdiction to hear complaints against the United States brought by parties who alleged that they had entered into contracts for secret services with the national government."[178] It was a narrow holding for a unique set of circumstances. Recently however, the doctrine has grown. From 1875 through 1951, the case was cited just six times. On the other hand, from 1951 to 2001, it was cited more than 65 times.[179] It has

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suit); Tenet v. Doe, 544 U.S. 1, 8 (2005) (reaffirming *Totten*'s broader holding, which "precludes judicial review in cases such as respondents' where success depends upon the existence of their secret espionage relationship with the Government"); Mohamed v. Jeppesen Dataplan, Inc., 614 F.3d 1070, 1079 (9th Cir. 2010) (discussing *Totten* but dismissing based on *Reynolds* in order to "avoid[] difficult questions about the scope of the *Totten* bar"); Al-Haramain Islamic Foundation, Inc. v. Bush, 507 F.3d 1190, 1197, 1201, 1204–05 (9th Cir. 2007) (distinguishing *Totten*—"a rule of non-justiciability, akin to a political question"—from *Reynolds*—"a privilege that may bar proof of a prima facie case"—and finding that *Reynolds* applied in the instant case while *Totten* did not).

174. *Totten,* 92 U.S. at 106.

175. D.A. Jeremy Telman, *Intolerable Abuses: Rendition for Torture and the State Secrets Privilege,* 63 ALA. L. REV. 429, 441 (2012).

176. *See* Doe v. Tenet, 329 F.3d 1135, 1155–56 (9th Cir. 2003) (Tallman, J., dissenting) (rejecting the majority's conclusion that "the *Totten* doctrine has somehow been supplanted by the modern state secrets evidentiary privilege" of *Reynolds*), *rev'd*, 544 U.S. 1; Telman, *supra* note 162, at 5 (addressing the conflation—among courts and academics—of the *Totten* doctrine with the state secrets privilege); Matthew Plunkett, *The Transformation of the State Secrets Doctrine Through Conflation of* Reynolds *and* Totten*: The Problems with* Jeppesen *and* El-Marsi, 2 U.C. IRVINE L. REV. 809, 816 (2012) ("During the course of the development of the doctrines, litigants and courts have, at times, erroneously considered *Reynolds* and *Totten* to be one and the same."); Galit Raguan, *Masquerading Justiciability: The Misapplication of State Secrets Privilege in* Mohamed v. Jeppesen – *Reflections from a Comparative Perspective*, 40 GA. J. INT'L & COMP. L. 423, 426 (2012) (referring to *Totten* as a "version of the state secrets privilege").

177. *Tenet*, 544 U.S. at 9–11.

178. Flynn, *supra* note 165, at 793.

179. *Id*.

been applied to contracts that included information that could potentially damage the security of the nation.[180] This interpretation comes from Justice Field's second part of the decision, in which he stated the following:

> It may be stated as a general principle, that public policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential, and respecting which it will not allow the confidence to be violated.[181]

This is a rule of justiciability. The suit may not be maintained and must be dismissed. That is not how privileges work. If a matter is privileged, the information is removed from the case. Privileges apply to all stages of a case or proceeding, which means privileged material need not be disclosed during discovery.[182] A case is not dismissed unless it is unable to continue without the evidence.[183] As explained *infra*, it is understandable that courts confuse the state secrets privilege with the *Totten* Doctrine. Justice Field himself made an error. He stated the following:

> On this principle, suits cannot be maintained which would require a disclosure of the confidences of the confessional, or those between husband and wife, or of communications by a client to his counsel for professional advice, or of a patient to his physician for a similar purpose.[184]

That is not a proper statement of the law. Such lawsuits are not dismissed, except in very limited circumstances in which the suit may not be maintained without the evidence. The suits instead continue without the evidence that is privileged. The *Totten* Doctrine is not the states secret privilege but is rather a "distant ancestor of the state secrets privilege."[185]

3. State Secrets Privilege Distinct from Executive Privilege

Another area of confusion is the difference between the state secrets privilege and the deliberative process privilege. These are both under the umbrella of "executive privilege."[186] There are a number of

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180. *Id.* at 796.
181. Totten v. United States, 92 U.S. 105, 107 (1875).
182. FED. R. EVID. 1101(c).
183. Ellsberg v. Mitchell, 709 F.2d 51, 65 (D.C. Cir. 1983).
184. *Totten,* 92 U.S. at 107.
185. Flynn, *supra* note 165, at 796.
186. *See, e.g.*, *In re* Sealed Case, 121 F.3d 729, 736–37 (D.C. Cir. 1997) (explaining the "variety of privileges" that executive officials have claimed throughout American history).

privileges under the broad definition of executive privilege.[187] The state secrets privilege has been described as a *type* of executive privilege.[188] The state secrets privilege is distinct from the deliberative process privilege, which generally applies to "advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated."[189] To be subject to the deliberative process privilege, material must be predecisional.[190] On the other hand, the state secrets privilege could apply either to predecisional material or material created after an action has been taken. By way of example, consider the *Burr* case. At issue was a letter allegedly written by Burr to General James Wilkerson.[191] There were no communications from the executive branch. Accordingly, the deliberative process privilege would not have been applicable, but the state secrets privilege would have been pertinent. On the other hand, the *United States v. Nixon* case is a perfect example of the deliberative process privilege because then-President Nixon brought an action to quash a *subpoena duces tecum* issued by Special Prosecutor Archibald Cox for tapes and documents.[192] The tapes were audio recordings of conversations between Nixon and members of his cabinet.[193] Because these are communications, Nixon claimed the executive privilege, not the state secrets privilege. The terminology of "executive privilege" did not appear until the Eisenhower Administration during the discussion of an amendment to restrict executive agencies' ability to refuse a document request from a congressional committee.[194] The term appeared in a statement by Senator Joseph C. O'Mahoney of Wyoming.[195] There seemed to

187. *Id*.; Sam J. Ervin, Jr., *Controlling Executive Privilege*, 20 LOY. L. REV. 11, 11–12 (1974).

188. Shilpa Narayan, *Proper Assertion of the Deliberative Process Privilege: The Agency Head Requirement*, 77 FORDHAM L. REV. 1183, 1188 (2008).

189. *In re* Sealed Case, 121 F.3d at 737 (quoting Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena, 40 F.R.D. 318, 324 (D.D.C. 1966), *aff'd*, 384 F.2d 979 (D.C. Cir. 1967)).

190. *Id*.

191. *The Burr Conspiracy*, PBS, https://www.pbs.org/wgbh/americanexperience/features/duel-burr-conspiracy/ [https://perma.cc/9MVH-E8KZ]; Brett, *supra* note 161, at 8. Interestingly, there is some evidence that Burr did not actually author the letter. McDowell, *supra* note 145, at 1.

192. United States v. Nixon, 418 U.S. 683, 686–89 (1974). An image of the subpoena is available through the National Archives. Subpoena Duces Tecum to Richard M. Nixon, United States v. Mitchell, 377 F. Supp. 1326 (1774), https://catalog.archives.gov/id/7582824 [https://perma.cc/6HWN-KFKM].

193. Subpoena Duces Tecum to Richard M. Nixon at 3–4, United States v. Mitchell, 377 F. Supp. 1326 (1774), https://catalog.archives.gov/id/7582824 [https://perma.cc/6HWN-KFKM].

194. BRECKENRIDGE, *supra* note 143, at 59–60.

195. *Id.*

be no debate at that point that President Eisenhower held such a privilege, the only issue being who could waive that privilege.

Occasionally, courts conflate the "bundle of components" that exist under the broad umbrella of privileges of the executive.[196] Indeed, the state secrets privilege is different from several other doctrines affecting the executive.[197] The privilege is to be applied sparingly, and the executive's categorization of "top secret," "secret," or "confidential" is not binding on the judiciary.[198] The Department of Justice considers three types of privileges under the "executive privilege" definition.[199] These include the state secrets privilege, the deliberative process privilege, and the presidential communications privilege.[200]

C. Twentieth Century U.S. Supreme Court and Appellate Court State Secrets Doctrine

After Aaron Burr's case was decided, it was almost 150 years before a significant state secrets case again reached the U.S. Supreme

196. Indeed, even the Court in *Nixon* cited the *Reynolds* case, even though the *Nixon* case was not a state secrets case. *Nixon*, 418 U.S. at 710–11; *see also* Ann M. Murphy, *All the President's Privileges*, 27 J.L. & POL'Y 1, 20–21 (2018) (discussing the ways in which different courts have conflated and distinguished between the variations of executive privilege); NORMAN L. EISEN & ANDREW M. WRIGHT, AM. CONST. SOC'Y & CITIZENS FOR RESP. AND ETHICS IN WASHINGTON, EVIDENTIARY PRIVILEGES CAN DO LITTLE TO BLOCK TRUMP-RELATED INVESTIGATIONS 5 (2018) (using the "bundle of components" language to describe the variations of executive privilege). The bundle of privileges includes law enforcement, military, diplomatic, and national security information, administrative decisions that have a judicial character, presidential communications, and the deliberative process. *Id.* at 9–11.

197. WRIGHT & MILLER, *supra* note 44, § 5662.

198. McGehee v. Casey, 718 F.2d 1137, 1148–1149 (D.C. Cir. 1983).

199. *See* Prosecution for Contempt of Cong. of an Exec. Branch Off. Who Has Asserted a Claim of Exec. Privilege, 8 Op. O.L.C. 101, 116 (1984) ("The scope of executive privilege includes several related areas in which confidentiality within the Executive Branch is necessary for the effective execution of the laws."); TODD GARVEY, CONG. RSCH. SERV., R47102, EXECUTIVE PRIVILEGE AND PRESIDENTIAL COMMUNICATIONS: JUDICIAL PRINCIPLES 3 n.15 (2022), https://crsreports.congress.gov/product/pdf/R/R47102 [https://perma.cc/S452-JHA2] (citing Prosecution for Contempt, 8 Op. O.L.C. at 116).

200. GARVEY, *supra* note 199, at 3. The state secrets privilege is the subject of this Article. The deliberative process privilege protects the "decision making processes of government agencies," advisory opinions, recommendations, and deliberations. NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 149–51 (1975). The presidential communications privilege refers to the protection of communications made by presidential advisors in the course of preparing advice for the president. Behar v. U.S. Dep't of Homeland Sec., 39 F.4th 81, 93 (2d Cir. 2022) (citing *In re* Sealed Case, 121 F.3d 729, 751–52 (D.C. Cir. 1997)).

Court.[201] If the origins of the state secrets privilege in the United States go back to *Burr,* then the modern roots of the privilege come from *United States v. Reynolds*.[202] It is peculiar that there are so few cases based on such an important concept—the ability to know what our government is doing. This is undoubtedly due to the fact that the classification systems the United States uses today began in 1940, just prior to World War II.[203] As the number of classified secrets increased, so did the number of cases involving those secrets. Many of the disputes about government transparency now fall within the FOIA, effective as of 1967.[204] However, in litigation, when information is sought through discovery, privileges come into play.

Privileges prevent a party from discovering and using information under certain limited circumstances.[205] One of those circumstances is the use of state secrets.[206] The dilemma is that privileges impede the search for truth.[207] Accordingly, they are to be strictly construed.[208] As Dean Wigmore observed, the public has a right to "every man's evidence."[209] Professor Edward W. Cleary once testified at a House Subcommittee meeting on privileges, calling privileges "blockades" to the truth.[210] The former Attorney General and Chairman of the Committee on the Federal Rules of Civil Procedure, William Dewitt Mitchell, believed that it should not even be necessary to resort to discovery against the government.[211] He thought the

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

202*. In re* United States, 872 F.2d 472, 475 (D.C. Cir. 1989); Carrie Newton Lyons, *The State Secrets Privilege: Expanding its Scope Through Government Misuse*, 11 LEWIS & CLARK L. REV. 99, 102 (2007) (recognizing the privilege's roots in *Burr* while noting that the privilege was not fully examined until *Reynolds*).

203*. Office of Nuclear and National Security Information: History of Classification and Declassification*, FED'N OF AM. SCIENTISTS (July 22, 1996), https://sgp.fas.org/othergov/doe/history.html [https://perma.cc/LX8X-7ZAK].

204. 5 U.S.C. § 552 (1967).

205. William V. Sanford, *Evidentiary Privileges against the Production of Data Within the Control of Executive Departments*, 3 VAND. L. REV. 73, 73–74 (1949).

206*. See In re* Terrorist Attacks on September 11, 2001, 523 F. Supp. 3d 478, 496 (S.D.N.Y. 2021) (summarizing the state secrets privilege).

207. Trammel v. United States, 445 U.S. 40, 50–51 (1980).

208. Baldrige v. Shapiro, 455 U.S. 345, 360 (1982) ("A statute granting a privilege is to be strictly construed so as 'to avoid a construction that would suppress otherwise competent evidence.'" (quoting St. Regis Paper Co. v. United States, 368 U.S. 208, 218 (1961))).

209. 8 JOHN HENRY WIGMORE, A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 2192 (3d ed. 1940).

210. 1 EDWARD J. IMWINKELREID, THE NEW WIGMORE: A TREATISE ON EVIDENCE § 4.2.1(b) (3d ed. 2016).

211. William D. Mitchell, Chairman, Advisory Comm. on Rules of Civ. Proc., Answers to Questions at the Proceedings of the Symposium on the Federal Rules of Civil Procedure held at New York City (Oct. 19, 1938) *in* PROCEEDINGS OF THE INSTITUTE AT

government "ought to be frank and fair and disclose all the facts."[212] Despite these beliefs, the government has claimed the state secrets privilege frequently, and its use has grown significantly.[213] The state secrets privilege is "both expansive and malleable."[214] It is absolute and does not have an expiration date.[215] On the other hand, it is not to be "lightly invoked" and is an "option of last resort."[216] Wigmore was particularly wary of the state secrets privilege.[217] He thought it could lead to abuse.[218] As it turns out, he was correct.

The state secrets privilege was invoked rarely prior to World War II.[219] For decades, the *Reynolds* case, decided in 1953 at the height of the Korean War, was the leading case interpreting the law of state secrets.[220] Then, in *Zubaydah,* the U.S. Supreme Court reviewed for the first time the CIA's use of the Rendition, Detention, and Interrogation Program.[221]

WASHINGTON, D.C., OCTOBER 6, 7, 8, 1938 AND OF THE SYMPOSIUM AT NEW YORK CITY, OCTOBER 17, 18, 19, 1938, at 333–34 (Edward H. Hammond ed. 1939). Mitchell was the Attorney General from 1929 to 1933, and, in 1934, he was appointed the Chairman of the Advisory Committee on the Federal Rules of Civil Procedure. *See* EDWARD EVERETT WATTS, MEMORIAL ON WILLIAM DEWITT MITCHELL 5 (2012), http://www.minnesotalegalhistoryproject.org/assets/Wm%20D.%20Mitchell%20Bar%20Memorials=ttr.pdf [https://perma.cc/4UYJ-WQTJ] (summarizing Mitchell's career).

212. Mitchell, *supra* note 211, at 334.

213. *See* William G. Weaver & Robert M. Pallitto, *State Secrets and Executive Power*, 120 POL. SCI. Q. 85, 101 (2005) (explaining how use of the state secrets privilege has increased); Setty, *supra* note 61, at 209 (explaining a tendency by the judiciary to uphold claims of privilege without engaging in a meaningful analysis); Cassman, *supra* note 99, at 1189 (documenting the increased use of the state secrets privilege).

214. *In re* Terrorist Attacks on September 11, 2001, 523 F. Supp. 3d 478, 498 (S.D.N.Y. 2021).

215. *Id.* at 497.

216. General Dynamics Corp. v. United States, 563 U.S. 478, 492 (2011) (quoting *Reynolds*, 345 U.S. at 7).

217. WIGMORE, *supra* note 209, § 2212a(4).

218. *Id.* § 2379. He asked, "[s]hall every subordinate in the department have access to the secret and not the presiding officer of justice?" *Id.* To Wigmore, "[t]he truth cannot be escaped that a Court which abdicates its inherent function of determining the facts upon which the admissibility of evidence depends will furnish to bureaucratic officials too ample opportunities for abusing the privilege." *Id.*

219. Ellsberg v. Mitchell, 709 F.2d 51, 56 (D.C. Cir. 1983); *Background on the State Secrets Privilege*, AM. C.L. UNION (Jan. 1, 2007), https://www.aclu.org/other/background-state-secrets-privilege [https://perma.cc/EB8R-KFXU].

220. *The Military and State Secrets Privilege: Protection for the National Security or Immunity for the Executive*? 91 YALE L.J. 570, 571–73 (1982).

221. *Id.*

1. *United States v. Reynolds*

Reynolds established the "modern analytical framework" for the state secrets privilege.[222] In *Brauner v. United States*, later merged with and known collectively as *Reynolds*,[223] widows of civilian passengers killed in a military B-29 plane crash sued the government under the Federal Tort Claims Act (FTCA).[224] The deceased were "engineer employees of private organizations involved in the research and development of the electronics equipment being tested."[225] Pursuant to their lawsuit, the plaintiffs requested the production of the Air Force's official crash accident report.[226] The government resisted providing it and claimed "a new kind of privilege."[227] The government asserted that all investigations of the armed services should be privileged.[228] Interestingly, the District Court noted that "the Government does not here contend that this is a case involving the well-recognized common-law privilege protecting state secrets or facts which might seriously harm the Government in its diplomatic relations, military operations or measures for national security."[229] After the District Court rejected the government's claim, it granted the families' motion for production of the report.[230]

The government, undoubtedly due to the Court's mention of the state secrets privilege, requested a rehearing.[231] Upon rehearing, the District Court considered a new letter provided by the then-Secretary of the Air Force and also received a formal claim of privilege by the government.[232] The District Court again decided the case in favor of the

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222. GARVEY, *supra* note 199, at 2; *In re* Terrorist Attacks on September 11, 2001, 523 F. Supp. 3d 478, 496 (S.D.N.Y. 2021).

223. Brauner v. United States, 10 F.R.D. 468 (E.D. Pa. 1950), *aff'd sub nom.* Reynolds v. United States, 192 F.2d 987 (3d Cir. 1951), *rev'd*, 345 U.S. 1 (1953).

224. *Id.* at 469.

225. Reynolds v. United States, 192 F.2d 987, 989 (3d Cir. 1951).

226. *Brauner*, 10 F.R.D. at 469.

227. *Id.* at 472.

228. *Id.*

229. *Id.* at 471–72.

230. *Id.* at 472.

231. The District Court's rehearing is referred to in *Reynolds*, 192 F.2d at 990. There is no written opinion of the District Court after the rehearing. It occurred on August 9, 1950, and an amended order was issued on September 21, 1950. The Judge ordered the government to produce the documents for *in camera* review. The government refused to produce the documents, and "on October 12, 1950, the district judge issued an order, under Civil Procedure Rule 37, that the facts in plaintiffs' favor on the issue of negligence be taken as established and prohibiting the defendant from introducing evidence to controvert those facts." Consequently, "judgment was entered for the plaintiffs on February 27, 1951." *Id.* at 991.

232. *Id.* at 990.

plaintiffs.[233] The Third Circuit Court of Appeals affirmed and ordered production of the report.[234] The U.S. Supreme Court reversed and remanded the case because it found the report privileged.[235] It observed that it was a time of "vigorous preparation for national defense," and it sustained the government's claim of privilege.[236] Three justices, Black, Frankfurter, and Jackson, dissented from the majority opinion, indicating they agreed with the Third Circuit Court of Appeals decision.[237]

The Court articulated that it disagreed with the "broad propositions" advocated by both the government and the plaintiffs.[238] The government had urged full exclusion with no judicial review, and the plaintiffs claimed the government waived the state secrets privilege when Congress passed the FTCA.[239] Instead, the Court indicated that it found a "narrower ground" for decision.[240] Although the FTCA did not create a cause of action against the government, it waived sovereign immunity for certain actions of the government.[241] The FTCA contained a provision that the Federal Rules of Civil Procedure applied to any claims under the Act.[242] The U.S. Supreme Court held that Federal Rule of Civil Procedure 34 governing discovery applied, and it contained the words "not privileged."[243] The Court's route through the Federal Rules of Civil Procedure was circuitous, but once *Reynolds* was decided, it became the law.[244]

The Supreme Court noted that judicial experience with the state secrets privilege in the United States was limited, so the majority looked to the English practice.[245] It settled on analyzing the state secrets privilege

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233. *Id.*

234. *Id.* at 998.

235. *Reynolds*, 345 U.S. at 12.

236. *Id.* at 10.

237. *Id.* at 12.

238. *Id.* at 6.

239. *Id.* at 12; Federal Torts Claims Act, Pub. L. No. 79-601, 60 Stat. 812–852 (1946) (codified as amended in scattered sections of 28 U.S.C.).

240. *Reynolds*, 345 U.S. at 6.

241. Michael D. Contino & Andreas Kuersten, CONG. RSCH. SERV., R45732, THE FEDERAL TORT CLAIMS ACT (FTCA): A LEGAL OVERVIEW 5 (2023), https://crsreports.congress.gov/product/pdf/R/R45732 [https://perma.cc/W2QY-LJJY].

242. Federal Torts Claims Act § 411.

243. *Reynolds,* 345 U.S. at 6. Federal Rule of Civil Procedure 34 contained the words "not privileged" at the time of the *Reynolds* opinion. The terminology is now in Federal Rule of Civil Procedure 26, which limits the scope of Rule 34. It indicates that the party "may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense . . . ." FED. R. CIV. P. 26.

244. Note, *The Extent of Governmental Immunity from Federal Rule 34*, 41 VA. L. REV. 507, 519 (1955).

245. *Reynolds,* 345 U.S. at 7.

alongside the "analogous privilege" against self-incrimination.[246] It was an unusual choice, because the two privileges are quite different. The Court instead focused on the proposition that in both situations, disclosure could reveal the very thing the privileges were designed to protect.[247] This is true of all secrets. Writing for the majority, Chief Justice Vinson first indicated that in the self-incrimination realm, courts had been presented with two extreme positions.[248] On the one hand, the court could allow the witness to refuse to answer, and on the other hand, the court could have the witness reveal the incriminating information.[249] Neither extreme position would be helpful in all situations. There must be a compromise.[250] Chief Justice Vinson then used the same type of analysis for the state secrets privilege and made a key determination that "some like form of compromise must be applied here."[251] Accordingly, it was imperative to balance the need for the material against the danger resulting from its disclosure.[252]

Regrettably, the Reynolds opinion is a bit convoluted. In one paragraph, the Court stated the following: "Judicial control over the evidence in a case cannot be abdicated to the caprice of executive officers. Yet we will not go so far as to say that the court may automatically require a complete disclosure . . . ."[253] So far so good. However, the Court then stated that if the government makes a *formal claim* of privilege, "under circumstances indicating a reasonable possibility that military secrets were involved," then a "sufficient showing of privilege" has been made.[254] That certainly sounds like a fixed rule. If a formal claim is made, the court need look no further. That would mean there is no need for *in camera* review. That is borne out by the Court's further language that if "the evidence will expose military matters, which in the interest of national security should not be divulged," then "the court should not jeopardize the security which the privilege is meant to protect by insisting upon an examination of the

246. *Id.* at 8.
247. *Id.*
248. *Id.* at 9.
249. *Id.*
250. In the self-incrimination realm, the compromise was that a judge must be satisfied that the witness has "reasonable cause to apprehend danger from a direct answer." Hoffman v. U.S., 341 U.S. 479, 486 (1951); *see also Reynolds* 345 U.S. at 9 (citing *Hoffman*, 341 U.S. at 486–87).
251. *Reynolds,* 345 U.S. at 9.
252. *Id.* at 10–11.
253. *Id.* at 9–10.
254. *Id.* at 10–11. "Thereafter, when the formal claim of privilege was filed by the Secretary of the Air Force, under circumstances indicating a reasonable possibility that military secrets were involved," the Court wrote, "there was certainly a sufficient showing of privilege to cut off further demand for the document on the showing of necessity for its compulsion that had been made." *Id.*

evidence, even by the judge alone, in chambers."[255] Chief Justice Vinson could have ended the opinion there. But he did not.

Further perplexity comes as he continues the majority opinion. The Court indicated that a "showing of necessity" must be considered by a court in order for it to determine "how far the court should probe."[256] This language was later interpreted as creating a balancing test.[257] What it really did create is "a confused level of judicial supervision."[258] It has been described as a two-step process, but Justice Breyer, in the plurality opinion in *Zubaydah,* discussed *infra,* seemed to suggest a three-step process.[259] The *Reynolds* case was so confusing that each of the five opinions[260] in the *Zubaydah* case cite it for various purposes, as described *infra*.

Notably, the *Reynolds* majority found that the plaintiffs failed to pursue the alternative offered by the government, in which the government would produce surviving crew members for examination without cost to the plaintiffs.[261] The Court specifically found that the plaintiffs made a "dubious showing of necessity" and that the "offer should have been accepted."[262] This appears to weigh heavily on the Court's ultimate decision.

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255. *Id.* at 10.

256. *Id.* at 11.

257. *See, e.g.*, Tenet v. Doe, 544 U.S. 1, 9 (2005) (explaining that, in *Reynolds*, the Court "set out a balancing approach for courts to apply in resolving Government claims of privilege"); *see also* Salisbury v. United States, 690 F.2d 966, 975 n.5 (D.C. Cir. 1982) ("[T]he Court in Reynolds employed a balancing test, setting the would-be discoveror's [sic] need for the information against the need to protect state secrets . . . ."); ACLU v. Brown, 609 F.2d 277, 280 (7th Cir. 1979) ("The District Court correctly pursued the procedure set down in [*Reynolds*] by considering the appellees' need for the information and balancing that need against the claims made by the government."); United States v. Shehadeh, 857 F. Supp. 2d 290, 292–93 (E.D.N.Y. 2012) ("Proper application of [the state secrets] privilege requires a balancing of the government's need to protect national security with the right of a defendant to mount a full defense.").

258. Fisher, *supra* note 12, at 397.

259. GARVEY & LIU, *supra* note 115, at 2; United States v. Zubaydah, 595 U.S. 195, 205–06 (2022).

260. Opinions were written by the following: Justice Breyer, in a plurality joined in full by Chief Justice Roberts and in part by Justices Kagan, Kavanaugh, Barrett, Thomas, and Alito, *Zubaydah*, 595 U.S. at 197–216; Justice Thomas, in a concurrence joined by Justice Alito, *Id.* at 216–232; Justice Kavanaugh, in a concurrence joined by Justice Barrett, *Id.* at 232–34; Justice Kagan, in an opinion concurring in part and dissenting in part, *Id.* at 234–37; and Justice Gorsuch, in a dissent joined by Justice Sotomayor, *Id.* at 237–266.

261. United States v. Reynolds, 345 U.S. 1, 11 (1953).

262. *Id.*

After *Reynolds*, courts were reluctant to review claims of state secrets and became "profoundly deferential to executive invocations."[263] The Court recognized both sides of the issue in *Reynolds,* but, both pre- and post-9/11, lower courts have "uph[e]ld the privilege in a majority of cases."[264] The balancing test called for in *Reynolds,* if there was such a thing, did not in fact occur.

Remarkably, the *Reynolds* case itself proves the critical need for judicial review. Had the District Court performed *in camera* review, it would have discovered that the state secrets privilege was improperly asserted.[265] Fifty years after *Reynolds*, Judith Loether, the daughter of one of the engineers who died in the accident, checked on the internet to see whether she could discover any facts about her father's death.[266] Judith learned that the accident report had since been declassified and turned over to a private company (Accident-Report.com).[267] She paid $63 for the report and found that there were no electronic secrets mentioned in it at all.[268] When she attempted to undo the wrong and her lawyers sought a Writ of Error from the U.S. Supreme Court, she was denied relief.[269]

Patricia Herring, another heir and the sole remaining widow from *Reynolds,* filed another action in the U.S. District Court for the Eastern District of Pennsylvania to set aside the 50-year-old settlement agreement reached between the parties.[270] The Third Circuit Court of Appeals determined on review that the families did not prove perjury, an exceedingly difficult standard, which would have been required to set aside the agreement.[271] Had the documents been made available to the District Court, it would have discovered "nothing about the plane's secret mission or the confidential equipment."[272] On the other hand, it would have recognized that the crew made numerous Air Force-documented mistakes that were exacerbated by equipment errors, most notably the absence of a

263. Faaris Akremi, *Does Justice "Need to Know"?: Judging Classified State Secrets in the Face of Executive Obstruction,* 70 STAN. L. REV. 973, 990 (2018).

264. Cassman, *supra* note 99, at 1192.

265. WRIGHT & MILLER, *supra* note 44, § 5663.

266. *Id.*

267. Fisher, *supra* note 12, at 398.

268. *Id.*; WRIGHT & MILLER, *supra* note 44, § 5663.

269. *In re* Herring, 539 U.S. 940, 940 (2003).

270. Independent Action for Relief From Judgment to Remedy Fraud on the Court at 15, Herring v. United States, 2004 WL 2040272 (2004) (No. 2:03-CV-05500).

271. Herring v. United States, 424 F.3d 384, 392 (3rd Cir. 2005).

272. Fisher, *supra* note 12, at 393.

heat shield.[273] It appears the government did not want to release the report because of liability and embarrassment.[274]

2. Post-*Reynolds* State Secrets Cases – 20th Century Jurisprudence

There are very few *true* state secrets cases.[275] By this, the author means the application of a privilege, with the case continuing without the privileged evidence.[276] In some cases, courts discuss "state secrets," but these are in fact nonjusticiable cases.[277] Many times courts use the term "state secrets" when what they really are analyzing is the executive privilege—in non-state secrets settings —or a *Totten*-type situation, in which the issue is justiciability rather than the evidentiary privilege.[278] The U.S. Supreme Court has stated that the *Totten* and *Reynolds* cases are distinct.[279] The Sixth Circuit put it the following way: "The State Secrets Doctrine has two applications: a rule of evidentiary privilege, see *United*

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273. *Reform of the State Secrets Privilege: Hearing Before the Subcomm. on the Const., C.R., & C.L. of the H. Comm. on the Judiciary*, 110th Cong 23–25 (2008) (statement of Judith Loether, daughter of victim in *United States v. Reynolds*).

274. *See* Weaver & Pallitto, *supra* at note 213, at 99 ("[I]t is now known that the goal of the government in claiming the privilege in *Reynolds* was to avoid liability and embarrassment.").

275. *See, e.g.*, Nixon v. Sirica, 487 F.2d 700, 759 (D.C. Cir. 1973); *see also* United States v. O'Neill, 619 F.2d 222, 228 (3d Cir. 1980) (emphasizing that executive privilege extends to military and state secrets); Exxon Shipping Co. v. U.S. Dept. of Just., 34 F.3d 774, 780 (9th Cir. 1994) (explaining that common law governs privileges recognized by federal courts).

276. *See, e.g.*, Fitzgerald v. Penthouse Int'l, 776 F.2d 1236, 1243 (4th Cir. 1985) ("Once the state secrets privilege has been properly invoked, the district court must consider whether and how the case may proceed in light of the privilege.").

277. *See, e.g.*, Kasza v. Browner, 133 F.3d 1159, 1170 (9th Cir. 1998); *see also Fitzgerald*, 776 F.2d at 1244 (dismissing after the assertion of the state secrets privilege because "no amount of effort and care on the part of the court and the parties will safeguard privileged material"); Zuckerbraun v. Gen. Dynamics Corp, 935 F.2d 544, 547 (2d Cir. 1991) (explaining that if a defense requires the use of a state secret, then dismissal is warranted); Air-Sea Forwarders, Inc. v. United States, 39 Fed.Cl. 434, 440 (1989) (explaining that a contract to perform "state services" for the United States is unenforceable in court). All these cases are really *Totten* cases. *See also* Telman, *supra* note 162, at 7 ("A justiciability doctrine is not a component of an evidentiary privilege, and an evidentiary privilege cannot provide a basis for dismissal before any evidence has been sought or introduced.").

278. Telman, *supra* note 162, at 5–7 (discussing courts' conflation of the state secrets privilege with the *Totten* doctrine, which is a rule of non-justiciability rather than an evidentiary privilege).

279. Tenet v. Doe, 544 U.S. 1, 9–10 (2005); Plunkett, *supra* note 176, at 815–16.

States v. Reynolds . . . and a rule of non-justiciability, see *Tenet v. Doe* . . . ."[280] The Ninth Circuit is in accord.[281] *Reynolds* has been described as a "relative" of the *Totten* Doctrine.[282]

Writing for the majority in *Tenet*, Chief Justice Rehnquist stated that in *Reynolds*, the Court cited to the "'well established' state secrets privilege" from *Totten*.[283] This is not correct, however. *Totten* never used the privilege terminology. Instead, the *Totten* Court indicated that the claim was non-justiciable.[284] This is different from a privilege. If a privilege applies, the evidence is precluded.[285] The use of *Totten* in pure privilege cases "collapses the distinction" and makes an evidentiary rule into a justiciability standard.[286]

Under the *Totten* Doctrine, the claim itself is precluded.[287] The Court did recognize in *Tenet* that *Totten* had a more "sweeping holding."[288] Essentially, courts have collapsed the *Reynolds* analysis into a *Totten* situation. The result is that more cases are dismissed, as discussed *infra*. The wording of *Totten* has at its core the same principle as the state secrets privilege. The Court indicated that any mention of the contract would lead to the disclosure of information that would be to the "serious detriment of the public."[289] In a privilege case, the case continues without the evidence. When courts conflate the two, it has become much more than simply a privilege.[290]

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280. ACLU v. NSA, 493 F.3d 644, 650 n.2 (6th Cir. 2007) (referring to *Totten* and its rule of non-justiciability).

281. Al-Haramain Islamic Found., Inc. v. Bush, 507 F.3d 1190, 1197 (9th Cir. 2007).

282. Shannon Vibbert, *A Twisted Mosaic: The Ninth Circuit's Piecemeal Approval of Environmental Crime in* Kasza v. Browner, 17 J. NAT'L RES. & ENV'T L. 95, 98 (2002).

283. Tenet v. Doe, 544 U.S. 1, 9 (2005) (quoting United States v. Reynolds, 345 U.S. 1, 6–7 (1953)).

284. Wilson v. Libby, 498 F. Supp. 2d 74, 91 (D.D.C. 2007) (citing *Tenet*, 544 U.S. at 8). For the Supreme Court's explanation of justiciability, see Aetna Life Ins. Co. of Hartford v. Haworth, 300 U.S. 227, 240–41 (1937).

285. Jewel v. NSA, 965 F. Supp. 2d 1090, 1100 (N.D. Cal. 2013).

286. Laura K. Donohue, *Surveillance, State Secrets, and the Future of Constitutional Rights*, 21 S. CT. REV. (forthcoming 2023) (manuscript at 21) (on file with the *Columbia Human Rights Law Review*).

287. Totten v. United States, 92 U.S. 105, 107 (1875) ("The secrecy which such contracts impose precludes any action for their enforcement.").

288. *Tenet*, 544 U.S. at 3, 15.

289. *Totten*, 92 U.S. at 107.

290. *See* Brief for the Plaintiff-Appellant at 56–62, Wikimedia Found. v. NSA, 14 F.4th 276 (4th Cir. 2021), *cert. denied,* 143 S. Ct. 774 (2023) (No. 20-1191) (arguing that the district court erred in dismissing plaintiff-appellant's case on the basis of the state secrets privilege).

a. United States Supreme Court Cases

There were only three post-*Reynolds* twentieth-century U.S. Supreme Court cases that made a passing reference to the state secrets privilege.[291] None of the cases addressed the privilege directly.

b. Courts of Appeals Cases

In the Circuit Courts of Appeal, there were a few true state secrets privilege cases in the twentieth century. The courts followed *Reynolds* but further elaborated.[292] For example, in *Ellsberg v. Mitchell*, a high-profile case based on the warrantless electronic surveillance of the Pentagon Papers leaker, the U.S. Court for Appeals for the D.C. Circuit decided the persons surveilled were entitled to know the identities of the attorneys general who authorized the wiretaps.[293] *Ellsberg* also clarified that the privilege applies to "impairment of the nation's defense capabilities, disclosure of intelligence-gathering methods or capabilities, and disruption of diplomatic relations with foreign governments."[294] In *Ellsberg*, the D.C. Circuit Court stated that courts should attempt to separate privileged information from that which is not privileged;[295] that idea was rejected by the Ninth Circuit in *Kasza v. Browner* in 1998 when it stated that a court could not order the government to "disentangle" the information.[296]

Many courts have adopted this "mosaic theory," under which disentanglement would certainly not be an issue. For instance, in the 1978 case *Halkin v. Helm* (*Halkin I*), the D.C. Circuit adopted a "mosaic" view of the state secrets privilege, which significantly expanded the scope of the privilege.[297] The mosaic theory is described as a type of intelligence gathering.[298] The theory is that many pieces of information on their own may not have much significance, but together the synergy of these many

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291. Jencks v. United States, 353 U.S. 657, 672 (1957) (Burton, J., concurring); N.Y. Times Co. v. United States, 403 U.S. 713, 757 (Harlan, J., dissenting); Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 440 (1977).

292. *In re* Under Seal, 945 F.2d 1285, 1288 (4th Cir. 1991).

293. Ellsberg v. Mitchell, 709 F.2d 51, 65 (D.C. Cir. 1983).

294. *Id.* at 57.

295. *Id.*

296. Kasza v. Browner, 133 F.3d 1159, 1166 (9th Cir. 1998).

297. Halkin v. Helms, 598 F.2d 1, 8 (D.C. Cir. 1978); *see* Christina E. Wells, *State Secrets & Executive Accountability*, 26 CONST. COMMENT. 625, 636 (2010) ("Mosaic theory expressly shields from production otherwise innocuous information that *might*, *if* combined by knowledgeable actors with other information, pose a danger to national security." (emphasis in original)).

298. David E. Pozen, *The Mosaic Theory, National Security, and the Freedom of Information Act*, 115 YALE L. J. 628, 630 (2005).

pieces may provide strategic clues about an adversary's capabilities and threats.[299] In *Halkin I*, the Court indicated that a single piece of evidence may seem "innocuous," but computer technology is "more akin to the construction of a mosaic."[300] This "mosaic theory" eventually caught on.[301] The *Halkin I* Court did, however, indicate that *in camera* reviews are an appropriate means of deciding privilege disputes.[302] By 1984, the same court decided that there was a "sliding scale" to determine whether *in camera* review was necessary.[303]

In another case, *In re United States*, the D.C. Circuit applied the "utmost deference" standard to the state secrets privilege, but it cited *Halkin I*, which itself relied on *United States v. Nixon,* which is not a state secrets case.[304] The Fourth Circuit also adopted the utmost deference standard and again cited to *Nixon*.[305] The Ninth Circuit adopted the language as well but cited *Reynold*s, which does not contain that wording.[306] Later, the utmost deference standard was urged in the concurring opinion of Justices Thomas and Alito in *Zubaydah.*[307]

Whether a court should conduct *in camera* review was a post-*Reynolds* issue, due to the contradictory wording in that opinion. In *Northrop Corp. v. McDonnell Douglas Corp*., the D.C. Circuit set the framework at two extremes.[308] If the government's claim is "dubious in circumstances surrounding the case," a court *must* perform *in camera* review.[309] How a court might make that determination is a mystery. At least one circuit has ruled that courts may not inquire into the motivation for claiming the privilege.[310] At the other extreme described by the *Northrop* court, if the requester's need for the material is "trivial," then a court *must*

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299. *Id.*

300. *Halkin*, 598 F.2d at 8.

301. *See* Pozen, *supra* note 298, at 630–31 (noting that, while the mosaic theory initially receded after the Reagan administration, it has made a comeback since the attacks on September 11th, 2001); *see also* Christina E. Wells, CIA v. Sims*: Mosaic Theory and Government Attitude*, 58 ADMIN. L. REV. 845 (2006) (illustrating the increasing acceptance of the mosaic theory following the Supreme Court's acceptance of the argument in *CIA v. Sims*).

302. *Halkin*, 598 F.2d at 5–6.

303. Northrop Corp. v. McDonnell Douglas Corp., 751 F.2d 395, 401 (D.C. Cir. 1984).

304. *In re* United States, 872 F.2d 472, 475 (D.C. Cir. 1989) (citing *Halkin I*, 598 F.2d at 9). Interestingly, an earlier case from that Circuit used the "considerable deference" standard. Molerio v. FBI, 749 F.2d 815, 822 (D.C. Cir. 1984).

305. Abilt v. CIA, 848 F.3d 305, 312 (4th Cir. 2017).

306. Kasza v. Browner, 133 F.3d 1159, 1166 (9th Cir. 1998).

307. United States v. Zubaydah, 595 U.S. 195, 216 (2022), discussed *infra*.

308. *Northrop Corp.*, 751 F.2d at 401.

309. *Id.*

310. Halperin v. Kissinger, 807 F.2d 180, 188 (D.C. Cir. 1986).

not perform *in camera* review.[311] If a case falls somewhere between those two extremes, then a reviewing court should not disturb the ruling of the trial court unless that court abused its discretion.[312] The Fourth Circuit clarified that the state secrets privilege works the same as any other privilege: the evidence is removed from the case, and the case goes forward without that evidence.[313] It is a *Totten* situation when the excluded evidence is the only way to establish a case, and the case is dismissed entirely.[314]

After *Reynolds*, courts have largely deferred to the government in state secrets privilege cases.[315] Professor, now Dean, Robert Chesney has found that, since the early 1970s, various types of cases alleging government misconduct have "frequently been the occasion for abrupt dismissal of lawsuits."[316] In particular, criminal defendants have difficulty overcoming state secrets privilege assertions by the government.[317] Without judicial inquiry, the state secrets privilege "has proven a successful defensive litigation tactic."[318] Throughout the years after *Reynolds*, the state secrets doctrine had an "[a]rc of [e]xpansion" in which courts "vastly expanded the boundaries of the privilege."[319]

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311. *Northrop Corp.*, 751 F.2d at 401 (quoting Ellsberg v. Mitchell, 709 F.2d 51, 59 n.38 (D.C.Cir.1983)). In the later *FBI v. Fazaga* case, the U.S. Supreme Court stated that the state secrets privilege may preclude even *in camera* review. FBI v. Fazaga, 595 U.S. 344, 357–58 (2022).

312. *See* Northrop Corp., 751 F.2d at 399 (stating generally that the abuse-of-discretion standard applies to appellate review of district court exercises of discretion in discovery matters); *see also* Silets v. U.S. Dep't of Just., 945 F.2d 227, 229 (7th Cir. 1991) (applying the abuse-of-discretion standard specifically to a district court's denial of *in camera* review of documents that were the subject of a FOIA request).

313. Farnsworth Cannon v. Grimes, 635 F.2d 268, 271–73 (4th Cir. 1980).

314. *Id.* at 271–72; Bowles v. United States, 950 F.2d 154, 156 (4th Cir. 1991) (citing Fitzgerald v. Penthouse Int'l, Ltd., 776 F.2d 1236, 1243–44 (4th Cir. 1985)).

315. H.R. REP. NO. 110-442, at 5 (2008).

316. Chesney, *supra* note 54, at 1249; *see also* GARVEY & LIU, *supra* note 115, at 11 (discussing the impact of state secrets privilege on national security cases).

317. Cassman, *supra* note 99, at 1203.

318. Meredith Fuchs, *Judging Secrets: The Role Courts Should Play in Preventing Unnecessary Secrecy*, 58 ADMIN L. REV. 131, 135 (2006).

319. David Rudenstine, *The Courts and National Security: The Ordeal of the State Secrets Privilege*, 44 U. BALT. L. REV. 37, 50–51 (2014).

D. 21st Century U.S. Supreme Court and Appellate State Secrets Doctrine

1. Pre-*Zubaydah* Cases

a. U.S. Supreme Court Cases

The U.S. Supreme Court has decided four cases that involved the state secrets privilege, one of which was *Zubaydah*.[320] Two of those cases were *Totten* cases.[321] One of the cases, decided only a day after *Zubaydah*, involved the limited question of whether a provision of the Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. § 1806(f), displaced the state secrets privilege.[322] The Court determined it did not. The unanimous opinion by Justice Alito did contain two comments on the state secrets privilege.[323]

b. Courts of Appeals Cases

There have been over one hundred courts of appeal opinions in the twenty-first century, prior to *Zubaydah*, mentioning state secrets.[324] Many of these cases involve alleged terrorism.[325] The assertion of the state secrets privilege skyrocketed after 9/11.[326] A sizable number of cases were dismissed outright as nonjusticiable, à la *Totten*.[327] Although circuit courts

320. Those cases are the following: Tenet v. Doe, 544 U.S. 1, 9–10 (2005); Gen. Dynamics Corp. v. United States, 563 U.S. 478 (2011); United States v. Zubaydah, 595 U.S. 195 (2022); FBI v. Fazaga, 595 U.S. 344 (2022).

321. *Gen. Dynamics*, 563 U.S. at 485–86; *Tenet*, 544 U.S. at 3.

322. *Fazaga*, 595 U.S. at 357–59.

323. *Id.*

324. A search of U.S. Courts of Appeals cases conducted on Westlaw Precision reveals a total of 152 cases between 1/1/2000 and 3/3/2022, the date of the *Zubaydah* opinion.

325. *See, e.g.*, Mohamed v. Jeppesen Dataplan, Inc., 614 F.3d 1070 (9th Cir. 2010) (discussing allegations of extraordinary rendition); El-Masri v. United States, 479 F.3d 296 (4th Cir. 2007) (involving claims related to extraordinary rendition); Al-Haramain Islamic Found., Inc. v. Bush, 507 F.3d 1190 (9th Cir. 2007) (addressing issues related to warrantless surveillance and state secret privilege).

326. Beatrix Geaghan-Breiner, *Rethinking the State Secrets Privilege After the War on Terror*, COLUM. UNDERGRAD. L. REV. (June 20, 2022), https://www.culawreview.org/journal/rethinking-the-state-secrets-privilege-after-the-war-on-terror [https://perma.cc/AE8X-SBDU].

327. *See, e.g.*, *Mohamed*, 614 F.3d at 1092 (discussing the application of state secrets privilege); *El-Masri*, 479 F.3d at 313 (examining state secrets privilege implications); Sterling v. Tenet, 416 F.3d 338, 348 (4th Cir. 2005) (analyzing state secrets privilege in the context of national security); *see also* Wikimedia Found. v. NSA, 14 F.4th 276, 302–04

first discussing the privilege had indicated this would be a "rare" occurrence, it is not.[328] An outright dismissal of a case may occur even when constitutional rights are at stake.[329]

After 9/11, the government argued that the state secrets privilege had constitutional dimensions.[330] In a 2008 letter to the Honorable Patrick J. Leahy, then-Chairman of the Senate Committee on the Judiciary, the Justice Department claimed that the state secrets privilege is "not a mere common law privilege, but instead, as the courts have long recognized, is a privilege with a firm foundation in the Constitution."[331] This is quite a claim. The state secrets privilege had, until that point, always been thought of as an evidentiary privilege. In *Reynolds*, the Court reiterated that the claim of military secrets is "a privilege which is well established in the law of evidence" and cited to older cases and treatises.[332] The Advisory Committee on the Rules of Evidence, created by Chief Justice Earl Warren, produced a preliminary draft of the Federal Rules of Evidence that contained Proposed Rule 509.[333] It was proposed as the rule that would govern privileges covering secrets of the state and other official information.[334] The final draft had "secret of state" in its text.[335] Ultimately, Proposed Rule 509, as with all of the other proposed privilege rules, was never adopted due to

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(4th Cir. 2021), *cert. denied,* 143 S.Ct. 774 (2023) (addressing recent developments related to state secrets privilege).

328. *Mohamed*, 614 F.3d at 1092; *El-Masri*, 479 F.3d at 313.

329. *In re* Sealed Case, 494 F.3d 139, 143–44 (D.C. Cir. 2007); Daniel J. Huyck, *Fade to Black:* El-Masri v. United States *Validates the Use of the State Secrets Privilege to Dismiss Extraordinary Rendition Claims*, 17 MINN. J. INT'L L. 435, 444–45 (2008).

330. Steven D. Schwinn, *The State Secrets Privilege in the Post-9/11 Era*, 30 PACE L. REV. 778, 810 (2010).

331. Letter from Michael B. Mukasey, U.S. Attorney General, to The Honorable Patrick J. Leahy, Chairman of the Committee on the Judiciary (Mar. 31, 2008), https://sgp.fas.org/jud/statesec/ag033108.pdf [https://perma.cc/U6N7-UVT4] [hereinafter Letter to Leahy]. Mukasey states the following: "The state secrets privilege is not a mere common law privilege, but instead, as the courts have long recognized, is a privilege with a firm foundation in the Constitution." *Id.* Yet he provides no specific basis for this claim. It appears he is referring to the executive privilege, which has some basis for it in the separation of powers in the Constitution.

332. United States v. Reynolds, 345 U.S. 1, 6–7 (1953).

333. Michael Teter, *Acts of Emotion: Analyzing Congressional Involvement in the Federal Rules of Evidence*, 58 CATH. U. L. REV. 153, 158 (2009); WRIGHT & MILLER, *supra* note 44, § 5661.

334. WRIGHT & MILLER, *supra* note 44, § 5661; *see* Margaret A. Berger, *How the Privilege for Governmental Information Met Its Watergate*, 25 CASE W. RES. L. REV. 747, 749 (1975) ("In its final form, rule 509 provided for two privileges: a privilege for Secrets of State and a privilege for Official Information.").

335. Berger, *supra* note 334, at 756 n.51.

Congressional opposition.[336] Proposed Rule 509 was dropped in favor of a common law approach due to the Watergate crisis and its varying privilege issues.[337] Nevertheless, the Justice Department has continued to argue that the privilege has as its basis the president's Article II powers.[338] In support of that claim, the government has cited to the *Nixon* case, which is not a state secrets case, and *Department of the Navy v. Egan*, also not a state secrets case.[339]

The state secrets privilege has been used more recently to shield embarrassing information from public view. The George W. Bush Administration used the privilege to block lawsuits about the CIA torture programs, particularly in cases about both the extraordinary rendition program and National Security Agency (NSA) warrantless wiretapping.[340] When the Obama Administration came into office, President Obama pledged to review all pending cases asserting the privilege.[341] The administration found that every one of the assertions of the state secrets privilege was legitimate.[342] Although then-President Obama reportedly "toughened" the state secrets privilege and set forth new guidelines, little changed.[343] Although, under attorney general policy, periodic reports were to be made on every case in which the privilege was asserted, as of 2018,

336. Paul F. Rothstein, *The Proposed Amendments to the Federal Rules of Evidence*, 62 GEO. L. J. 125, 126–28 (1973); WRIGHT & MILLER, *supra* note 44, § 5661.

337. Berger, *supra* note 334, at 795.

338. *See* Brief for the Respondents in Opposition at 22–23, Wikimedia Found. v. Nat'l Sec. Agency, 143 S. Ct. 774 (2023) (No. 22-190) (arguing that the state secrets doctrine has as its basis both the law of evidence and Article II of the U.S. Constitution); Reply Brief for the Petitioners at 13–14, FBI v. Fazaga, 142 S. Ct. 1051 (2022) (No. 20-828) (tying the state secrets privilege to "the President's role as Commander in Chief and his Article II authority to conduct the Nation's foreign affairs").

339. United States v. Nixon, 418 U.S. 683 (1974); Dep't of the Navy v. Egan, 484 U.S. 518 (1988).

340. James Risen et al., *State Secrets Privilege Invoked to Block Testimony in C.I.A. Torture Case*, N.Y. TIMES, Mar. 8, 2017, at A20; Holly Wells, *The State Secrets Privilege: Overuse Causing Unintended Consequences*, 50 ARIZ. L. REV. 967, 979–988 (2008); Louis Fisher, *The Law: The State Secrets Privilege: From Bush II to Obama,* 46 PRESIDENTIAL STUDIES Q. 173, 185–189 (2016).

341. Risen et al., *supra* note 340; President Barack Obama, Remarks by the President on Review of Signals Intelligence, Department of Justice (Jan. 17, 2014), https://obamawhitehouse.archives.gov/the-press-office/2014/01/17/remarks-president-review-signals-intelligence [https://perma.cc/7SWD-BQM2].

342. Risen et al., *supra* note 340.

343. On September 23, 2009, Attorney General Holder issued a memorandum setting forth policies and procedures for the government's assertion of the state secrets privilege. Press Release, Dept. of Just. Off. of Pub. Affs., Attorney General Establishes New State Secrets Policies and Procedures (Sept. 23, 2009), https://www.justice.gov/opa/pr/attorney-general-establishes-new-state-secrets-policies-and-procedures [https://perma.cc/S4DC-WP8B].

only one report had been furnished to Congress.[344] In October of 2022, under the Biden Administration, Attorney General Garland issued a supplement to policies and procedures on the state secrets privilege issued during the Obama Administration by then-Attorney General Holder.[345] Even if these guidelines are helpful, all the "protections" set forth are controlled by the executive branch.[346] The government continues to assert that the state secrets privilege has its roots in Article II, not just in the law of evidence.[347] In other words, according to the government, the privilege is not simply a privilege; it is far more.[348]

2. *United States v. Zubaydah*

Seventy years passed from *Reynolds* until the next major case on state secrets, *United States v. Zubaydah*, was decided by the U.S. Supreme Court.[349] Abu Zubaydah, a stateless Palestinian,[350] was captured in Faisalabad, Pakistan on March 28, 2002, by Pakistani government authorities working with the CIA and the Federal Bureau of Investigation (FBI) and was transferred to "black sites."[351] There he was horrifically

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344. Steven Aftergood, *Secrecy About Secrecy: The State Secrets Privilege*, FED. OF AM. SCIENTISTS (June 20, 2018), https://fas.org/publication/state-secrets-reporting/ [https://perma.cc/HX2U-4MLG]; OFF. OF THE ATT'Y GEN., MEMORANDUM FOR HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES (2009), https://www.justice.gov/archive/opa/documents/state-secret-privileges.pdf [https://perma.cc/R9PM-JN8X]. The Policies and Procedures Governing Invocation of the State Secrets Privilege does not define "periodic." *Id.* at 4.

345. OFF. OF THE ATT'Y GEN., SUPPLEMENT TO POLICIES AND PROCEDURES GOVERNING INVOCATION OF THE STATE SECRETS PRIVILEGE (2022), https://www.justice.gov/ag/page/file/1539346/download [https://perma.cc/2SEE-HHAB].

346. There are additional procedures that must be followed for invocation of the privilege in civil litigation.

347. *See* Brief for the Respondents in Opposition at 22–23, Wikimedia Found. v. Nat'l Sec. Agency, 143 S. Ct. 774 (2023) (No. 22-190) (arguing that the state secrets doctrine has as its basis both the law of evidence and Article II of the U.S. Constitution).

348. *Id.* at 22–28.

349. United States v. Zubaydah, 142 S. Ct. 959 (2022).

350. As of this writing, the Occupied Palestinian Territories are not internationally recognized as a sovereign state. *See, e.g.*, Press Statement, Antony J. Blinken, Secretary of State, The United States Opposes the ICC Investigation into the Palestinian Situation (Mar. 3, 2021), https://il.usembassy.gov/the-united-states-opposes-the-icc-investigation-into-the-palestinian-situation/ [https://perma.cc/EQ7W-JDVU] ("The Palestinians do not qualify as a sovereign state . . . .").

351. S. SELECT COM. ON INTEL., COMMITTEE STUDY OF THE CENTRAL INTELLIGENCE AGENCY'S DETENTION AND INTERROGATION PROGRAM, S. REP. NO. 113-288, at 21, 46–48 (2014); AMRIT SINGH, GLOBALIZING TORTURE: CIA SECRET DETENTION AND EXTRAORDINARY RENDITION 60 (2013), https://repositories.lib.utexas.edu/handle/2152/28112

tortured.[352] Currently he is confined at the U.S. Naval Station at Guantánamo Bay, Cuba.[353] In a speech from the White House, then-President Bush named Abu Zubaydah as "a senior terrorist leader and a trusted associate of Osama bin Laden."[354] Presumably unbeknownst to Bush, by 2006, the CIA knew Zubaydah had never been a member of al Qaeda and indeed had been rejected by the group in 1993.[355]

Abu Zubaydah has sought relief—including damages—for his torture from all of the countries he could identify that played a role. Lithuania has paid over $110,000 to Abu Zubaydah for its role in his torture.[356] The European Court of Human Rights ordered the compensation

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[https://perma.cc/AMM2-F2UK]; Charles R. Church, *What Politics and the Media Still Get Wrong About Abu Zubaydah*, LAWFARE (Aug. 1, 2018), https://www.lawfaremedia.org/article/what-politics-and-media-still-get-wrong-about-abu-zubaydah [https://perma.cc/UBM8-4QFE]; *see also* DEBORAH M. WEISSMAN ET AL., EXTRAORDINARY RENDITION AND TORTURE VICTIM NARRATIVES 368–74 (2017), https://law.unc.edu/wp-content/uploads/2019/10/extraordinaryrenditionandNC.pdf [https://perma.cc/5YXE-Q3K4] (fitting Abu Zubaydah's capture into the larger narrative of his life).

352. S. REP. NO. 113-288, at 43–44.

353. OFF. OF THE DIR. OF NAT'L INTEL., SUMMARY OF THE HIGH VALUE TERRORIST DETAINEE PROGRAM 14, https://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20(AE628KKK(AAA)).pdf [https://perma.cc/NW3C-685M]; JENNIFER K. ELSEA, CONG. RSCH. SERV., LSB10764, ABU ZUBAYDAH AND THE STATE SECRETS DOCTRINE 1 (2022). Abu Zubaydah has been held at the Guantánamo Bay Detention Camp since September of 2006. Husayn v. Austin, No. 08-CV-1360, 2022 WL 2093067, at *1 (D.D.C. June 10, 2022).

354. President George W. Bush, *Speech on Terrorism*, N.Y. TIMES (Sept. 6, 2006), https://www.nytimes.com/2006/09/06/washington/06bush_transcript.html (on file with the *Columbia Human Rights Law Review*).

355. CIA, COUNTERING MISCONCEPTIONS ABOUT TRAINING CAMPS IN AFGHANISTAN, 1990-2001 (2006) *in* S. REP. NO. 113-288, app. at 661; *see also* Petition to United Nations Working Group on Arbitrary Detention at 6–7, Zayn Al-Abidin Muhammad Husayn (Abu Zubaydah) v. Government of the United States of America (Apr. 4, 2021), https://static1.squarespace.com/static/5b82ab175b409b90d4c99071/t/608bd7d73a86451ed53c8182/1619777499149/30042021+AZ+v+US+et+al+as+filed+unsigned.pdf [https://perma.cc/T8U6-W5GU] ("[E]ven once the CIA concluded that Abu Zubaydah was not a member of al Qa'ida this was not communicated between departments, and misinformation continued to be shared after it was discredited." (internal quotation marks omitted)).

356. Ed Pilkington, *Lithuania Pays Guantánamo 'Forever Prisoner' Abu Zubaydah €100,000 Over CIA Torture,* THE GUARDIAN (Jan. 10, 2022), https://www.theguardian.com/us-news/2022/jan/10/lithuania-pays-guantanamo-forever-prisoner-abu-zubaydah-100000-cia-torture [https://perma.cc/AL9Z-P893]. Abu Zubaydah has not received this compensation, because his assets are frozen by the U.S. government. Abu Zubaydah brought an action against Lithuania before the European Court of Human Rights for allowing the CIA to torture him within the country. Case of Abu Zubaydah v. Lithuania, App. No. 46454/11, 1 (Eur. Ct. H.R. May 31, 2018).

for Lithuania's violation of European law prohibiting torture.[357] Poland was also ordered to pay damages,[358] though its government is still investigating the case. A U.N. human rights panel has urged the United States to release Abu Zubaydah.[359] Abu Zubaydah continues to seek more information about his torture from the offending states.

At issue in *Zubaydah* was the enforcement of the subpoenas to depose the psychologists James E. Mitchell and John Bruce Jessen, who designed the torture protocols.[360] Abu Zubaydah also requested 13 documents concerning his torture.[361] Michael Pompeo, then-CIA Director, filed a formal claim of the state secrets privilege.[362] Although former President George W. Bush stated, "[w]e do not torture," the government indeed did.[363] The government "waterboarded [Abu] Zubaydah at least 80 times, simulated live burials in coffins for hundreds of hours, and performed rectal exams designed to establish 'total control over the detainee.'"[364]

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357. Case of Abu Zubaydah v. Lithuania, App. No. 46454/11, 295 (Eur. Ct. H.R. May 31, 2018).

358. Associated Press in Warsaw, *Poland Pays $250,000 to Victims of CIA Rendition and Torture*, THE GUARDIAN, (May 15, 2015), https://www.theguardian.com/world/2015/may/15/poland-pays-250000-alleged-victims-cia-rendition-torture [https://perma.cc/BW3F-PXRU].

359. Carol Rosenberg, *U.N. Body Demands Release of Guantánamo Prisoner Who Was Tortured by the C.I.A.*, N.Y. TIMES (Mar. 1, 2023), https://www.nytimes.com/2023/05/01/us/politics/un-gitmo-abu-zubaydah.html (on file with the *Columbia Human Rights Law Review*).

360. United States v. Zubaydah, 595 U.S. 195, 198–99 (2022). For a copy of the subpoenas issued to James E. Mitchell and John Bruce Jessen, see Reply Brief for the United States app. at 3a–4a, 9a–10a, United States v. Zubaydah, 595 U.S. 195 (2022) (No. 20-827). For unredacted portions of the Inspector General Report identifying Mitchell and Jessen, see OFF. OF INSPECTOR GEN., CIA, REPORT OF AN INVESTIGATION 2, 18–20, 22–24 (Apr. 27, 2005), https://www.thetorturedatabase.org/files/foia_subsite/cia_25_29.x.pdf [https://perma.cc/3W2N-FF4X].

361. *Zubaydah*, 595 U.S. at 202.

362. Petition for a Writ of Certiorari app. F at 123a, United States v. Zubaydah, 595 U.S. 195 (2022) (No. 20-827).

363. *Bush: 'We Do Not Torture' Terror Suspects*, NBC NEWS (Nov. 7, 2005), https://www.nbcnews.com/id/wbna9956644 [https://perma.cc/NU9W-NYQQ]; EUROPEAN CTR. FOR CONST. AND HUM. RTS., DOSSIER, THE US TORTURE PROGRAM – APPROVED AT THE HIGHEST LEVELS 1 (2020), https://www.ecchr.eu/fileadmin/Sondernewsletter_Dossiers/Dossier_US_Accountability_2020January.pdf [https://perma.cc/Q7TE-4W6H].

364. *Zubaydah*, 595 U.S. at 239 (Gorsuch, J., dissenting). Abu Zubaydah was the first detainee waterboarded. Sheri Fink & James Risen, *Psychologists Open a Window on Brutal C.I.A. Interrogations*, N.Y. TIMES (June 21, 2017), https://www.nytimes.com/interactive/2017/06/20/us/cia-torture.html [https://perma.cc/3ZZG-FF7U].

Together with his attorney, Abu Zubaydah filed an *ex parte* 28 U.S.C. § 1782 motion, which is a discovery application. On October 4, 2017, his attorney served subpoenas upon Jessen and Mitchell to provide testimony and to produce documents, information, or objects about the torture protocol.[365] It was a civil action filed in the United States District Court for the Eastern District of Washington.[366] Jessen and Mitchell developed the program of torture.[367] The psychologists were paid $80 million by the CIA.[368] The Government intervened in the discovery action and moved to quash the subpoenas based on the state secrets privilege, despite the fact that it was a matter of public knowledge.[369] Ultimately, the U.S. Supreme Court dismissed the case.[370] It is in *Zubaydah* that the Supreme Court erased 215 years of history that held the executive branch in check with respect to its secrets. It effectively sounded the death knell for any judicial review of state secrets privilege assertions.

The controlling *Zubaydah* decision is a plurality opinion. In addition, there are two concurring opinions, an opinion concurring and dissenting in part, and a dissenting opinion. Justice Breyer wrote the plurality opinion, and Chief Justice Roberts agreed with his opinion completely. Beyond that, the Justices disagreed. By a vote of 7-2, the Court found that the state secrets privilege applied. By a vote of 6-3, the Court dismissed the case. The results are so fractured that the following chart laying out who signed on to which parts of the plurality opinion is helpful.

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365. Reply Brief for the United States app. at 3a–4a, 9a–10a, United States v. Zubaydah, 595 U.S. 195 (2022) (No. 20-827); *Zubaydah*, 595 U.S. at 198–99; *Ex Parte* Application for Discovery Order Pursuant to 28 U.S.C. § 1782 In Aid of Foreign Proceeding, *In re* Zayn Al-Abidin Muhammad Husayn, No. 2:17-CV-0171-JLQ, 2018 WL 11150135 (E.D. Wash. Feb. 21, 2018) (No. 2:17-cv-00171), ECF No. 1.

366. *In re* Zayn Al-Abidin Muhammad Husayn, 2018 WL 11150135, at *1 (E.D. Wash. Feb. 21, 2018), *rev'd and remanded sub nom.* Husayn v. Mitchell, 938 F.3d 1123 (9th Cir. 2019), *rev'd and remanded sub nom.* United States v. Zubaydah, 595 U.S. 195 (2022), *and aff'd sub nom.* Husayn v. Mitchell, 31 F.4th 1274 (9th Cir. 2022).

367. *Ex Parte* Application for Discovery Order Pursuant to 28 U.S.C. § 1782 In Aid of Foreign Proceeding at 8, *In re* Zayn Al-Abidin Muhammad Husayn, No. 2:17-CV-0171-JLQ, 2018 WL 11150135 (E.D. Wash. Feb. 21, 2018) (No. 2:17-cv-00171), ECF No. 1.

368. Bill Chappell, *Psychologists Behind CIA 'Enhanced Interrogation' Program Settle Detainees' Lawsuit*, NPR (Aug. 17, 2017), https://www.npr.org/sections/thetwo-way/2017/08/17/544183178/psychologists-behind-cia-enhanced-interrogation-program-settle-detainees-lawsuit [https://perma.cc/RPQ2-ADH4]. Abu Zubaydah was not one of the detainees involved in that lawsuit.

369. *Zubaydah*, 595 U.S. 198–99.

370. *Id.* at 214.

Part	I. A. and B.	II. A. and II. B. 1, 3, 4, and 5	II. B. 2	III.	IV.
Summary of Part	Introduction	The State Secrets Privilege Applies	FIOA Analysis Suports Conclusion "Official Acknowleged Doctrine"	No Reason to Remand	Judgment of Ninth Circuit Reversed; Instructions to Dismiss Zubaydah's Application for Discovery
Breyer	X	X	X	X	X
CJ Roberts	X	X	X	X	X
Thomas					X
Alito					X
Sotomayor					
Kagan	X	X	X		
Gorsuch					
Kavanaugh	X	X		X	X
Barrett	X	X		X	X

Beginning with the introduction, background facts, and procedure, four justices agreed with Justice Breyer—Roberts, Kagan, Kavanaugh, and Barrett. As a starting point, these justices assumed that Abu Zubaydah had indeed been tortured.[371] In the oral argument on October 6, 2021, four justices plus the government attorney used the terms "torture" and "tortured."[372] This is the first time that members of the Court have described post-9/11 treatment in this way.

The same four justices agreed with almost all of Justice Breyer's opinion in Part II of the plurality opinion. This part was the bulk of the opinion and defined the parameters of the state secrets privilege. The opinion cited to both the Supreme Court's and the circuit courts' prior opinions and cited extensively to the language in *Reynolds*.[373] Breyer

371. *Zubaydah*, 595 U.S. at 200 (citing President Barack Obama, Press Conference (Aug. 1, 2014), https://obamawhitehouse.archives.gov/the-press-office/2014/08/01/press-conference-president [https://perma.cc/CRX4-59FM]).

372. The Justices were Barrett, Gorsuch, Sotomayor, and Kagan. Transcript of Oral Argument at 16, 30, 39, 41, 43, 46-50, 56–57, 60, and 62, *Zubaydah*, 595 U.S. 195 (No. 20-827).

373. *Zubaydah*, 595 U.S. at 204–206.

indicated that the Court was deciding a very "narrow evidentiary dispute" to determine whether the specific language of the discovery requests asks for information that falls under the state secrets privilege.[374] In actuality, it was much more.

The *Zubaydah* case had a unique procedural history. Abu Zubaydah was—and still is—being held as a "law-of-war detainee."[375] This is a status under the Geneva Convention for Prisoners that dictates treatment of the following: those who are members of armed forces, organized militias, and participate in hostilities, perform a continuous combat function for an organized armed group, or otherwise pose a security risk or threat.[376]

Abu Zubaydah had not been charged with a crime, had not been recommended for transfer, and had not been adjudicated in a military commissions system.[377] Guantánamo detainees such as Abu Zubaydah have limited legal rights. It is unclear whether they have due process rights.[378] As of the time of publication, a case is pending for rehearing in the Court of Appeals for the D.C. Circuit on this issue.[379] Initially, then-Defense Secretary Donald Rumsfeld claimed that Guantánamo detainees did not have the protections of the Geneva Convention, and the government claimed they had no right to a writ of habeas corpus.[380] Prior to the *Zubaydah* case, the

374. *Id.* at 206.

375. *The Guantanamo Docket*, N.Y. TIMES (last updated Feb. 2, 2023), https://www.nytimes.com/interactive/2021/us/guantanamo-bay-detainees.html [https://perma.cc/Z2TP-WA7J].

376. Geneva Convention Relative to the Treatment of Prisoners of War art. 4, Aug. 12, 1949, 6 U.S.T. 3316, 3320, 75 U.N.T.S. 135, 138 (entered into force Oct. 21, 1950); Chris Jenks & Eric Talbot Jensen, *Indefinite Detention Under the Laws of War*, 22 STAN. L. & POL'Y REV. 41, 54 (2011).

377. *The Guantanamo Docket*, *supra* note 375; Scott Tong & Serena McMahon, *New Documentary 'The Forever Prisoner' Details Treatment of Terror Suspect Abu Zubaydah*, WBUR HERE AND NOW (Dec. 6, 2021), https://www.wbur.org/hereandnow/2021/12/06/forever-prisoner-hbo-max [https://perma.cc/95PC-NBSR].

378. The Court of Appeals for the District of Columbia initially ruled that detainees do not have due process rights. Al Hela v. Trump, 972 F.3d 120, 150 (D.C. Cir. 2020). Then that court granted the detainee's petition for a rehearing en banc. Al-Hela v. Biden, 2021 WL 6753656, at *1 (D.C. Cir. Apr. 23, 2021).

379. Amanda Robert, *ABA Files Amicus Brief in Guantanamo Detainee's Case*, ABA JOURNAL (July 6, 2021), https://www.abajournal.com/news/article/aba-files-amicus-brief-in-al-hela-v.-biden [https://perma.cc/329H-RJGQ].

380. Erin Chlopak, *Dealing with the Detainees at Guantanamo Bay: Humanitarian and Human Rights Obligations under the Geneva Conventions*, 9 HUM. RTS. BRIEF, no. 3, 2002, at 6; LISA HAJJAR, THE WAR IN COURT: INSIDE THE LONG FIGHT AGAINST TORTURE 123 (2022); Renée De Nevers, *The Geneva Conventions and New Wars*, 121 POL. SCI. Q. 369 (2006); JOSEPH MARGULIES, GUANTANAMO AND THE ABUSE OF PRESIDENTIAL POWER 8 (2006).

U.S. Supreme Court ruled that Guantánamo detainees do in fact have a right to habeas corpus.[381]

Abu Zubaydah and other detainees filed a petition for a writ of habeas corpus in 2008.[382] That case is still pending due to inaction by the trial judge. Due to this delay, his lawyers took the unusual step of submitting a "Notice of Filing Motion to Recuse Judge Roberts for Nonfeasance, Including Protracted Failure to Rule on More than a Dozen Fully Briefed Motions Filed by a Man Imprisoned without Charge for Nearly Thirteen Years."[383] The motion to recuse was not ruled upon for over a year, when it was rendered moot when the case was reassigned to Judge Emmet G. Sullivan in 2016.[384] Additionally, Abu Zubaydah's attorneys sought a writ of mandamus in 2019 in the D.C. Circuit Court to force the District Court Judge to act.[385] The motion was denied.[386] During oral argument on *Zubaydah*, the Justices were clearly unaware of the difficulty with his habeas petition. The following are comments made by two of the Justices:

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381. Rasul v. Bush, 542 U.S. 466, 483–84 (2004); Boumediene v. Bush, 553 U.S. 723, 771 (2008); *see also* Jenks & Jensen, *supra* note 376 at 49–50 ("The same day as *Hamdi*, the Court issued its ruling in *Rasul v. Bush*, establishing that the federal habeas corpus statute provides U.S. federal courts jurisdiction over challenges by foreign nationals detained at Guantanamo.").

382. Raymond Bonner, *A Guantanamo Detainee's Case Has Been Languishing Without Action Since 2008. The Supreme Court Wants to Know Why.*, PROPUBLICA (Oct. 7, 2021), https://www.propublica.org/article/a-guantanamo-detainees-case-has-been-languishing-without-action-since-2008-the-supreme-court-wants-to-know-why [https://perma.cc/CY2X-MLJX]; William J. Aceves, United States v. George Tenet*: A Federal Indictment for Torture*, 48 N.Y.U. J. INT'L L. & POL. 1, 64 (2015).

383. Notice of Filing Motion to Recuse Judge Roberts for Nonfeasance, Including Protracted Failure to Rule on More than a Dozen Fully Briefed Motions Filed by a Man Imprisoned without Charge for Nearly Thirteen Years, Husayn v. Austin, No. 08-cv-01360 (D.D.C. filed Feb. 24, 2015), ECF No. 311. This document was filed with the Court Security Officer who reviews them for any classified material. *See also* Notice, Husayn v. Austin, No. 08-vc-01360 (D.D.C. filed Oct. 5, 2018), ECF No. 526 (alerting the Court that "all pending motions are fully briefed and await action by the Court"); Bonner, *supra* note 382 (noting that Zubaydah's habeas case had "languished without action for more than 13 years").

384. Petition to United Nations Working Group on Arbitrary Detention, *supra* note 355, at 26.

385. Bonner, *supra* note 382; *see also* Human Rights Council Working Group on Arbitrary Detention, A/HRC/WGAD/2022/66, ¶ 40, https://www.ohchr.org/sites/default/files/documents/issues/detention-wg/opinions/session95/A-HRC-WGAD-2022-66-Advance-Edited-Version.pdf [https://perma.cc/XW4Z-PRW5] ("A petition for a writ of mandamus in the Court of Appeals for the District of Columbia Circuit seeking an order to attend to the case was rejected").

386. Husayn v. Austin, No. 08-cv-01360, slip op. at 1 (D.D.C. Nov. 6, 2019), ECF No. 538.

> Justice Breyer: So—so what's the—why is he there?
> Mr. Klein [counsel for Abu Zubaydah]: That's a question to put to the government. We don't know the answer to that.
> Justice Breyer: I mean, have you filed a habeas or something to get him out?
> Mr. Klein: There's been a habeas proceeding pending in D.C. for the last 14 years. There's been —
> Justice Breyer: Well, how —
> Mr. Klein:—there's been no action.
> Justice Breyer: Don't they decide it? They don't decide it?
> Mr. Klein: I'm sorry?
> Justice Breyer: I mean, you just let it sit there? All right.
> Mr. Klein: No.[387]
>
> ——
>
> Justice Breyer: . . . Look, I don't understand why he's still there after 14 years. . . .
> Mr. Fletcher [counsel for the United States]: So the—because the detainees at Guantanamo are all subject to a regime, a protective order in their habeas litigation —.[388]

Unable to procure any relief in the United States, Abu Zubaydah's counsel looked to Europe. He filed a criminal complaint in Poland to hold Polish officials accountable for his torture.[389] The investigation closed with no charges.[390] Next, he filed applications in the European Court of Human Rights (ECHR) against both Lithuania and Poland.[391] The ECHR determined that both the member states violated the Convention for the Protection of Human Rights and Fundamental Freedoms and awarded damages to Abu Zubaydah.[392] It was the Polish prosecutorial case that eventually made its way into the *Zubaydah* opinion. The ECHR found beyond a reasonable doubt

387. Transcript of Oral Argument at 55–56, United States v. Zubaydah, 595 U.S. 195 (2022) (No. 20-827).

388. *Id*. at 72–73.

389. Husayn v. Mitchell, 938 F.3d 1123, 1126 (9th Cir. 2019), *rev'd and remanded sub nom.* United States v. Zubaydah, 595 U.S. 195 (2022).

390. *Id.*

391. Case of Abu Zubaydah v. Lithuania, App. No. 46454/11 (Eur. Ct. H.R. May 31, 2018); Case of Abu Zubaydah v. Poland, App. No. 7511/13 (Eur. Ct. H.R. Feb. 16, 2015).

392. Case of Abu Zubaydah v. Lithuania, App. No. 46454/11, 295–96 (Eur. Ct. H.R. May 31, 2018); Case of Abu Zubaydah v. Poland, App. No. 7511/13, 212–13 (Eur. Ct. H.R. Feb. 16, 2015).

that *Zubaydah* was tortured in Poland.[393] It also found that the previous investigation that Poland conducted was deficient.[394]

After the ECHR findings, the Polish prosecutors reopened their investigation of the Abu Zubaydah case.[395] It asked the U.S. government for a second time under the Mutual Legal Assistance Treaty for information on Abu Zubaydah.[396] The United States again denied the request.[397] Piotr Kosmaty, the spokesman for the Polish prosecutor, reported that the United States ignored Poland's request for documents to aid its investigation.[398] Poland later invited Abu Zubaydah's lawyers to submit any evidence they could.[399] That in turn led to the discovery request that made its way to the U.S. Supreme Court.[400]

In the U.S. District Court, Judge Quackenbush had granted Abu Zubaydah's application for discovery.[401] The United States intervened in the action, attaching a declaration from then-CIA Director Pompeo indicating that disclosure of the information would harm national security, and Judge

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393. Elizabeth Goitein, *The State Secrets Sidestep:* Zubaydah *and* Fazaga *Offer Little Guidance on Core Questions of Accountability*, 2021 CATO SUP. CT. REV. 193, 206 (2021–2022).

394. Case of Abu Zubaydah v. Poland, App. No. 7511/13, 187 (Eur. Ct. H.R. Feb. 16, 2015).

395. United States v. Zubaydah, 595 U.S. 195, 202 (2022).

396. Treaty Between the United States of America and the Government of the Republic of Poland on Mutual Legal Assistance in Criminal Matters, Pol.-U.S., July 10, 1996, 99 U.S.T. 917.1. "The United States denied each of the additional requests and informed the Polish prosecutors that it would not entertain any further [MLAT requests] concerning alleged CIA detention spots for persons suspected of terrorist activities," according to the government's brief in *Zubaydah*. Brief for the United States at 8–9, *Zubaydah*, 595 U.S. 195 (2022) (No. 20-827) (alteration in original) (internal quotation marks omitted). "An attorney in Krakow's regional prosecutor's office thereafter invited [Abu Zubaydah's Polish counsel] to submit evidence to aid the investigation . . . ." *Id.* (alteration in original) (internal quotation marks omitted).

397. Christian Lowe & Wojciech Zurawski, *Poland Says Washington Stonewalling CIA Jail Investigation*, REUTERS (June 12, 2015), https://www.reuters.com/article/usa-cia-torture-poland/poland-says-washington-stonewalling-cia-jail-investigation-idINKBN0OS1MK20150612 [https://perma.cc/NJ4V-G4VJ]; *Zubaydah*, 595 U.S. at 202.

398. Dominic Yobbi, *Poland Official: U.S. Hindering Investigation into Secret CIA Prison*, JURIST (June 14, 2015), https://www.jurist.org/news/2015/06/us-hindering-polish-investigation-into-secret-cia-prison/ [https://perma.cc/N6F3-3Y5S].

399. Raymond Bonner, *Will the United States Officially Acknowledge That It Had a Secret Torture Site in Poland*, PROPUBLICA (Oct. 1, 2021), https://www.propublica.org/article/will-the-united-states-officially-acknowledge-that-it-had-a-secret-torture-site-in-poland [https://perma.cc/SY3S-AJFD].

400. *Zubaydah,* 595 U.S. at 202; Alana Mattei, *Privilege in Peril:* U.S. v. Zubaydah *and the State Secrets Privilege*, 17 DUKE J. CONST. L. & PUB. POL'Y 195, 197 (2022).

401. *In re* Application of Zayn Al-Abidin Muhammad Husayn (Abu Zubaydah), No. 17-cv-00171 (E.D. Wash. Sept. 7, 2017) (order granting application for discovery).

Quackenbush granted its motion and quashed the subpoena.[402] The Ninth Circuit Court of Appeals reversed, with one Judge dissenting.[403]

Each of the five opinions in the *Zubaydah* case at the Supreme Court relied on *Reynolds*. Given the wide-ranging language of *Reynolds*, it is no surprise. The case requires the above chart to follow all the opinions. In the plurality opinion, the Court expressed its disagreement with Justice Gorsuch's dissent where he indicated that the plurality opinion put the burden on Abu Zubaydah to *disprove* the government's assertion of harm.[404] Although the plurality disputed that, it went on to indicate that the government met its burden that the privilege applied due to Pompeo's declaration.[405] The plurality also signaled its disagreement with Justice Thomas' statement in his concurrence that the Court need not consider the government justifications because Abu Zubaydah had not indicated his need for the information.[406] Immediately after indicating the disagreements, the plurality stated the following three-part test:

> 1. The government must formally invoke the state secrets privilege.
> 2. The court must "determine whether the circumstances are appropriate for the claim of privilege."
> 3. The court must then turn to the issue of necessity.[407]

In reality, the plurality stopped its analysis at step one above and stated that *Reynolds* contemplated that a "basis for a claim of privilege could prevail without further examination by the court of the ostensibly privileged evidence."[408] Although this notion was based on some of the wording of *Reynolds*,[409] its analysis stopped there by concluding that a

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402. *Id.*; *In re* Application of Zayn Al-Abidin Muhammad Husayn (Abu Zubaydah), No. 17-cv-00171 (E.D. Wash. Feb. 21, 2018) (order re: motion to quash and motion to intervene).

403. Husayn v. Mitchell, 938 F. 3d 1123, 1138 (9th Cir. 2019).

404. *Zubaydah*, 595 U.S. at 209; *Id.* at 259 (Gorsuch, J., dissenting) ("Even the majority seems uncomfortable . . . . The best [it] can say is this: The location of a CIA detention site . . . qualifies as a 'state secret' because . . . 'nothing in the evidentiary record . . . casts doubt' . . . that national security harms could follow from acknowledging its existence. . . . [T]his effectively reverses the burden of proof.").

405. *Id.* at 209.

406. *Id.*

407. *Id*. at 209–210 (quoting United States v. Reynolds, 345 U.S. 1, 8 (1953)).

408. *Id.* at 209.

409. In *Reynolds*, the Court wrote that "[i]n each case, the showing of necessity which is made will determine how far the court should probe in satisfying itself that the occasion for invoking the privilege is appropriate." It further stated that where such a showing is strong, "the claim of privilege should not be lightly accepted, but even the most compelling necessity cannot overcome the claim of privilege if the court is

declaration from the government is sufficient. In Justice Gorsuch's dissent, he protested that now "[a] bare expression of national security concern becomes reason enough to deny the ancient right to every man's evidence."[410] His conclusion seems correct because a court could never accurately "determine whether the circumstances are appropriate for the claim of privilege" if it relies entirely on the declaration of government officials.[411]

To be fair, the Supreme Court in *Reynolds* did speak of a situation in which courts should not exercise judicial review.[412] It is notable that the Court took judicial notice in the very next paragraph in *Reynolds* that "this is a time of vigorous preparation for national defense."[413] On the other hand, the *Reynolds* Court also cautioned against the abdication of judicial review to the executive branch.[414] In truth, the growth of state secrets was likely unanticipated by the Court in 1953. The first time that regulations to classify information were established was in 1951 by executive order of then-President Truman, just two years before the *Reynolds* opinion.[415] No doubt the multitude of outright dismissals could not have been predicted either. It was the combination of *Reynolds* with *Totten* that has led to wholesale dismissal of cases.

The Founders believed strongly in checks and balances, but it appears that in the area of state secrets, this concept is now only a distant memory.[416] In *Zubaydah,* the results were taken to the extreme because it

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ultimately satisfied that military secrets are at stake." United States v. Reynolds*,* 345 U.S. 1, 11 (1953).

410*.* *Zubaydah*, 595 U.S. at 259 (Gorsuch, J., dissenting).

411*.* *Reynolds*, 345 U.S. at 8.

412. The Court in *Reynolds* wrote that "[i]t may be possible to satisfy the court from all of the circumstances of the case, that there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged" and that, in such an instance, "the occasion for the privilege is appropriate, and the court should not jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence, even by the judge alone, in chambers." *Id.* at 10.

413*.* *Id.*

414*.* *Id.* at 9–10.

415. Exec. Order No. 10290, 16 Fed. Reg. 9795 (Sept. 27, 1951), *revoked by* Exec. Order No. 10501, 18 Fed. Reg. 1749 (Nov. 5, 1953). There were earlier classification orders, such as the one that kept the Manhattan Project a secret. Exec. Order No. 8807, 6 Fed. Reg. 3207 (July 2, 1941). The current standards are at Exec. Order No. 13526, 3 C.F.R. 298 (2010), *as amended by* 75 Fed. Reg. 1013 (Jan. 8, 2010).

416*.* *See* Norman Abrams, *Developments in US Anti-terrorism Law: Checks and Balances Undermined*, 4 J. OF INT'L CRIM. JUST. 1117, 1118 (2006) (arguing that post-9/11 anti-terrorism policy "resulted in an undermining of the check that each branch of government provides on the actions of the other branches").

was common knowledge that the torture took place in Poland. There, one of the proposed psychologist deponents wrote a book detailing their activities, and both the psychologists were deposed in another case involving detainees other than Abu Zubaydah.[417] As was pointed out by Justice Gorsuch, Polish prosecutors were "seeking to unravel that part of the story and determine whether criminal charges [were] appropriate in that country."[418]

Mitchell and Jessen settled a separate case brought by three detainees, one of whom died in detention of hypothermia.[419] Inexplicably, the U.S. government did not claim the state secrets privilege in that case.[420] The district court judge was the same as in the Abu Zubaydah case, who initially ruled that Abu Zubaydah was entitled to depose the psychologists, but who later reversed his decision and dismissed the case once the government claimed the state secrets privilege.[421] The American Psychological Association (APA) issued an editorial in which it stated: "It is a clear violation of professional ethics for a psychologist to have played a role in the torture of CIA detainees."[422] According to the APA, Mitchell and Jessen were not members of the APA, and the organization indicated it did not have jurisdiction to investigate their activities.[423] Mitchell and Jessen

417. For the book written by one of the proposed psychologist deponents, see JAMES E. MITCHELL WITH BILL HARLOW, ENHANCED INTERROGATION (2016); *see also* Sheri Fink & James Risen, *Lawsuit Aims to Hold 2 Contractors Accountable for C.I.A. Torture*, N.Y. TIMES (Nov. 27, 2016), https://www.nytimes.com/2016/11/27/us/lawsuit-aims-to-hold-2-contractors-accountable-for-cia-torture.html (on file with the *Columbia Human Rights Law Review*) (describing Mitchell's book and the other lawsuit). The detainees were Gul Rahman (deceased), Suleiman Salim, and Mohamed Ben Soud. Fink & Risen, *supra* note 364.

418. United States v. Zubaydah, 595 U.S. 195, 242 (2022) (Gorsuch, J., dissenting).

419. Jonathan Glover, *In What ACLU Calls "Historic Victory," Settlement Reached in CIA Interrogation Suit of 2 Former Spokane Psychologists*, SPOKESMAN-REV. (Aug. 17, 2017), https://www.spokesman.com/stories/2017/aug/17/alert-settlement-reach-in-mitchell-jessen-interrog/ (on file with the *Columbia Human Rights Law Review*).

420. *Id.*

421. *See* Eric M. Johnson, *U.S. Judge Allows CIA Interrogation Lawsuit to Proceed*, REUTERS (Apr. 22, 2016), https://www.reuters.com/article/usa-cia-psychologists/u-s-judge-allows-cia-interrogation-lawsuit-to-proceed-idUSL2N17P0GW [https://perma.cc/TMP2-XCAF]; Husayn v. Mitchell, 938 F.3d 1123 (9th Cir. 2019), *rev'd and remanded sub nom.* United States v. Zubaydah, 142 S. Ct. 959 (2022).

422. James H. Bray, *Saying it Again: Psychologists May Never Participate in Torture*, AM. PSYCH. ASS'N (2009), https://www.apa.org/news/press/op-eds/bray-interrogations [https://perma.cc/9SD5-TKTZ] (arguing that psychologists participating in the torture of CIA detainees is a violation of professional ethics).

423. *Id. But see* Roy Eidelson, *Psychologists are Facing Consequences for Helping With Torture. It's Not Enough*, WASH. POST (Oct. 13, 2017), https://www.washingtonpost.com/outlook/psychologists-are-facing-consequences-for-helping-with-torture-its-not-enough/2017/10/13/2756b734-ad14-11e7-9e58-

have never faced serious consequences resulting from their torture techniques.[424] The pair settled a case brought by the ACLU on behalf of two detainees and the family of one detainee who died of exposure.[425] Because Abu Zubaydah's case was dismissed, he was not able to depose these psychologists. However, on September 18, 2023, Abu Zubaydah filed a tort action against the psychologists.[426] He brought four causes of action: torture, nonconsensual medical and scientific experimentation, war crimes, and arbitrary detention.[427] As it currently stands, if the government asserts the state secrets privilege, a court will look no further and will rubber stamp the assertion and dismiss the case.

II. THE END OF THE ROAD FOR LITIGANTS

There has been a "drastic increase" in the government's use of the state secrets privilege since 9/11.[428] Between the *Reynolds* decision in 1953 and the election of Jimmy Carter in 1976, there were four reported cases in which the government invoked the privilege.[429] Contrast that with 51 reported cases between 1977 and 2001.[430] Between 2001 and 2009, due to the "War on Terror," the number of cases increased to over 100.[431] The threat of even raising the privilege may discourage litigants from pursuing relief from the courts because invocation of the privilege has in many instances proven deadly to a lawsuit.[432]

Although, in 2007, the Ninth Circuit emphasized that "simply saying 'military secret,' 'national security,' or 'terrorist threat' or invoking an ethereal fear that disclosure will threaten our nation is insufficient," the opposite certainly seems to be the case post-*Zubaydah*.[433] It was the Ninth

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e6288544af98_story.html (on file with the *Columbia Human Rights Law Review*) (stating that Mitchell was an APA member).

424. Eidelson, *supra* note 423.

425. Chappell, *supra* note 368. Abu Zubaydah was not one of the detainees involved in that lawsuit. *Id.* According to the newspaper report, the federal government—not the psychologists—paid the damages. *Id.*

426. Complaint and Demand for Jury Trial, Zayn v. Mitchell, No. 2:23-cv-00270 (E.D. Wash. Sep 18, 2023).

427. *Id.*

428. Akremi, *supra* note 263, at 977; Laura K. Donohue, *The Shadow of State Secrets*, 159 U. PA. L. REV. 77, 184 (2010); Andrew Burtless, *Limiting a Limitless Defense: A Case for Reviving the State Secrets Protection Act*, 44 J. MARSHALL L. REV. 1003, 1015 (2011).

429. Weaver & Pallitto, *supra* note 213, at 101.

430. *Id.*

431. Donohue, *supra* note 428, at 87.

432. *Id.* at 197 (describing the state secrets privilege as a "tactical advantage").

433. Al-Haramain Islamic Found., Inc. v. Bush, 507 F.3d 1190, 1203 (9th Cir. 2007).

Circuit's decision, of course, that was reversed in *Zubaydah*.[434] After *Zubaydah,* a well-drafted affidavit from the government is all it will take to satisfy the courts of any national danger, absent *in camera* review.

The Public Interest Declassification Board, which was established by Congress in 2000, found there is "widespread, bipartisan recognition that the Government classifies too much information for too long, at great and unnecessary cost to taxpayers."[435] The number of classified documents has also skyrocketed.[436] In 2014, there were 50,000 original classification decisions and "75.5 million *derivative* classification decisions, which could have been made by any of the 4.5 million government employees who have access to secrets."[437] Derivative classification means that classified information that is incorporated or paraphrased in other documents is also classified.[438] In 2023, the number of original classified documents had increased to 50 million documents per year.[439] Courts are not bound by the classification system provided by the executive branch.[440] But they must give deference to the "reasoned and detailed" explanations given for classification decisions.[441] The D.C. Circuit has indicated that courts should not "second-guess" reasonable decisions of agencies "due to the mosaic-like nature of intelligence gathering."[442] In contrast, the current Director of National Intelligence, Avril Haines, indicated that the over-classification of documents "undermines critical democratic objectives, such as increasing transparency to promote an informed citizenry and greater accountability."[443] As seen in *Zubaydah,* classified documents may form the

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434. United States v. Zubaydah, 595 U.S. 195, 214 (2022)

435. PUB. INT. DECLASSIFICATION BD., A VISION FOR THE DIGITAL AGE: MODERNIZATION OF THE U.S. NATIONAL SECURITY CLASSIFICATION SYSTEM 1 (May 2020), https://www.archives.gov/files/declassification/pidb/recommendations/pidb-vision-for-digital-age-may-2020.pdf [https://perma.cc/EG4M-DMTP]; Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. 108-458, 118 Stat. 3640 (2004).

436. Fuchs, *supra* note 318, at 133.

437. Sam Lebovic, *The Surprisingly Short History of American Secrecy*, PERSPECTIVES ON HISTORY (July 5, 2016), https://www.historians.org/research-and-publications/perspectives-on-history/summer-2016/the-surprisingly-short-history-of-american-secrecy [https://perma.cc/AX6A-NQZK] (emphasis added).

438. PEGGY USHMAN, INFO. SEC. OVERSIGHT OFF., ORIGINAL VS. DERIVATIVE CLASSIFICATION 2 https://www.archives.gov/files/isoo/training/original-vs-derivative-classification.pdf [https://perma.cc/LL4A-VKV3] (referring to Exec. Order No. 13526, 3 C.F.R. 298 (2010)).

439. German Lopez, *Too Many Top Secrets*, N.Y. TIMES, (Jan. 27, 2023), https://www.nytimes.com/2023/01/27/briefing/classified-documents-government.html [https://perma.cc/8QJP-32ZP].

440. McGehee v. Casey, 718 F.2d 1137, 1149 (D.C. Cir. 1983).

441. *Id.* at 1148.

442. *Id.* at 1149.

443. Courtney Bublé, *The National Intelligence Director: Over-Classification Undermines Democracy*, GOV'T EXEC. (Jan. 30, 2023),

basis of the government's claim of the privilege and serve to defeat an individual's claim to uphold their rights.

A. Case Dismissed

Abu Zubaydah's case was dismissed, although three justices disagreed with that particular holding.[444] The government has used the state secrets privilege to dismiss cases over the extraordinary rendition program.[445] An outright dismissal of a case is a draconian result, yet it has happened frequently, particularly after the declaration of the "War on Terror."[446] Dismissal deprives parties of justice; it should happen only as a last resort. These cases are never heard, and the facts never see the light of day. That result shields the government from responsibility for wrongdoing.

During the Bush Administration, the government sought dismissals by an increase of 90 percent.[447] As detailed in one scholarly article, "in virtually every case that pits the privilege against citizens' constitutional claims, it is the privilege that wins the encounter."[448] The state secrets

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https://www.govexec.com/management/2023/01/national-intelligence-director-over-classification-undermines-democracy/382346/ [https://perma.cc/4CHK-65MX].

444. Justices Kagan, Gorsuch, and Sotomayor believed the case should go forward. United States v. Zubaydah, 595 U.S. 195, 234 (Kagan, J., concurring in part and dissenting in part); *Id.* at 237 (Gorsuch, J., and Sotomayor, J., dissenting).

445. Benjamin Bernstein, *Over Before it Even Began:* Mohamed v. Jeppesen Dataplan *and the Use of the State Secrets Privilege in Extraordinary Rendition Cases*, 34 FORDHAM INT'L L.J. 1400, 1410–1413 (2011). Extraordinary rendition is "[t]he practice of 'outsourcing' prisoners to foreign countries for detention, interrogation, and sometimes trial." Leila Nadya Sadat, *Ghost Prisoners and Black Sites: Extraordinary Rendition Under International Law*, 37 CASE W. RES. J. INT'L L. 309, 315 (2006).

446. *See In re* United States, 872 F.2d 472, 477 (D.C. Cir. 1989) (collecting cases in which the U.S. Court of Appeals for the District of Columbia Circuit affirmed dismissals on state secrets grounds); Chesney, *supra* note 54 at 1269–70 n.124 (collecting cases); Margaret Ziegler, *Pay No Attention to the Man Behind the Curtain: The Government's Increased Use of the State Secrets Privilege to Conceal Wrongdoing*, 23 BERKELEY TECH. L. J. 691, 709 (2008) (discussing the government's increasingly frequent—and increasingly expansive—invocation of the privilege); Erin M. Stilp, *The Military and State-Secrets Privilege: The Quietly Expanding Power*, 55 CATH. U. L. REV. 831, 839–41 (2006) (detailing the rise in the number of state secrets privilege cases and the percentage of those cases that are outright dismissed); Timothy Bazzle, *Shutting the Courthouse Doors: Invoking the State Secrets Privilege to Thwart Judicial Review in the Age of Terror*, 23 GEO. MASON U. C.R. L.J. 29, 29 (2012) ("The war on terror has led to an increased use of the state secrets privilege by the Executive Branch . . . .").

447. 154 CONG. REC. S198–201 (2008) (statement of Sen. Edward Kennedy).

448. Weaver & Pallitto, *supra* note 213, at 86.

evidentiary privilege has evolved into a motion to dismiss.[449] In the *Zubaydah* oral argument, Justice Kagan stated "I mean, maybe we should rename it or something. It's not a state secrets privilege anymore."[450] In reality, the cases brought by detainees are not privilege cases; they have become justiciability cases.[451] This leads to overprotection of information and impedes the search for truth. Dismissal of cases is now routine, which is a rarity in cases that raise other privileges. As observed by Professor Imwinklereid:

> [T]he view that has emerged among the lower courts is that, after sustaining a *Reynolds* claim, a court ought to end the litigation when the court is convinced that the litigation will pose an "intolerable," "unacceptable," "unjustifiable," "reasonable," or "significant" possibility that there will be an accidental or inadvertent revelation of privileged information.[452]

Courts are quite capable of conducting *in camera* review in all cases. In other types of cases, judges have been trusted with parsing through valuable company data—trade secrets—and personal medical information—psychotherapist privilege. In these cases, confidential company information and very sensitive personal information is at stake. We trust courts to keep this valuable information confidential. Due to the absence of meaningful review, state secrets cases are now dismissed.[453]

Aside from the privilege, judges have other mechanisms that they can use to protect classified defense information throughout the course of Guantánamo habeas litigation and which seek to "strike a careful balance between protecting classified information and ensuring that petitioners have enough information to challenge their detention."[454] As one judge

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449. Beth George, *An Administrative Law Approach to Reforming the State Secrets Privilege*, 84 N.Y.U. L. Rev. 1691, 1697 (2009).

450. Transcript of Oral Argument at 25, United States v. Zubaydah, 595 U.S. 195 (2022) (No. 20-827).

451. "Justiciable refers to a matter which is capable of being decided by a court. Justiciable means that a case is suitable for courts to hear and decide on the merits. On the other hand, if a case is not justiciable, the court must dismiss it." Legal Information Institute, *Justiciable*, CORNELL LAW SCHOOL, https://www.law.cornell.edu/wex/justiciable [https://perma.cc/23BQ-AHS4].

452. Edward J. Imwinkelried, *The Effect of the Successful Assertion of the State Secrets Privilege in a Civil Lawsuit in Which the Government is Not a Party: When, If Ever, Should the Defendant Shoulder the Burden of the Government's Successful Privilege Claim?*, 16 WYO. L. REV. 1, 12 (2016).

453. *In re* Sealed Case, 494 F.3d 139, 150 (D.C. Cir. 2007).

454. HUM. RTS. FIRST & CONST. PROJECT, HABEAS WORKS: FEDERAL COURTS' PROVEN CAPACITY TO HANDLE GUANTÁNAMO CASES 17 (2010); *see In re* Guantanamo Bay Detainee Litig., 2008 WL 4858241 (D.D.C. Nov. 6, 2008) (issuing a Case Management Order to

described it, the courts have a "constitutionally ordained role" to decide in a variety of cases whether executive claims of secrecy are valid.[455]

In rare cases in the past, courts stated that the state secrets privilege could "not be used to shield any material not strictly necessary to prevent injury to national security."[456] A court was to "disentangle" sensitive from non-sensitive information through *in camera* review whenever possible.[457] In the case of intermingling, privileged portions could be excised.[458] Unfortunately, those days have passed. In *Zubaydah*, the Supreme Court failed to allow an *in camera* review in the most egregious of circumstances. It may be that the Court is too removed from reality. In the oral argument, it was clear that the Justices did not understand Abu Zubaydah's tragic position. The following colloquy occurred:

> Justice Breyer: If it's exactly, why don't you ask Mr. Zubaydah? Why doesn't he testify? Why doesn't Mr. Zubaydah—he was there. Why doesn't he say this is what happened? And—and they won't deny it, I mean, I don't think, if he's telling the truth.
>
> Mr. Klein [counsel for Abu Zubaydah]: You're talking about Mitchell or Jessen when you say —
>
> Justice Breyer: No, I'm not. I'm saying the person who was there —
>
> Mr. Klein: Yeah.
>
> Justice Breyer:—was—was—I don't know if he's your client. Isn't he your client? His name is on this thing.
>
> Mr. Klein: Abu Zubaydah can't —
>
> Justice Breyer: Yes.
>
> Mr. Klein: Abu Zubaydah cannot testify.
>
> Justice Breyer: Why not?
>
> Mr. Klein: He's—he's—because he is being held incommunicado. He has been held in Guantanamo incommunicado.[459]

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govern several detainee cases); Halpern v. United States, 258 F.2d 36, 43 (2d Cir. 1958) (contemplating a trial in camera in a state secrets privilege case).

455. Robert D. Sack, Judge, U.S. Court of Appeals for the Second Circuit, Remarks at the Philip D. Reed Lecture Series: The State Secrets Privilege and Access to Justice: What is the Proper Balance? (Mar. 23, 2011), *in* 80 FORDHAM L. REV. 1, 8 (2011).

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

457. *Id.*

458. *In re* Subpoena to Nixon, 360 F. Supp. 1, 14 (D.D.C. 1973).

459. What Mr. Klein meant by this is that Abu Zubaydah is prohibited from communicating with anyone except his lawyers. CIA interrogators reportedly want Zubaydah to "'remain in isolation and incommunicado for the remainder of his life.'" *Incommunicado Forever: Gitmo Detainee's Case Stalled for 2,477 Days and Counting*, PROPUBLICA (May 12, 2015), https://www.propublica.org/article/guantanamo-detainee-

> Justice Breyer: Why? Why? . . . [460]
>
> ———
>
> Justice Gorsuch: Mr. Fletcher, I don't want to interrupt you later, so I'm just going to —
>
> Mr. Fletcher [counsel for the United States]: Please.
>
> Justice Gorsuch:—do it up-front. Why not make the witness available? What is the government's objection to the witness testifying to his own treatment and not requiring any admission from the government of any kind?
>
> Mr. Fletcher: . . . He is not being held incommunicado. He is subject to the same restrictions that apply to other similar detainees at Guantanamo. His communications are subject to security screening for classified information and other security risks. But he's able to communicate with his lawyers about his case proceeding.
>
> Justice Gorsuch: That—that's not really answering my question, I don't think, because I understand there are all sorts of protocols that may or may not, in the government's view, prohibit him from testifying. But I'm asking much more directly, will the government make the Petitioner available to testify on this subject?
>
> Mr. Fletcher: We would allow him to communicate about this subject under the same terms as on anything else.
>
> Justice Breyer: The same terms? Look, I don't understand why he's still there after 14 years. It's a little hard to, given *Hamdi*, but assuming that isn't in this case, why not do just what Justice Gorsuch says? Just say, hey, you want to ask what happened, ask him what happened? And maybe this is special.
>
> Mr. Fletcher: So the—because the detainees at Guantanamo are all subject to a regime, a protective order in their habeas litigation –
>
> Justice Gorsuch: I'm not asking—I understand there are all sorts of rules and protective orders. I'm aware of that. I'm asking much more directly, and I'd just really appreciate a straight answer to this, will the government make Petitioner available to testify as to his treatment during these dates?

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case-stalled-for-2477-days-and-counting [https://perma.cc/L2HK-53Q7]. The head of the CIA unit tasked with finding Osama Bin Laden told the interrogators that Zubaydah "'will never be placed in a situation where he has any significant contact with others and/or has the opportunity to be released,'" and "'should remain incommunicado for the remainder of his life.'" *Id.*

460. Transcript of Oral Argument at 54–55, United States v. Zubaydah, 595 U.S. 195 (2022) (No. 20-827).

> Mr. Fletcher: I cannot offer that now because that's a request that has not been made. And so we have not taken that back to the folks at DoD—
>
> Justice Gorsuch: Well, gosh—
>
> Mr. Fletcher:—who are running Guantanamo –
>
> Justice Gorsuch:—we've been—this case has been litigated for years and all the way up to the United States Supreme Court, and you haven't considered whether that's an off-ramp that—that the government could provide that would obviate the need for any of this?
>
> Mr. Fletcher: Well, Justice Gorsuch, we considered the request that was put before the district court and the Ninth Circuit under Section 1782. Our position as to all communications by Abu Zubaydah is that he can communicate subject to security screening. . . .
>
> Justice Gorsuch: Which—which takes us right back to where we are. And I—that—and—and—and it doesn't answer the question. And I guess will the government at least commit to answering, informing this Court whether it will or will not allow the Petitioner to testify as to—as to his treatment during these dates?
>
> Mr. Fletcher: If—if the Court would like a direct answer to that question, of course.
>
> Justice Gorsuch: I personally would appreciate a direct answer to that question.[461]

Clearly the Court did not understand the circumstances of Abu Zubaydah's confinement. After the oral argument, the United States submitted a letter to the Court outlining what it was willing to allow.[462] Despite Abu Zubaydah's limitations pursuant to a protective order,[463] the government agreed to allow him to send a "declaration that could be transmitted to Polish prosecutors."[464] This declaration, however, would be subject to a security review by government, which "could result in the redaction of information that could prejudice the security of the United States."[465] Abu Zubaydah submitted a letter to the Court in response.[466] Abu

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461. *Id.* at 71–76.

462. Letter from Brian H. Fletcher, Acting Solicitor General, U.S. Dep't of Just., to Scott S. Harris, Clerk of the Supreme Court of the United States (Oct. 15, 2021) https://www.supremecourt.gov/DocketPDF/20/20-827/196599/20211015172617420_Letter%2020-827.pdf [https://perma.cc/LX87-DZ8P] [hereinafter Letter to Harris].

463. *In re* Guantanamo Bay Detainee Litig., 630 F. Supp. 2d 1 (D.D.C. 2009).

464. Letter to Harris, *supra* note 462, at 1.

465. *Id.*

Zubaydah's counsel pointed out that the security review performed by the privilege review team (PRT) solicits the input of the CIA in making any decisions.[467]

Unfortunately for Abu Zubaydah, the CIA would effectively be reviewing his letter about his treatment by the CIA. His counsel attached to the letter an example of a letter written by a detainee to then-Prime Minister Tony Blair.[468] Nearly the entire letter had been redacted. Mr. Klein proposed that the Supreme Court hold the matter in abeyance and instruct the district court to supervise the preparation and review of a declaration by Abu Zubaydah.[469] The Court declined to follow that request. Abu Zubaydah's case, like those of so many other Guantánamo detainee cases, was dismissed. This dismissal is another instance of the conflation of *Totten* and *Reynolds*. The Ninth Circuit described the two as "parallel strands of the state secrets doctrine" when the two are quite different.[470] The result of this error is the outright dismissal of cases.

B. Failure to Review State Secrets Claims Leads to Abuse

As reflected above, claims of state secrets lead to the outright dismissal of cases. Prior to *Zubaydah*, courts performed an *in camera* review in only one-third of the cases presented.[471] Because only three of the nine Supreme Court justices in *Zubaydah* thought *in camera* review was appropriate, that fraction will undoubtedly decrease.[472] There is no incentive for a court to probe further once the government claims state secrets.

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466. Letter from David F. Klein, Counsel for Abu Zubaydah, to Scott S. Harris, Clerk of the Supreme Court of the United States (Oct. 25, 2021), https://www.supremecourt.gov/DocketPDF/20/20-827/199643/20211110190150508_AZ%202021.10.25%20Letter%20to%20Mr.%20Harris%204872-4094-1312%20v.1.pdf [https://perma.cc/SUX5-WSGS].

467. *Id.*

468. *Id.*

469. *Id.*

470. Mohamed v. Jeppesen Dataplan, Inc., 563 F.3d 992, 1000 (9th Cir.), *opinion amended and superseded*, 579 F.3d 943 (9th Cir. 2009), *on reh'g en banc*, 614 F.3d 1070 (9th Cir. 2010).

471. George, *supra* note 449 at 1699 (citing to Weaver & Pallitto, *supra* note 213).

472. United States v. Zubaydah, 595 U.S. 195, 212–13, 217 (2022). Justice Breyer and Chief Justice Roberts specifically found that *in camera* review was inappropriate. Justices Kavanaugh and Barrett joined that portion of the opinion. Justices Thomas and Alito believed that *in camera* review was a "last resort" and only available after "utmost deference" is applied to the Executive's assessment. *Id.* at 220.

Were it not for leaks, United States. torture of detainees in violation of the Geneva Conventions may never have been discovered.[473] In a confidential 2007 report provided to senior White House officials, the International Committee of the Red Cross (ICRC) concluded that Guantánamo detainees were tortured.[474] The report was eventually leaked to the press, and, in 2009, Mark Danner detailed its contents in an article for the *New York Review of Books*.[475] The report gave an account of visits the ICRC made with detainees in 2006.[476] Similar abuses at Abu Ghraib were uncovered due to a prior ICRC report that was leaked in 2004.[477] Journalist Jane Mayer wrote a series of articles about the rendition program and torture that were all confirmed by the Senate Select Committee on Intelligence.[478] Given the number of leaks, Judge Robert D. Sack, a judge on the Second Circuit Court of Appeals, was perhaps correct when he said the judiciary is "one of the more leak-resistant of government institutions."[479]

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473. Mark Danner, *The Red Cross Torture Report: What it Means*, N.Y. REV. OF BOOKS (Apr. 30, 2009), https://www.nybooks.com/articles/2009/04/30/the-red-cross-torture-report-what-it-means/?lp_txn_id=1478244 [https://perma.cc/KB4Q-WYK7].

474. Jonathan Adams, *Red Cross Report Says Detainees at CIA 'Black Sites' Were Tortured*, CHRISTIAN SCI. MONITOR (Mar. 16, 2009), https://www.csmonitor.com/World/terrorism-security/2009/0316/p99s01-duts.html [https://perma.cc/3E7Y-VV38]. Scott Neuman, *Red Cross: Terrorism Suspects Subjected to Torture*, NPR (Mar. 16, 2009), https://www.npr.org/2009/03/16/101943735/red-cross-terrorism-suspects-subjected-to-torture [https://perma.cc/UY7R-8H3W].

475. Mark Danner, *US Torture: Voices from the Black Sites*, N.Y. REV. OF BOOKS (Apr. 9, 2009), https://www.nybooks.com/articles/2009/04/09/us-torture-voices-from-the-black-sites/?lp_txn_id=1478276 [https://perma.cc/93M5-3MF2].

476. HAJJAR, *supra* note 380, at 223.

477. Stephanie Nebahay, *ICRC, Jurists Join Rebuke of Trump Torture Remarks, 'Black Site' Reports*, REUTERS (Jan. 26, 2017), https://www.reuters.com/article/us-usa-trump-prisons-reaction/icrc-jurists-join-rebuke-of-trump-torture-remarks-black-site-reports-idUSKBN15A21U [https://perma.cc/68X3-P9U2].

478. Joshua Rothman, *Jane Mayer's Reporting on Torture*, NEW YORKER (Dec. 13, 2014), https://www.newyorker.com/books/double-take/jane-mayers-reporting-torture (on file with the *Columbia Human Rights Law Review*).

479. Sack, *supra* note 455, at 9. It is quite interesting to the author that in his concurring opinion in *Zubaydah*, Justice Thomas stated the following: "While the Executive can control its subordinates' access to state secrets and enforce penalties if such material is mishandled, it has little control once state secrets fall into the Judiciary's hands. Disclosure to a judge, therefore, poses a very real national-security threat." United States v. Zubaydah, 595 U.S. 195, 223 (2022). It is curious that he would believe a secret is safer in the hands of an Executive Branch "subordinate" than in the hands of a judge, particularly in light of the leak of the *Dobbs* draft opinion at the U.S. Supreme Court. The U.S. Supreme Court indicated that it was unable to determine the source of the leak. Press Release, U.S. Supreme Court, Statement of the Court Concerning the Leak Investigation (Jan. 19, 2023), https://www.supremecourt.gov/publicinfo/press/Dobbs_Public_Report_January_19_2023.pdf [https://perma.cc/AY3R-H8E4].

Former Attorney General Ramsey Clark stated "[n]othing so diminishes democracy as secrecy."[480] Suggestions made by scholars to reform the privilege have been disregarded.[481] The vast majority of documents from Abu Zubaydah's habeas petition case, filed in 2008, contained extensive redactions even after being released to the public.[482] The only available information about Abu Zubaydah is found in motions filed by his attorneys, information requested by journalists, a report and findings of ICRC, and the extensive report compiled by the Senate Select Committee's investigation of the CIA activities.[483] Pleadings filed, to the extent they are made available, have produced limited information.[484] Even Abu Zubaydah's medical records have been the subject of a protracted dispute.[485] One of his attorneys wrote a detailed article that combined information from the Senate subcommittee on the CIA detention and interrogation program and Abu Zubaydah's notes and drawings of his torture experience.[486] Perhaps the most disturbing thing about the

480. Ramsey Clark, *Foreword* to U.S. DEP'T OF JUST., ATTORNEY GENERAL'S MEMORANDUM ON THE PUBLIC INFORMATION SECTION OF THE ADMINISTRATIVE PROCEDURES ACT (June 1967).

481. *See, e.g.*, Michael H. Page, *Judging Without the Facts: A Schematic for Reviewing State Secrets Privilege Claims*, 93 CORNELL L. REV. 1243, 1246 (2008) (detailing the near universal criticism of state secrets privilege); Rita Glasinov, *In Furtherance of Transparency and Litigants' Rights: Reforming the State Secrets Privilege*, 77 GEO. WASH. L. REV. 458, 481–86 (2009) (proposing statutory regulations to state secrets privilege); Amanda Frost & Justin Florence, *Reforming the State Secrets Privilege*, 3 ADVANCE 111, 124–27 (2009) (suggesting specific measures the Obama Administration should adopt); Telman, *supra* note 26 at 518–22 (describing alternative responses to dismissal when the state secrets privilege is raised).

482. *See* Memorandum of Law in Support of Motion to Intervene and Unseal by Raymond Bonner, Husayn v. Austin, No. 08-cv-01360 (D.D.C. *filed* Apr. 20, 2016), ECF No. 319 (requesting that relevant documents to the case be made public); Reply Memorandum in Support of Motion to Unseal by Raymond Bonner, Husayn v. Austin, No. 08-cv-01360 (D.D.C. *filed* Nov. 7, 2016), ECF No. 436 (complaining that many of the released documents are heavily redacted).

483. S. SELECT COM. ON INTEL., COMMITTEE STUDY OF THE CENTRAL INTELLIGENCE AGENCY'S DETENTION AND INTERROGATION PROGRAM, S. REP. NO. 113-288 (2014); MARK DENBEAUX ET AL., SETON HALL L. CTR. FOR POL'Y & RSCH., HOW AMERICA TORTURES (2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3494533 (on file with the *Columbia Human Rights Law Review*); INT'L COMM. OF THE RED CROSS, ICRC REPORT ON THE TREATMENT OF FOURTEEN "HIGH VALUE DETAINEES" IN CIA CUSTODY (Feb. 2007), https://nsarchive2.gwu.edu/torture_archive/docs/Document%2008.pdf [https://perma.cc/EDZ2-L2AF].

484. *See, e.g.*, Petitioner's Sur-Sur-Reply in his Motion Seeking Immediate Release and Repatriation, Husayn v. Austin, No. 08-cv-01360 (D.D.C. *filed* Nov. 22, 2021), ECF No. 600 (providing information about Abu Zubaydah's case).

485. *In re* Guantanamo Bay Detainee Litig., 577 F. Supp. 2d 314 (D.D.C. 2008).

486. DENBEAUX ET AL., *supra* note 483. These drawings were made available only after his attorneys' motions. *See* Respondent's Opposition to Petitioner's Motion to Order

Zubaydah case is that the government will not allow Abu Zubaydah to testify about his own torture history due to the state secrets privilege.[487] That result is tragic.

In 1995, Senator Daniel Patrick Moynihan introduced a bill to abolish the CIA, and stated that "secrecy keeps mistakes secret," and "secrecy is a disease."[488] In all likelihood, Moynihan was not serious, but CIA secrets, ineptitude, and outright lawlessness have been commonplace throughout its history. We have witnessed what an out of control executive branch might do. One need only consider the following few examples: the botched Bay of Pigs landing in 1961;[489] the Tonkin Resolution that led the United States further into the Vietnam War in 1964;[490] the illegal bombing of Cambodia in 1969–70;[491] the Iran-Contra Affair from 1985 to 1987;[492] and the claim of weapons of mass destruction that led to the Iraq war in 2003.[493] If the government is able to keep information from the public, its activities will naturally become more clandestine. Oddly enough, the Biden Administration shared its intelligence on the Russian-planned invasion of Ukraine based in part upon the United States' past intelligence failure with respect to the alleged weapons of mass destruction in Iraq.[494]

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the Director of National Intelligence to Search for Tapes and Drawings at 2, Husayn v. Austin, No. 08-cv-01360 (D.D.C. *filed* Mar. 20, 2019), ECF No. 534.

487. Letter to Harris, *supra* note 462.

488. Amy Davidson Sorkin, *Has the C.I.A. Done More Harm Than Good?*, NEW YORKER (Oct. 3, 2022), https://www.newyorker.com/magazine/2022/10/10/has-the-cia-done-more-harm-than-good (on file with the *Columbia Human Rights Law Review*).

489. *How the Bay of Pigs Invasion Began – and Failed – 60 Years On*, BBC NEWS (Apr. 23, 2021), https://www.bbc.com/news/world-us-canada-56808455 [https://perma.cc/N5Q9-5S6B].

490. *Tonkin Gulf Resolution*, NATIONAL ARCHIVES FOUNDATION, https://www.archivesfoundation.org/documents/tonkin-gulf-resolution/ [https://perma.cc/NV2Y-5H62].

491. Brian Cuddy, *Was it Legal for the U.S. to Bomb Cambodia*?, N.Y. TIMES (Dec. 12, 2017), https://www.nytimes.com/2017/12/12/opinion/america-cambodia-bomb.html (on file with the *Columbia Human Rights Law Review*).

492. *The Iran-Contra Affair*, PBS, https://www.pbs.org/wgbh/americanexperience/features/reagan-iran/ [https://perma.cc/UVG2-HEBA].

493. *20 Years Ago, the U.S. Warned of Iraq's Alleged Weapons of Mass Destruction*, NPR (Feb. 3, 2023), https://www.npr.org/transcripts/1151160567 [https://perma.cc/XH34-7WJJ].

494. Julian E. Barnes & Adam Entous, *How the U.S. Adopted a New Intelligence Playbook to Expose Russia's War Plans*, N.Y. TIMES (Feb. 23, 2023), https://www.nytimes.com/2023/02/23/us/politics/intelligence-russia-us-ukraine-china.html (on file with the *Columbia Human Rights Law Review*).

Many of the Guantánamo detainees arrested following the attacks of 9/11 were held effectively incommunicado for years.[495] In 2004, there were more than 120 cases of self-harm or suicides by detainees.[496] Finally, that year, a judge recognized that the detainees had a right to counsel.[497] Attorneys for the detainees today are bound by a protection order that severely limits their activities.[498] Almost no photographs of the detainees were public until WikiLeaks released classified pictures in 2011.[499] The detainees' lawyers were able to publicly share some portraits of their clients taken by ICRC.[500] The United Nations described Guantánamo Bay as an "ugly chapter of unrelenting human rights violations."[501] In the words of the First Baron Acton, "[p]ower tends to corrupt and absolute power corrupts absolutely."[502] The system of checks and balances is subverted if there is no effective check on the Executive. In a pretrial hearing before Col. Lanny J. Acosta, Jr., at Guantánamo Bay, a physician with expertise in torture and trauma testified about "rectal feeding" of detainees.[503] The physician described one detainee's experience as "like a violent rape, sexual

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495. Richard J. Wilson, *Defending the Detainees at Guantánamo Bay*, 12 HUM. RTS. BRIEF, no. 3, 2005, at 1.

496. Id.

497. Al Odah v. United States, 346 F. Supp. 2d 1, 5 (D.D.C. 2004).

498. *In re* Guantanamo Bay Detainee Litig., 2009 WL 50155 (D.D.C. Jan. 9, 2009), *amended in part*, 634 F. Supp. 2d 17 (D.D.C. 2009); *see* Brendan M. Driscoll, *The Guantanamo Protective Order*, 40 FORDHAM INT'L L.J. 873, 874–75 (2007) (discussing the restrictions that the protection order placed on access to and communication with Guantánamo detainees); JOSEPH MARGULIES, GUANTANAMO AND THE ABUSE OF PRESIDENTIAL POWER 25–26 (2006) (describing additional hurdles to client contact in the cases of Yaser Hamdi and José Padilla); Wilson, *supra* note 495, at 3 ("Among other impediments, it required security clearances for all counsel and staff, review of classified documents only in a secure facility located in Washington, D.C., and tight restrictions on client contact and visits at Guantánamo.").

499. Carol Rosenberg, *The Secret Pentagon Photos of the First Prisoners at Guantánamo Bay*, N.Y. TIMES (June 12, 2022), https://www.nytimes.com/interactive/2022/06/12/us/guantanamo-bay-pentagon-photos.html (on file with the *Columbia Human Rights Law Review*).

500. Id.

501. Press Release, United Nations Office of the High Commissioner of Human Rights, Guantanamo Bay: "Ugly Chapter of Unrelenting Human Rights Violations" – U.N. Experts (Jan. 10, 2022), https://www.ohchr.org/en/press-releases/2022/01/guantanamo-bay-ugly-chapter-unrelenting-human-rights-violations-un-experts [https://perma.cc/ULW9-P3DN].

502. Letter from John Emerich Edward Dalberg-Acton, 1st Baron Acton, to Mandell Creighton, Anglican Bishop (Apr. 5, 1887) (on file with the *Columbia Human Rights Law Review*).

503. Carol Rosenberg, *Doctor Describes and Denounces C.I.A. Practice of "Rectal Feeding" of Prisoners*, N.Y. TIMES (Feb. 24, 2023), https://www.nytimes.com/2023/02/24/us/politics/cia-torture-guantanamo-nashiri-doctor.html (on file with the *Columbia Human Rights Law Review*).

assault."[504] This was testimony at a Military Commission pretrial hearing in the case of Abd al-Rahim al-Nashiri, the alleged mastermind of the 2000 U.S.S. Cole bombing in Yemen.[505]

In December 2007, the Senate Select Committee on Intelligence began a review of the destruction of videotapes of interrogations of two detainees, one of whom was Abu Zubaydah.[506] The CIA Chief of Undercover Operations had ordered the tapes destroyed in 2005.[507] This order was in response to negative press the government had received over the Abu Ghraib prisoner abuse by U.S. soldiers in Iraq.[508] After receiving a staff summary about the destroyed tapes, the Committee approved a study of the CIA's program of detention and interrogation by a vote of fourteen to one.[509] Most of the information known about the detainees comes from the vast quantity of information available in this report.[510] Extensive information on the particulars of the "enhanced interrogation techniques" used on Abu Zubaydah are detailed in pages 17 through 49 of the report.[511]

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504. *Id.*

505. *Id.*; Gary D. Brown, *Another Decade of Military Commissions*, AM. BAR ASS'N (Jan. 9, 2023), https://www.americanbar.org/groups/law_national_security/publications/aba-standing-committee-on-law-and-national-security-60-th-anniversary-an-anthology/another-decade-of-military-commissions/ [https://perma.cc/N9ST-3C7Q] ("During the past decade, there have been only two convictions and both were guilty pleas. Although prosecutors have brought charges against 11 detainees since 2011, none of the cases has progressed beyond pretrial matters.").

506. S. SELECT COM. ON INTEL., COMMITTEE STUDY OF THE CENTRAL INTELLIGENCE AGENCY'S DETENTION AND INTERROGATION PROGRAM, S. REP. NO. 113-288, at 8 (2014); Douglas Cox, *Burn After Viewing: the CIA's Destruction of the Abu Zubaydah Tapes and the Laws of Federal Records*, 5 J. NAT'L SEC. L. & POL'Y 131, 131 (2011); Patrice Taddonio, *Why You Never Saw the CIA's Interrogation Tapes*, PBS (May 19, 2005), https://www.pbs.org/wgbh/frontline/article/why-you-never-saw-the-cias-interrogation-tapes/ [https://perma.cc/ST7B-GZFK].

507. Taddonio, *supra* note 506; Mark Mazzetti & Charlie Savage, *No Criminal Charges Sought Over C.I.A. Tapes*, N.Y. TIMES (Nov. 9, 2010), https://www.nytimes.com/2010/11/10/world/10tapes.html (on file with the *Columbia Human Rights Law Review*) ("[The head of the CIA's clandestine services] had argued that 'the heat' agency officials would take over destroying the tapes 'is nothing compared to what it would be if the tapes ever got into the public domain.'"); Tim Golden, *Haspel, Spies and Videotapes*, PROPUBLICA (May 9, 2018), https://www.propublica.org/article/haspel-spies-and-videotape [https://perma.cc/8N68-TBW5].

508. *See, e.g.*, Seymour M. Hersh, *Torture at Abu Ghraib*, NEW YORKER (Apr. 30, 2004), https://www.newyorker.com/magazine/2004/05/10/torture-at-abu-ghraib (on file with the *Columbia Human Rights Law Review*) (detailing the Abu Ghraib torture scandal).

509. S. REP. NO. 113-288, at 8.

510. *Id.* The Committee study exceeds 6,700 pages with approximately 38,000 footnotes.

511. *Id.* at 17–49.

Were it not for this study, most of the information about the torture of detainees might never be known. The Committee subsequently voted by nine to six to declassify its study in 2014.[512] In December 2014, President Obama agreed, and the study was released to the public with redactions.[513] Given the courts' unwillingness to be an important check on the executive branch, Congress once again needs to step in.

III. THE LEGISLATIVE BRANCH MUST PERFORM THE NECESSARY CHECK ON THE EXECUTIVE BRANCH

Beginning in 2008, members of both the House and Senate have introduced bills to change the state secrets evidentiary doctrine.[514] The impetus for the proposed legislation was the perceived abuse of warrantless wiretapping of citizens, and the extraordinary rendition program.[515] Members of Congress believed that the executive branch invoked the privilege more often than in the past and sought wholesale dismissal of cases when it did so.[516] The first bill proposed in the Senate was the State Secrets Protection Act of 2008, and all of the later bills were similarly named.[517] That first bill was introduced by a champion of civil rights, Senator Edward Kennedy.[518] Senator Arlen Specter, a Republican,

512. *Id*. at 8–9.

513. Press Release, The White House Office of the Press Secretary, Statement by the President Report of the Senate Select Committee on Intelligence (Dec. 9, 2014), https://obamawhitehouse.archives.gov/the-press-office/2014/12/09/statement-president-report-senate-select-committee-intelligence [https://perma.cc/ME9M-53E6].

514. S. 2533, 110th Cong. (2008); H.R. 5607, 110th Cong. (2008); S. 417, 111th Cong. (2009); H.R. 984, 111th Cong. (2009); H.R. 5956, 112th Cong. (2012); H.R. 3332, 113th Cong. (2013); H.R. 4767, 114th Cong. (2016).

515. Press Release, Electronic Frontier Foundation, EFF to Urge Reform of State Secrets Privilege at Tuesday Congressional Hearing (Jan. 25, 2008), https://www.eff.org/press/archives/2008/01/25 [https://perma.cc/G64E-9GXZ]; *see also* Elizabeth Goitein & Frederick A. O. Schwarz, Jr., *Congress Must Stop Abuses of Secrets Privilege*, BRENNAN CTR. FOR JUST. (Dec. 14, 2009), https://www.brennancenter.org/our-work/research-reports/congress-must-stop-abuses-secrets-privilege [https://perma.cc/7WZD-5KYV] (calling for congressional action in response to, *inter alia*, the invocation of the state secrets privilege in a government wiretapping case); Kenneth Anderson, *It's Congress's War Too*, N.Y. TIMES (Sept. 3, 2006), https://www.nytimes.com/2006/09/03/magazine/03wwln_essay.html (on file with the *Columbia Human Rights Law Review*) (arguing that congressional action is necessary to define counter-terrorism policy more clearly).

516. S. REP. NO. 110-442, at 3 (2008).

517. *Id.* at 13.

518. *Id.*; *see also* Nina Totenberg, *Kennedy Remembered as Civil Rights Champion*, NPR (Aug. 27, 2009), https://www.npr.org/2009/08/27/112251970/kennedy-remembered-as-civil-rights-champion [https://perma.cc/2P87-AMGW] (detailing Senator Kennedy's dedication to civil rights causes).

was a co-sponsor, and he co-sponsored the 2009 Senate bill as well.[519] In the House, a similar bill was introduced by Representative Jerold Nadler, a Democrat.[520] It was co-sponsored by Representative Thomas Petri, a Republican.[521] Representative Tom McClintock, also a Republican co-sponsored the bills in 2013 and 2016.[522] With the exceptions of Senator Specter and Representatives Petri and McClintock, all co-sponsors have been Democrats.[523] The first bills were introduced during the George W. Bush Administration, but the later bills were proposed during the Obama Administration. No such bills have been proposed since 2016. The Office of the Attorney General issued a letter to the Honorable Patrick J. Leahy in 2008 opposing the first bill, relying on *Reynolds* and *Totten*.[524]

None of the proposed state secrets protection acts have made it out of committees or subcommittees with the exceptions of S. 2533, proposed in 2008, and H.R. 984, proposed in 2009.[525] There was a hearing in the Senate Committee on the Judiciary two weeks after S. 2533 was proposed.[526] In his opening statement, Senator Leahy mentioned the case of Khalid al-Masri who was left without any remedy after his extraordinary rendition.[527] Al-Masri was a German and Lebanese citizen who was wrongfully detained.[528] Senator Leahy was critical that the privilege was

519. S. REP. NO. 110-442, at 13 (2008); S. 417, 111th Cong. (2009). Specter later switched his allegiance to the Democratic Party. Carl Hulse & Adam Nagourney, *Specter Switches Parties; More Heft for Democrats*, N.Y. TIMES (Apr. 28, 2009), https://www.nytimes.com/2009/04/29/us/politics/29specter.html (on file with the *Columbia Human Rights Law Review*).

520. H.R. 5607, 110th Cong. (2008).

521. *Id.*

522. H.R. 3332, 113th Cong. (2013); H.R. 4767, 114th Cong. (2016).

523. S. 2533, 110th Cong. (2008); H.R. 5607; S. 417, 111th Cong. (2009); H.R. 984, 111th Cong. (2009); H.R. 5956, 112th Cong. (2012); H.R. 3332; H.R. 4767.

524. Letter to Leahy, *supra* note 331, at 1–2.

525. *S. 2533 – State Secrets Protection Act* CONGRESS.GOV, https://www.congress.gov/bill/110th-congress/senate-bill/2533 [https://perma.cc/WEM5-NXXA]; *H.R.984 – State Secret Protection Act of 2009*, CONGRESS.GOV, https://www.congress.gov/bill/111th-congress/house-bill/984?s=1&r=42 [https://perma.cc/QXV7-RUGU].

526. *Examining the State Secrets Privilege: Protecting National Security While Preserving Accountability: Hearing before the S. Comm. on the Judiciary*, 110th Cong. (2008).

527. *Id.* at 2 (statement of Sen. Patrick J. Leahy, Chairman, S. Comm. on the Judiciary); El-Masri v. United States, 479 F.3d 296 (4th Cir. 2007).

528. Souad Mekhennet, *A German Man Held Captive in the CIA's Secret Prisons Gives First Interview in 8 Years*, WASH. POST (Sept. 16, 2015), https://www.washingtonpost.com/news/worldviews/wp/2015/09/16/a-german-man-held-captive-in-the-cias-secret-prisons-gives-first-interview-in-8-years/ (on file with the *Columbia Human Rights Law Review*).

used to "cover one's mistakes."[529] When Senator Kennedy spoke, he cited to letters received from Patricia Reynolds Herring and Susan Parker Brauner, two relatives of those killed in the plane crash that was the subject of the *Reynolds* case.[530] A report was issued on S. 2533, including minority views.[531]

Shortly before the Senate Hearing, the House Subcommittee on the Constitution, Civil Rights, and Civil Liberties held a hearing on reforming the state secrets privilege.[532] This occurred before Representative Nadler proposed H.R. 5607 in 2008.[533] In this hearing, another relative impacted by the Reynolds air crash testified.[534] Nadler described the state secrets privilege as "impairing the ability of Congress and the Judiciary to perform their constitutional duty to check executive power."[535] In another hearing in 2009, held after he had introduced H.R. 984, Nadler cited to the Ninth Circuit opinion in the *Jeppesen* case and stated that "[t]he executive cannot be its own judge."[536] Indeed, Nadler believed that would abandon the protections sought by the Founding Fathers against tyranny. At that point, he did not know the Ninth Circuit itself would order a rehearing en banc and dismiss the case, which represented yet another dismissal of a case generated by the "War on Terror".[537]

The State Secrets Protection Act of 2009 would have required courts to consider the evidence, which typically means *in camera* review should be conducted.[538] The courts have grown increasingly reluctant to do

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529. *Examining the State Secrets Privilege*, *supra* note 526, at 2 (statement of Sen. Patrick J. Leahy, Chairman, S. Comm. on the Judiciary).

530. *Id.* at 6.

531. S. REP. NO. 110-442 (2008).

532. *Reform of the State Secrets Privilege*, *supra* note 273.

533. *Reform of the State Secrets Privilege: Hearing Before the Subcomm. on the Const., C.R., & C.L. of the H. Comm. on the Judiciary*, 110th Cong 23–25 (2008), January 29, 2008.

534 *Id.* at 23–25. The relative was Judith Loether, daughter of crash victim Al Palya. Barry Siegel, *A Daughter Discovers What Really Happened*, L.A. TIMES (Apr. 19, 2004), https://www.latimes.com/archives/la-xpm-2004-apr-19-na-b29parttwo19-story.html (on file with the *Columbia Human Rights Law Review*).

535. *Reform of the State Secrets Privilege*, *supra* note 273, at 2.

536. *State Secret Protection Act of 2009 Hearing*, *supra* note 109, at 3. While Nadler claimed his language came from "the Ninth Circuit in the recent Jeppesen decision"—likely Mohamed v. Jeppesen Dataplan, Inc., 563 F.3d 992 (9th Cir.), *opinion amended and superseded*, 579 F.3d 943 (9th Cir. 2009), *on reh'g en banc*, 614 F.3d 1070 (9th Cir. 2010), which had been decided that April—the Ninth Circuit did not use the language Nadler quoted. The Court did note that "[j]udicial control over the evidence in a case cannot be abdicated to the caprice of executive officers." Jeppesen, 563 F.3d at 1001 (alteration in original) (quoting United States v. Reynolds, 345 U.S. 1, 9–10 (1953)).

537. Mohamed v. Jeppesen Dataplan, Inc., 614 F.3d 1070 (9th Cir. 2010).

538. EDWARD C. LIU, CONG. RSCH. SERV., R40603, THE STATE SECRETS PRIVILEGE AND OTHER LIMITS ON LITIGATION INVOLVING CLASSIFIED INFORMATION 12–13 (2009).

these reviews, and instead rely on the notion that the executive branch is in a better position to judge any risk. The timidity of the Judicial Branch is not effective.[539] Clearly the government is protecting too much.[540] It is estimated that 50 to 90 percent of classified documents could safely be released.[541] With no review of what is classified, there is no incentive for government employees not to mark a document as secret. In a novel idea, the 2009 bills would have authorized courts to require the government to suggest alternative, non-privileged substitutes for the information it planned to block.[542] The bills would have put more discretion in the hands of judges, although exactly what level of discretion was unclear.[543] Moreover, the proposed legislation contemplated that courts could use expert advisers or special masters during any *in camera* review.[544] As a safeguard measure, the executive branch would have been required to inform Congress of cases in which it planned to assert the privilege and seek dismissal.[545]

If the state secrets privilege is indeed a privilege and not a constitutional dictate, Congress has broad power to legislate change.[546] In reality, state secrets began as a common law privilege and remains such. The executive branch, however, has been treating it as a constitutional duty.[547] This was never intended by the law of privileges, which are to be used sparingly.[548] The government has relied on *Nixon* for its constitutional argument, but *Nixon* is not a state secrets case. The *Nixon* case concerned

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539. *See, e.g.*, Barry Siegel, *National Security Push-Back*, L.A. TIMES (June 29, 2008), https://www.latimes.com/archives/la-xpm-2008-jun-29-op-siegel29-story.html (on file with the *Columbia Human Rights Law Review*) (arguing that courts should look behind claims of state secrets privilege more often).

540. *See, e.g.*, Mike Giglio, *The U.S. Government Keeps Too Many Secrets*, ATLANTIC (Oct. 3, 2019), https://www.theatlantic.com/politics/archive/2019/10/us-government-has-secrecy-problem/599380/ [https://perma.cc/SQN8-UBTV] (discussing the overclassification of documents by the U.S. government); Elizabeth Goitein, *The Government is Classifying Too Many Documents*, BRENNAN CTR. FOR JUST. (July 8, 2016), https://www.brennancenter.org/our-work/analysis-opinion/government-classifying-too-many-documents [https://perma.cc/9AVR-JR4V] (providing an overview of the classification system and its overuse).

541. Goitein, *supra* note 540.

542. LIU, *supra* note 538, at 13. The bills are S. 417 and H.R. 984.

543. Robert M. Chesney, *Legislative Reform of the State Secrets Privilege*, 13 ROGER WILLIAMS U. L. REV. 443, 454 (2008).

544. *Id.* at 461–62.

545. Frost & Florence, *supra* note 481, at 129.

546. Chesney, *supra* note 543, at 448.

547. *See* Wikimedia Found. v. NSA, 14 F.4th 276, 294 (4th Cir. 2021), *cert. denied*, 143 S. Ct. 774 (2023) (noting the government's contention that the state secrets privilege is grounded in the U.S. Constitution).

548. Baldridge v. Shapiro, 455 U.S. 345, 360 (1982).

the executive privilege.[549] In *Nixon*, the Court cited *Reynolds* in its reasoning and determined that presidential communications are presumptively privileged but "must be considered in light of our historic commitment to the rule of law."[550] The two privileges are distinct because the executive privilege protects communications, in keeping with other federally recognized privileges such as the attorney-client privilege and spousal privileges, while the state secrets privilege is much broader. It may be invoked to safeguard communications and a range of other types of evidence such as the information requested in the detainee cases. Treating it as a constitutional right of the executive takes the privilege too far and in an unintended direction. Indeed, dismissing cases outright deprives plaintiffs of their constitutional rights.[551]

Courts must act as a bulwark against overzealous use of the state secrets privilege to ensure the rule of law. Extreme deference to the executive is no judicial review at all. An absolute state secrets privilege "encourages government abuse."[552] The courts clearly are not currently policing this privilege, and Congress may provide the help the courts need via the State Secrets Privilege Act. The courts have insulated executive claims of privilege from meaningful judicial review.[553]

There are a range of special security measures that could be taken in certain extremely sensitive cases.[554] The Federal Judicial Center published a guide for judges faced with sensitive information cases.[555] As Dean Wigmore stated, "[b]oth principle and policy demand that the

549. United States v. Nixon, 418 U.S. 683, 686 (1974); *Constitutional Law—Executive Privilege—D. C. Circuit Defines Scope of Presidential Communications Privilege*—In Re *Sealed Case, 116 F.3d 550 (D.C. Cir. 1997),* 111 HARV. L. REV. 861, 861 (1998).

550. *Nixon*, 418 U.S. at 708.

551. *See* Brief of Former Federal Judges as *Amici Curiae* in Support of Petitioner at 12, Wikimedia Found. v. NSA 143 S.Ct. 774 (2023) (No. 22-190) (criticizing a version of the privilege that would "'allow[] the mere prospect of a privileged defense to thwart a citizen's efforts to vindicate his or her constitutional rights'" (quoting *In re* Sealed Case, 494 F.3d 139, 151 (D.C. Cir. 2007)).

552. Nicole Hallett, *Protecting National Security or Covering Up Malfeasance: The Modern State Secrets Privilege and its Alternatives,* 117 YALE L.J. F. 55, 55 (2007).

553. Rudenstine, *supra* note 319, at 37.

554. *See, e.g.*, FISA CT. R. P. 7(j) (providing for *ex parte* and *in camera* review of classified information in cases before the U.S. Foreign Intelligence Surveillance Court); 18 U.S.C. app. 3, § 4 (allowing the deletion of classified information, substitution with a summary, or substitution of an admission of relevant facts from documents discoverable by a criminal defendant).

555. ROBERT TIMOTHY REAGAN, FED. JUD. CTR., KEEPING GOVERNMENT SECRETS: A POCKET GUIDE FOR JUDGES ON THE STATE-SECRETS PRIVILEGE, THE CLASSIFIED INFORMATION PROCEDURES ACT, AND COURT SECURITY OFFICERS (2007), https://fas.org/sgp/jud/judges.pdf [https://perma.cc/TFG6-HQSX].

determination of the privilege shall be for the Court."[556] The proper functioning of our government needs each branch to perform its individual function. Courts are competent to evaluate state secrets. In fact, there has not yet been a case where courts have released military, national security, foreign policy, or diplomatic secrets.[557]

CONCLUSION

The Founders developed a brilliant structure of government that ensures no one particular branch has exclusive control over power. In *Zubaydah*, the Court essentially announced that it will no longer review a claim of state secrets in nearly any situation. Never before has the judiciary given carte blanche to the executive to hide information.

The government must not use the state secrets privilege as both a sword and a shield. The Office of the Attorney General issued a letter to the Honorable Patrick J. Leahy in 2008 opposing the State Secrets Protection Act, using *Reynolds* and *Totten* as swords.[558] Evidentiary privileges were not designed to fully dismiss cases wholesale and such dismissals are not the proper use of a privilege. Although Justice Breyer characterized the *Zubaydah* case as a narrow one based on a discovery issue, it is an alarming decision. It marks the first time the Court fully embraced the idea that there is no need for any *in camera* review, even in matters involving torture, a fundamental human rights violation. The decision also showed remarkable deference to the executive branch.[559] This is not something that affects only plaintiffs. Simply put, it affects the public too. No extraordinary rendition case nor any case on the detainees' torture has ever reached the merits stage.[560] Courts are increasingly likely to dismiss cases where the executive

556. WIGMORE, *supra* note 209, § 2379.

557. Brief of Former Federal Judges as *Amici Curiae* in Support of Petitioner at 16, Wikimedia Found. v. NSA, 143 S.Ct. 774 (2023) (No. 22-190).

558. Letter to Leahy, *supra* note 331. In this letter, Attorney General Michael Mukasey indicated that "[t]he state secrets privilege has a long and well-established pedigree." He then cited to *Totten*, which is not a state secrets case. Additionally, he stated the following: "The Supreme Court recognized the imperative of protecting such information when it further held that even where a litigant has a strong need for that information, the privilege is absolute . . . ." *Id.*

559. Goitein, *supra* note 393, at 193–94.

560. Ben Wizner, Lit. Dir., ACLU Nat'l Sec. Project, Remarks at the Philip D. Reed Lecture Series: The State Secrets Privilege and Access to Justice: What is the Proper Balance? (Mar. 23, 2011), *in* 80 FORDHAM L. REV. 1, 17 (2011) ("[E]very single case since 9/11 that has sought to hold U.S. officials accountable for torture, every single one of those cases, has been dismissed at the pleading stage without any adjudication of either the facts or the law."); Singh, *supra* note 351, at 20 ("To date, not a single case brought by an extraordinary rendition victim has reached the merits stage in a U.S. court."); *see also*

has asserted the state secrets privilege.[561] Treatment of state secrets with extraordinary deference diminishes the legitimacy of the courts.[562] It could very well be that the "secrets" the government wishes to hide are not in any way injurious to the United States.

It is vitally important that Congress move the courts in the right direction, particularly in times where there is no definable end to a "war." Although U.S. military action in Afghanistan has officially ended, Abu Zubaydah has not been released.[563] He moved for immediate release, but his motion was denied because the court found hostilities were ongoing against al Qaeda.[564] At this moment in history, it is critical that Congress and the courts take care to protect checks and balances.[565] The Guantánamo Bay Detention Camp was set up for detainees so that the executive branch could hold individuals without judicial review.[566] The Bush Administration developed "an entire legal strategy built on executive supremacy and relentless secrecy."[567]

Political embarrassment is not an acceptable reason to shield state secrets. The privilege should not be used to bury our past indiscretions or to conceal outright illegality. In 1989, Erwin Griswold, the solicitor general in the *Pentagon Papers Case*, indicated the following: "I have never seen any trace of a threat to the national security from the publication [of the Pentagon Papers]. Indeed, I have never seen it even suggested that there was such an actual threat."[568] Shockingly, Griswold's boss, the U.S. Attorney

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Lyons, *supra* note 106, at 117 ("[T]he government . . . is applying the privilege in such a way that complaints are being completely dismissed, denying any forum to plaintiffs for redress.").

561. Christopher D. Yamaoka, *The State Secrets Privilege: What's Wrong with It, How It Got That Way, and How the Courts Can Fix It*, 35 HASTINGS CONST. L. Q. 139, 144 (2007).

562. *See* Rudenstine, *supra* note 319, at 46 (arguing that the state secrets privilege should be reformed because it "threatens the legitimacy of the judiciary").

563. Husayn v. Austin, No. 08-cv-1360, 2022 WL 2093067 (D.D.C. June 10, 2022) (denying Abu Zubaydah's motion for immediate release).

564. *Id.* at 11.

565. *See, e.g.*, Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 643 (1952) (Jackson, J., concurring) (arguing against a theory of presidential war powers that would allow a president to "vastly enlarge his mastery over the internal affairs of the country by his own commitment of the Nation's armed forces to some foreign venture").

566. *See* Neal K. Katyal, *Executive and Judicial Overreaction in the Guantanamo Cases*, 2003 CATO SUP. CT. REV. 49, 49 (2003–2004) (summarizing the administration's position as "asserting that it had the ability to build an offshore facility to evade judicial review, do what it wanted at that facility to detainees under the auspices of the commander-in-chief power, and keep the entire process (including its legal opinions) secret").

567. *Id.* at 50.

568. Erwin Griswold, *Secrets Not Worth Keeping*, WASH. POST (Feb. 15, 1989), https://www.washingtonpost.com/archive/opinions/1989/02/15/secrets-not-worth-

General, did not even know what was in the papers.[569] Griswold amplified his statement by explaining that the government overclassifies information, and the main reason for claiming a secret is to avoid embarrassment.[570] A blanket privilege is neither reasonable nor advisable to guard past actions where information is widely available. Thus far, courts have sustained the privilege even when information is officially known. The rationale is based on the argument that, although known to the public, the government has not officially acknowledged the information. This theory disregards common sense. As the appeals court for the District of Columbia declared, "[d]ismissal of a suit, and the consequent denial of a forum without giving the plaintiff her day in court . . . is indeed draconian."[571] Justice Gorsuch said it best, "[w]e should not let shame obscure our vision."[572]

keeping/a115a154-4c6f-41fd-816a-112dd9908115/ (on file with the *Columbia Human Rights Law Review*).

569. *Id.*

570. *Id.*

571. *In re* United States, 872 F.2d, 472, 477 (D.C. Cir. 1989).

572. United States v. Zubaydah, 595 U.S. 195, 266 (2022) (Gorsuch, J., dissenting).