

MASQUERADING JUSTICIABILITY: THE MISAPPLICATION OF
STATE SECRETS PRIVILEGE IN *MOHAMED V. JEPPESEN*—
REFLECTIONS FROM A COMPARATIVE PERSPECTIVE

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* J.S.D., University of California, Berkeley, 2012; LL.M., University of California, Berkeley, 2006; LL.B., Tel-Aviv University, 2004. My thanks to Hilla Gorni, and Nimrod Karin for their comments on earlier drafts. I am also indebted to Benny Cohen, Shai Nitzan, and Michal Bardenstein for their valuable time and input. Naturally, I alone bear responsibility for any inaccuracies or omissions.

I. INTRODUCTION

In September 2010, the Ninth Circuit sitting en banc dismissed a potential challenge against the U.S. government's extraordinary rendition program. The suit was filed against Jeppesen Dataplan, Inc., a subsidiary of Boeing Company, for its alleged role in facilitating the transportation of detainees to countries where they were subjected to presumably illegal interrogation techniques amounting to torture.¹ Although the lawsuit was filed against a private actor, the government was allowed to intervene and ask for dismissal.² A closely divided court dismissed the case under the state secret privilege as formulated in *United States v. Reynolds*,³ finding that "Jeppesen's alleged role and its attendant liability cannot be isolated from aspects that are secret and protected. Because the facts underlying plaintiffs' claims are so infused with these secrets, any plausible effort by Jeppesen to defend against them would create an unjustifiable risk of revealing state secrets"⁴

The decision, one of several recent federal court rulings in lawsuits attempting to challenge national security policy and involving state secrets,⁵

¹ *Mohammed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070 (9th Cir. 2010). In December 2010, a petition for certiorari was filed with the Supreme Court, and was denied in May 2011, *Mohamed v. Jeppesen Dataplan, Inc.*, 179 181 S. Ct. 2442 (2011).

² *Id.* at 1094 (Hawkins, J., dissenting). While governmental intervention in itself is not novel, *see, e.g.*, *DTM Research, L.L.C. v. AT&T Corp.*, 245 F.3d 327, 330 (4th Cir. 2001), in the context of national security litigation that attempts to challenge what is arguably unconstitutional or otherwise illegal government behavior, the pervasiveness of the state secrets privilege in lawsuits between private actors potentially absolves from responsibility an entire group of potential defendants who may have been complicit in dubious government behavior. *See, e.g.*, Laura K. Donohue, *The Shadow of State Secrets*, 159 U. PA. L. REV. 77, 98 (2010) (analyzing the relationship between government contractors and claims of the state secrets privilege in recent years and observing, *inter alia*, that "many government contractors . . . benefit from use of the state secrets privilege in suits that allege a range of illegal activity"). Even more troubling, Donohue notes that this gives rise to the potential for "graymail," or the risk that private companies with access to information that is sensitive or potentially politically damaging for the government may threaten to reveal such information if the government does not intervene and raise the state secrets claim on the company's behalf. *Id.* In any case, Donohue concludes, regardless of whether the government actually gets involved in such private litigation, the threat of invoking the state secrets privilege gives companies a tactical advantage. *Id.* at 99.

³ *United States v. Reynolds*, 345 U.S. 1 (1953).

⁴ *Jeppesen*, 614 F.3d at 1088.

⁵ *See, e.g.*, *El-Masri v. Tenet*, 437 F. Supp. 2d 530, 539 (E.D. Va. 2006) (dismissing the plaintiff's challenge to the extraordinary rendition program based on the government's claim of state secrets), *aff'd*, *El-Masri v. United States*, 479 F.3d 296 (4th Cir. 2007); *Al-Haramain Islamic Found., Inc. v. Bush*, 451 F. Supp. 2d 1215, 1229 (D. Or. 2006) (accepting the government's claim that a document required by the plaintiff to substantiate standing to challenge the warrantless wiretap program was protected by the state secrets privilege, yet permitting Al-Haramain's witnesses to file in camera affidavits attesting to the contents of the

is reflective of the flaws of contemporary application of the state secrets privilege. To begin with, the state secrets privilege as formulated by the Supreme Court in *Reynolds* created an inherent imbalance in favor of the government by providing privileged information with absolute protection once the privilege has been asserted successfully.⁶ Moreover, the majority's application of the privilege in *Jeppesen* has compounded this flaw tenfold by applying the state secrets privilege as a nonjusticiability doctrine rather than as an evidentiary privilege.⁷ In so doing, it has created an overly broad, substantive barrier for national security litigation—one that goes well beyond the original underlying rationale of the privilege. As a result, plaintiffs attempting to challenge potentially unconstitutional government behavior are forced to internalize the costs associated with asserting the privilege. From a policy perspective, this is undesirable.

Part II of this Article provides a brief background of the state secrets privilege. Part III presents in detail the Ninth Circuit's en banc decision in *Jeppesen*. Part IV goes on to analyze the majority's gross misapplication of the state secrets privilege in *Jeppesen*. It also criticizes the absence of a balancing test under *Reynolds*, which would allow courts to weigh competing interests of the parties when an assertion of privilege is made by the government. A comparative perspective of the treatment of privileged

document which had been inadvertently disclosed in the past), *rev'd and remanded* *Al-Haramain Islamic Found., Inc. v. Bush*, 507 F.3d 1190 (9th Cir. 2007) (affirming the district court's judgment that the lawsuit was not barred by the state secrets privilege, reversing the district court's judgment allowing plaintiffs to file in camera affidavits attesting to the contents of the sealed document, and remanding the case for further proceedings); *In re NSA Telecomms. Records Litig.*, 564 F. Supp. 2d 1109, 1119 (N.D. Cal. 2008) (finding that the Foreign Intelligence Surveillance Act (FISA) preempted the state secrets privilege in connection with electronic surveillance for intelligence purposes and would appear to displace the state secrets privilege for purposes of plaintiffs' claims); *In re NSA Telecomms. Records Litig.*, 595 F. Supp. 2d 1077 (N.D. Cal. 2009) (ruling that the court would review the sealed document ex parte and in camera); *In re NSA Telecomms. Records Litig.*, 700 F. Supp. 2d 1182 (N.D. Cal. 2010) (granting summary judgment to plaintiffs); *Hepting v. AT&T Corp.*, 439 F. Supp. 2d 974, 1010–11 (N.D. Cal. 2006) (denying the government's motion to dismiss based on state secrets grounds and ordering the parties to show cause in writing why the court should not appoint an expert "to assist the court in determining whether disclosing particular evidence would create a 'reasonable danger' of harming national security"); *remanded*, *Hepting v. AT&T Corp.*, 539 F.3d 1157 (9th Cir. 2008); *Arar v. Ashcroft*, 414 F. Supp. 2d 250 (E.D.N.Y. 2006) (dismissing Arar's challenge to the extraordinary rendition program on grounds other than the state secrets privilege, which was not analyzed although raised by the government), *aff'd en banc*, 532 F.3d 157 (2d Cir. 2008), *vacated and superseded on rehearing en banc*, 585 F.3d 559 (2d Cir. 2009); *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1 (D.D.C. 2010) (dismissing an attempt to challenge the inclusion of Al-Aulaqi's son on the government's "kill list" on grounds other than state secrets privilege, which was not analyzed although raised by the government).

⁶ *Reynolds*, 345 U.S. at 11.

⁷ *Jeppesen*, 614 F.3d at 1089.

information in national security litigation in Israel then follows in Part V. The Israeli experience not only provides a different approach to legislative and judicial mechanisms than the one currently in use in the U.S but also illuminates an intrinsically different attitude regarding the feasibility of adjudicating national security matters. In the present environment in the United States, it may be difficult to conceive of adjudication of such sensitive matters. However, Israeli jurisprudence shows that such adjudication is possible given not only an accommodating legal scheme but also a more accommodating mindset, both of which may be attainable in the United States as well.

II. THE STATE SECRETS PRIVILEGE

The state secrets privilege is a common law evidentiary executive privilege that permits the government to bar the disclosure of information if “there is a reasonable danger” that disclosure will “expose military matters which, in the interest of national security, should not be divulged.”⁸ As framed by the Ninth Circuit majority opinion in *Jeppesen*,⁹ the state secrets privilege has two variations originating from two Supreme Court precedents: *Totten v. United States*¹⁰ and *Reynolds*.

The *Totten* version of the state secrets privilege is the more drastic of the two. It completely bars adjudication of certain matters if such adjudication “would inevitably lead to the disclosure of matters which the law itself regards as confidential.”¹¹ In other words, *Totten* stands for the proposition that “where the very subject matter of the action . . . [is] a matter of state secret,” an action may be “dismissed on the pleadings without ever reaching the question of evidence.”¹² It has been found to apply primarily to suits which allege the existence of a covert agreement or relationship between the plaintiff and the government.¹³

⁸ *Reynolds*, 345 U.S. at 10.

⁹ *Jeppesen*, 614 F.3d at 1077.

¹⁰ *Totten v. United States*, 92 U.S. 105 (1875).

¹¹ *Id.* at 107.

¹² *Reynolds*, 345 U.S. at 11 n.26. *Totten* specifically involved an alleged agreement to compensate a spy for his wartime espionage services during the Civil War. The Court held that the action was barred because it was premised on the existence of a “contract for secret services with the government,” which was “a fact not to be disclosed.” *Totten*, 92 U.S. at 107; see also *Tenet v. Doe*, 544 U.S. 1 (2005) (affirming that the *Totten* bar precluded judicial review of any claim based on a covert agreement to engage in espionage for the United States).

¹³ See *Jeppesen*, 614 F.3d at 1078–79 (citing *Weinberger v. Catholic Action of Hawaii/Peace Educ. Project*, 454 U.S. 139, 146–47 (1981) in rejecting the contention that the *Totten* bar cannot apply unless the plaintiff is a party to a secret agreement with the government). The dissent also notes in *Jeppesen* that “[c]ourts have applied the *Totten* bar in

Application of the state secrets privilege under *Reynolds*¹⁴ is narrower.¹⁵ It allows the court to exclude privileged evidence from a case. This requires, whenever possible, disentangling sensitive from nonsensitive information to allow for the release of only the latter. However, there are occasions when, as a practical matter, such a dichotomy is impractical. In such cases, the court may not be able to restrict access strictly to sensitive information and may be forced to deny the parties access to nonsensitive information as well, so as to avoid the risk of unintentionally disclosing a state secret. Hence, in the relatively easy cases, litigation will proceed by simply walling off the privileged information. The more difficult cases will require prohibiting access to a larger chunk of evidence, which may include nonprivileged evidence fused together with privileged evidence. Granted, this may burden the parties, however, it does not foreclose adjudication altogether.

The most difficult cases are those in which walling off the evidence is insufficient. In such cases, according to the majority in *Jeppesen*, the *Reynolds* privilege, in effect, converges with the *Totten* privilege and, like the latter, requires dismissal of the case altogether.¹⁶ As the Ninth Circuit

one of two scenarios: (1) The plaintiff is party to a secret agreement with the government; or (2) The plaintiff sues to solicit information from the government on a 'state secret' matter." *Id.* at 1096 (Hawkins, J., dissenting). *Contra* D.A. Jeremy Telman, *Intolerable Abuses: Rendition for Torture and the State Secrets Privilege*, 63 ALA. L. REV. 429 (2011) (arguing that in fact "the *Totten* doctrine *only* applies to bar claims by parties to secret agreements with the government if the purpose of the suit is to enforce the terms of secret agreement" (emphasis added)). Telman further argues that "the logic of *Totten* cannot and should not extend to parties whose interaction with the government was involuntary," calling the Ninth Circuit's reliance on *Weinberger* in this regard "misplaced." *Id.* at 457.

¹⁴ *Reynolds* involved a suit for damages against the government brought by the widows of three civilian observers killed in a military plane crash. In discovery, plaintiffs sought production of the Air Force's official accident investigation report and the statements of the surviving crew members. The Air Force refused to produce the materials, citing the need to protect national security and military secrets. The Secretary of the Air Force wrote a letter to the district court to this effect. The Judge Advocate General of the Air Force filed an affidavit making a formal claim of privilege, stating that the material sought by the plaintiffs could not be provided "without seriously hampering national security." *Reynolds*, 345 U.S. at 5. The district court ordered the government to produce the documents in camera so the court could determine whether they contained privileged material. When the government refused, the court sanctioned the government by establishing the facts on the issue of negligence in plaintiffs' favor. The Supreme Court reversed and sustained the government's claim of privilege and provided guidance on how claims of privilege should be analyzed.

¹⁵ See Carrie Newton Lyons, *The State Secrets Privilege: Expanding Its Scope Through Government Misuse*, 11 LEWIS & CLARK L. REV. 99, 117 (2007) ("The state secrets privilege was not crafted in *Reynolds* to be a complete bar on the adjudication of complaints by the courts . . .").

¹⁶ *Jeppesen*, 614 F.3d at 1083. In support of its position that *Reynolds*, like *Totten*, allowed dismissal of a lawsuit, the majority did not cite *Reynolds* itself. Rather, it cited several federal court rulings, none of which were Supreme Court decisions. It seems that lower courts interpret *Reynolds* as accommodating a blanket dismissal of suits involving privileged

explained in its majority opinion in *Jeppesen*, there are three circumstances which justify terminating a case under the *Reynolds* privilege: first, a plaintiff's claim is dismissible if the plaintiff cannot make a prima facie case without the nonprivileged evidence.¹⁷ Second, a defendant is entitled to summary judgment should the privilege deny a defendant a valid defense to the plaintiff's claim.¹⁸ Third, and most expansive, even if the privileged evidence is unnecessary to a claim or defense, should the risk of revealing state secrets during the litigation prove unacceptable, a court may refuse to proceed with the claim.¹⁹

The bare assertion of the privilege by the executive is not sufficient to invoke it. First, the privilege must be asserted by the head of the department which has the responsibility for the information and evidence in question.²⁰ Next, it is up to the court to determine whether the circumstances warrant assertion of the claim,²¹ taking into account the plaintiff's need for information to litigate the case; the greater the need of the plaintiff to receive the information, the deeper the court must delve into the state secret assertion.²² However, the privilege is absolute in the sense that once it has been validly asserted, it applies regardless of what the opposing interests at stake may be.²³ Some commentators have opined that in practice, courts

information. *Id.*; see also Robert M. Chesney, *State Secrets and the Limits of National Security Litigation*, 75 GEO. WASH. L. REV. 1249, 1307 (2007) (“[T]he government has a long history of requesting dismissal (or summary judgment) on state secret grounds.”). In an appendix to his article, Chesney reviews all of the post-*Reynolds* decisions which included an assertion of the state secrets privilege. Of these eighty-nine decisions, only one, *Tenet v. Doe*, is a Supreme Court decision. According to the data analyzed by Chesney, over 30% of requests for dismissal or summary judgment (thirty-three) were granted. *Id.* app. at 1315. However, as noted earlier, the Court in *Tenet* dismissed the complaint based *not on Reynolds*, but on *Totten*, which it described as a “categorical bar” distinct from the “state secrets evidentiary privilege.” *Tenet*, 544 U.S. at 9–10. Hence, it is unclear which of these 33 decisions were based exclusively on the state secrets privilege as envisaged by the Supreme Court in *Reynolds*. See also *infra* notes 26–30 and accompanying text (discussing the view that *Totten* and *Reynolds* are possibly two distinct legal doctrines).

¹⁷ *Jeppesen*, 614 F.3d at 1083.

¹⁸ *Id.*

¹⁹ *Id.*; see also Holly Wells, Note, *The State Secrets Privilege: Overuse Causing Unintended Consequences*, 50 ARIZ. L. REV. 967, 975 (2008) (“[B]ecause the secrets are essential to the subject matter of the litigation, any attempts to move forward threaten disclosure of these secrets.”).

²⁰ *United States v. Reynolds*, 345 U.S. 1, 7–8 (1953). Lyons cites “two rare instances” in which “courts rejected the privilege on grounds that it was not properly asserted with regards to procedures”: *Kinoy v. Mitchell*, 67 F.R.D. 1 (S.D.N.Y. 1975) and *Yang v. Reno*, 157 F.R.D. 625 (M.D. Pa. 1994). Lyons, *supra* note 15, at 111. However, as Lyons notes, in both cases, the courts allowed the government to reassert the privilege. *Id.*

²¹ *Reynolds*, 345 U.S. at 8.

²² *Id.* at 11.

²³ *Id.*; Amanda Frost, *The State Secrets Privilege and Separation of Powers*, 75 FORDHAM L. REV. 1931, 1943 (2007) (citing *El-Masri v. United States*, 437 F. Supp. 2d 530 (E.D. Va.

show substantial deference to executive assertions of privilege,²⁴ primarily because of a presumption that the executive has greater expertise than the judiciary with regard to military and diplomatic matters.²⁵

It should be noted that some view *Reynolds* only as the basis for the state secrets privilege, whereas *Totten* is viewed as standing for the principle that the courts may dismiss claims which rely on a covert agreement with the government.²⁶ The relatively recent Supreme Court decision in *Tenet v. Doe* has been interpreted by some as having affirmed this distinction.²⁷ However, the Ninth Circuit's analysis in *Jeppesen* of the state secrets privilege views both precedents as separate prongs of essentially the same doctrine.²⁸ This framing is unsurprising given that, as is discussed below, the *Jeppesen* majority goes on to dismiss the suit presumably entirely under the *Reynolds* state secrets privilege.²⁹ Creating a linkage between *Totten* and *Reynolds*

2006), *aff'd* *El-Masri v. United States*, 479 F.3d 296 (4th Cir. 2007)); Lucien J. Dhooge, *The State Secrets Privilege and Corporate Complicity in Extraordinary Rendition*, 37 GA. J. INT'L & COMP. L. 469, 496 (2009) (“[E]ven the most compelling need demonstrated by the plaintiffs . . . cannot overcome the national security and foreign relations interests protected by the privilege. The strength of the plaintiffs’ claims and the disturbing nature of the behavior alleged in the complaint are equally irrelevant . . .”).

²⁴ William G. Weaver & Robert M. Pallitto, *State Secrets and Executive Power*, 120 POL. SCI. Q. 85, 98 (2005); LOUIS FISHER, IN THE NAME OF NATIONAL SECURITY: UNCHECKED PRESIDENTIAL POWERS AND THE *REYNOLDS* CASE 257 (2006) (“What Reynolds did was to send an ominous signal that in matters of national security, the judiciary is willing to fold its tent and join the executive branch.”); Lyons, *supra* note 15, at 108 (describing the “‘utmost deference’” by the courts to executive assertions of the privilege).

²⁵ *El-Masri*, 437 F. Supp. 2d at 536; Chesney, *supra* note 16, at 1288; Lyons, *supra* note 15, at 130.

²⁶ See, e.g., Christina E. Wells, *State Secrets and Executive Accountability*, 26 CONST. COMMENTARY 625, 639 (2010) (arguing, inter alia, that “*Reynolds* and *Totten* . . . involve distinct situations that argue against eliding the boundaries of the two doctrines. . . . From a due process perspective, a plaintiff facing dismissal is not in the same position as a party to a secret espionage contract who understood the nature of her relationship with the government.”); Sudha Setty, *Litigating Secrets: Comparative Perspectives on the State Secrets Privilege*, 75 BROOK. L. REV. 201, 233 (2009) (“[T]he relevance of *Totten* to the state secrets privilege is open to debate.”); Lyons, *supra* note 15, at 120–21 (“[A]n assertion of the *Totten* privilege is distinct and distinguishable from the state secrets privilege.”).

²⁷ *Tenet v. Doe*, 544 U.S. 1, 10 (2005) (“There is, in short, no basis for respondents’ and the Court of Appeals’ view that the *Totten* bar has been reduced to an example of the state secrets privilege.”).

²⁸ *Mohammed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1077 (9th Cir. 2010); see also *Al-Haramain Islamic Found., Inc. v. Bush*, 507 F.3d 1190, 1197 (9th Cir. 2007) (“Although *Reynolds* is widely viewed as the first explicit recognition of the privilege by the Supreme Court . . . the Supreme Court considered a form of the privilege—the non-justiciability of certain state secrets cases—in *Totten v. United States*”); Telman, *supra* note 13, at 441, 445 (stating plainly that the Ninth Circuit “erred in a fundamental way in treating *Totten* as a sub-category of the [state secrets privilege]” and that the “conflation of the [state secrets privilege] and *Totten* is an error”).

²⁹ *Jeppesen*, 614 F.3d at 1073.

lends more support for a more extreme application of the state secrets privilege than envisaged under *Reynolds*.³⁰

Some argue that the state secrets privilege ought to be viewed as constitutional in nature, derived from Article II of the Constitution.³¹ Viewed this way, the privilege also rests on theories of executive power³² and separation of powers³³ rather than just on common law.³⁴ This approach would affect the power of Congress or the courts to limit the scope of the privilege.³⁵ However, even if taken as a privilege of constitutional origin, it does not follow that the privilege is exempt from review.³⁶ Constitutional executive action is not immune to legislative or judicial oversight, as an integral part of checks and balances between the three branches,³⁷ as will be further illustrated below.

III. *MOHAMED V. JEPPESEN DATAPLAN, INC.*

Since 9/11, the state secrets privilege has been consistently raised by the government with regard to litigation attempting to challenge two executive policies: the extraordinary rendition program, which was the subject of the *Jeppesen* lawsuit, and the National Security Agency's (NSA) warrantless wiretapping program.³⁸ More recently, it has also been asserted in the

³⁰ See Lyons, *supra* note 15, at 122 (“This distinction [between *Totten* and *Reynolds*] is especially relevant since recent invocations of the state secrets privilege appear to be extending the parameters of the privilege such that the privilege is indistinguishable from *Totten*, despite their obvious differences.”).

³¹ As a matter of fact, the U.S. government in its briefs has argued that the privilege is constitutional in origin. See D.A. Jeremy Telman, *Our Very Privileged Executive: Why the Judiciary Can (and Should) Fix the State Secrets Privilege*, 80 TEMP. L. REV. 499, 506 (2007) (“In its recent memoranda in support of various motions invoking the [state secrets] Privilege, the U.S. government has again argued that the Privilege is constitutional in origin.”).

³² See, e.g., *United States v. Nixon*, 418 U.S. 683, 710–11 (1974) (discussing the deference courts have traditionally shown toward Article II duties of the President and referring in this context to *United States v. Reynolds*).

³³ Telman, *supra* note 31, at 505–06.

³⁴ *Id.* at 506.

³⁵ See *El-Masri v. United States*, 479 F.3d 296, 303 (4th Cir. 2007) (discussing the “constitutional dimension” of the privilege); cf. *Tenet v. Doe*, 544 U.S. 1, 11 (2005) (Stevens & Ginsburg, JJ., concurring) (describing *Totten* as a “federal common-law rule” and stating that Congress thus “can modify” that rule if it wishes to do so).

³⁶ See Telman, *supra* note 31, at 506–07 (discussing “judicial and legislative oversight” of the state secret privilege).

³⁷ *Id.* at 507 (“Courts and Congress must not go too far in restricting the executive branch from pursuing the foreign affairs strategies it believes necessary for national security, but those branches also must maintain sufficient power to check the executive and protect individual rights.”).

³⁸ Much of the writing regarding recent use of the state secrets privilege has addressed, in addition to legal challenges to the extraordinary rendition program, litigation regarding the Bush administration's warrantless wiretap program. In December 2005, a New York Times article

context of an attempted challenge to drone-operated targeting of individuals outside the United States.³⁹

Plaintiffs in *Jeppesen* were all apprehended and taken into custody following 9/11 in various countries around the world.⁴⁰ They claimed that at some point during their detention, they were transferred to U.S. custody or were held in Central Intelligence Agency (CIA) “dark prisons” outside U.S. territory, where they were detained incommunicado and underwent harsh interrogation.⁴¹ Plaintiffs presented disturbing accounts of what they had been subjected to in the course of their detention, including beatings, sensory deprivation, humiliation, threats of death, and other techniques amounting to both physical and psychological torture.⁴² Based on publically available information, plaintiffs concluded that they had been subjected to the U.S.

revealed that President Bush authorized the NSA to intercept communications that had originated or terminated in the United States, bypassing the statutory mechanism set forth in FISA (FISA was subsequently amended in 2008 to permit many of the practices undertaken by the Bush administration). James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005, at A1. Numerous lawsuits materialized following disclosure of the program’s existence, both against the government and against the telecommunications providers who had facilitated the government program. See cases cited *supra* note 5. Most litigation has been unable to proceed due to the successful assertion of the state secrets privilege, which has prevented plaintiffs from having access to documents necessary to substantiate their standing to sue. See cases cited *supra* note 5. While such litigation is not the focus of this Article, the government’s assertion of privilege in the surveillance litigation raises essentially the same concerns as does its assertion in the context of the extraordinary rendition litigation. See Frost, *supra* note 23, at 1942–50 (discussing the history of *El-Masri*, *Arar*, *Hepting*, *ACLU v. NSA*, and the pretrial consolidation to NSA wiretapping challenges); Michael C. Miller, Note, *Standing in the Wake of the Terrorist Surveillance Program: A Modified Standard for Challenges to Secret Government Surveillance*, 60 RUTGERS L. REV. 1039, 1057–67 (2008) (discussing similar cases and focusing on standing issues regarding these cases). For an analysis of the legality of the warrantless wiretap program, see generally Evan Tsen Lee, *The Legality of the NSA Wiretapping Program*, 12 TEX. J. C.L. & C.R. 1 (2006) (concluding that the NSA wiretapping program violates FISA, and therefore criminal liability attaches to the violators); Fletcher N. Baldwin, Jr. & Robert B. Shaw, *Down to the Wire: Assessing the Constitutionality of the National Security Agency’s Warrantless Wiretapping Program: Exit the Rule of Law*, 17 U. FLA. J.L. & PUB. POL’Y 429 (2006) (arguing that the President lacks Congressional or inherent authority to effectuate the wiretapping program); ELIZABETH B. BAZAN & JENNIFER K. ELSEA, CONG. RESEARCH SERV., MEMORANDUM, PRESIDENTIAL AUTHORITY TO CONDUCT WARRANTLESS ELECTRONIC SURVEILLANCE TO GATHER FOREIGN INTELLIGENCE INFORMATION 44 (2006), available at <http://www.fas.org/sgp/crs/intel/m010506.pdf> (finding that the President’s legal justifications for the NSA wiretapping program “does not seem . . . well-grounded”). Cf. U.S. DEP’T JUSTICE, LEGAL AUTHORITIES SUPPORTING THE ACTIVITIES OF THE NATIONAL SECURITY AGENCY DESCRIBED BY THE PRESIDENT (2006), available at http://www.justice.gov/opa/whitepa_peronnsalegalauthorities.pdf (setting forth the government’s position as to the legal basis for the NSA’s warrantless wiretap program as authorized by the President).

³⁹ *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1 (D.D.C. 2010).

⁴⁰ *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1073 (9th Cir. 2010).

⁴¹ *Id.* at 1074.

⁴² *Id.* at 1074–75.

government's extraordinary rendition program, the existence of which was publically acknowledged on several occasions by high-level government officials, including the President and Secretary of State.⁴³

Rather than suing the government directly, plaintiffs brought suit against Jeppesen Dataplan, Inc.⁴⁴ Plaintiffs alleged that Jeppesen had provided "flight planning and logistical support services to the aircraft and crew on all of the flights transporting each of the five plaintiffs among the various locations where they were detained and allegedly subjected to torture."⁴⁵ The complaint also alleged that "Jeppesen provided this assistance with actual or constructive 'knowledge of the objectives of the rendition program,' including knowledge that the plaintiffs 'would be subjected to . . . torture.'" ⁴⁶ Hence, the plaintiffs argued that Jeppesen was liable under the Alien Tort Statute, 28 U.S.C. § 1350, for their forced disappearance, as well as torture and other cruel, inhuman, or degrading treatment.⁴⁷

Before Jeppesen responded to the complaint, the U.S. government moved to intervene and requested dismissal of the complaint under the state secrets privilege.⁴⁸ The district court granted the government's motions and entered a judgment in favor of Jeppesen, finding that at the core of the case were allegations of covert U.S. military or CIA operations in foreign countries against foreign nationals—a subject matter which was a state secret.⁴⁹ The plaintiffs appealed and a three-judge panel reversed and remanded, holding that the government had failed to establish a basis for dismissal under the state secrets privilege, but permitting the government to reassert the privilege at subsequent stages of the litigation.⁵⁰ However, the Ninth Circuit agreed to rehear the case en banc in order to "resolve questions of exceptional

⁴³ For a summary of disclosures regarding the extraordinary rendition program, see Reply Brief of Plaintiffs-Appellants on Rehearing En Banc at 19–22, *Mohamed v. Jeppesen Dataplan, Inc.*, 563 F.3d 992 (9th Cir. 2009) (No. 08-15693) (summarizing the known history of the program's disclosures); *see also* Dhooze, *supra* note 23, at 474–75 (noting that the program was disclosed by President Bush on September 6, 2006 and ended in January 2009).

⁴⁴ *Jeppesen*, 614 F.3d at 1075.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ Motion to Dismiss at 34, *Jeppesen*, 563 F.3d 992 (No. C-07-02798-JW). Two declarations, one redacted and one classified, were filed by then-Director of the CIA, General Michael Hayden, asserting that "[d]isclosure of the information . . . reasonably could be expected to cause serious—and in some instances exceptionally grave—damage to the national security of the United States." *Id.*

⁴⁹ *Mohamed v. Jeppesen Dataplan, Inc.*, 539 F. Supp. 2d 1128, 1136 (N.D. Cal. 2008), *rev'd*, *Jeppesen*, 563 F.3d 992.

⁵⁰ *Jeppesen*, 563 F.3d 992.

importance regarding the scope and application of the state secrets doctrine.”⁵¹

As previously mentioned, the court analyzed both *Totten* and *Reynolds* as two prongs of the same doctrine—the state secrets privilege.⁵² It found that some of the plaintiffs’ claims may well fall within the *Totten* bar.⁵³ Other allegations, however, such as the claim that Jeppesen should be liable simply for what it “should have known” about the extraordinary rendition program, were not so obviously tied to proof of a secret agreement between Jeppesen and the government.⁵⁴ In any event, the court found no need to resolve the question of precisely which claims may be barred under *Totten* because it found that even application of the ordinarily narrower *Reynolds* privilege required dismissal of the case.⁵⁵

The court agreed with the government that at least some of the matters related to litigation of the case were valid state secrets which should not be revealed in the name of national security⁵⁶ (although it held that the existence of the program itself was not a state secret).⁵⁷ The court then moved on to examine the effect of the privilege on the proceedings, i.e., whether the case could nonetheless proceed or it required dismissal at the pleading stage. For this purpose, it assumed that plaintiffs’ prima facie case and Jeppesen’s defense did not inevitably depend on privileged evidence.⁵⁸

Nonetheless, the Ninth Circuit held that dismissal was required under *Reynolds* because there was “no feasible way to litigate Jeppesen’s alleged liability *without creating an unjustifiable risk of divulging state secrets.*”⁵⁹ As the majority explained, “[w]hether or not Jeppesen provided logistical support in connection with the [program], there [was] precious little Jeppesen

⁵¹ *Jeppesen*, 614 F.3d at 1077.

⁵² Elsewhere, *Totten* has been interpreted as a separate yet related doctrine. For a discussion of the view that *Totten* and *Reynolds* stand for different doctrines, see *supra* notes 26–30 and accompanying text.

⁵³ *Jeppesen*, 614 F.3d at 1084 (“In particular, [plaintiffs’] allegations that Jeppesen conspired with agents of the United States in plaintiffs’ forced disappearance, torture and degrading treatment are premised on the existence of an alleged covert relationship between Jeppesen and the government. . .”).

⁵⁴ *Id.* at 1085.

⁵⁵ *Id.* The dissent rejected the majority’s position that *Totten* potentially applied to some of the claims raised by the plaintiffs, stating that “*Totten*’s logic simply cannot be stretched to encompass the claims here, as they are brought by third-party plaintiffs against non-government defendant actors for their involvement in tortious activities.” *Id.* at 1097 (Hawkins, J., dissenting).

⁵⁶ *Id.* at 1086 (majority opinion). In fact, all of the judges on the panel agreed that the claim of privilege was proper, but had diverging views on its scope and impact on the plaintiffs’ case. *Id.*

⁵⁷ *Id.* at 1090.

⁵⁸ *Id.* at 1087.

⁵⁹ *Id.* at 1099 (emphasis added).

could say about its relevant conduct and knowledge without revealing information about how the United States government does *or does not* conduct covert operations.”⁶⁰ It went on to determine that this would remain the case no matter what protective procedures, such as protective orders or restrictions on testimony, the district court would employ because of the nature of the adversarial litigation process, in the course of which privileged information could inadvertently be revealed.⁶¹ The court dismissed the dissent’s objection to employing the *Reynolds* bar to dismiss a case at its outset.⁶²

Finally, recognizing the harsh results of its ruling, the court noted that its decision did not foreclose possible nonjudicial relief for the plaintiffs. Such potential avenues of relief included an independent assessment by the government of the merits of the plaintiffs’ claims (e.g., “reparations to Japanese Latin Americans abducted from Latin America for internment in the United States during World War II”);⁶³ an investigation by Congress into the allegations;⁶⁴ the enactment of a private bill which would grant plaintiffs compensation;⁶⁵ or the enactment by Congress of “remedial legislation authorizing appropriate causes of action and procedures to address claims” similar to those raised in *Jeppesen*.⁶⁶ The majority concluded its opinion by noting

that *Totten* has its limits, that every effort should be made to parse claims to salvage a case like this using the *Reynolds* approach, that the standards for peremptory dismissal are very high and it is the district court’s role to use its fact-finding and other tools to full advantage before it concludes that the rare step of dismissal is justified.⁶⁷

The dissenting opinion parted ways with the majority primarily with regard to the stage at which the state secrets privilege was to be applied. The dissent put great weight on the fact that although the state secrets privilege

⁶⁰ *Id.* at 1089 (emphasis in original).

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.* at 1091.

⁶⁴ *Id.*

⁶⁵ *Id.* at 1091–92.

⁶⁶ *Id.* at 1092.

⁶⁷ *Id.* at 1092–93. The majority was joined by Judge Bea in a concurring opinion who was of the view that the case should be dismissed under *Totten*. “[E]very claim in the Plaintiffs’ complaint is based on the allegation that officials of the United States government arrested and detained Plaintiffs and subjected them to specific interrogation techniques. Those alleged facts, not merely Jeppesen’s role in such activities, are a matter of state secret.” *Id.* at 1093 (Bea, J., concurring).

was presumably a rule of evidence—an assumption embraced by the majority—the majority opinion nonetheless allowed the privilege to apply at the pleading stage.⁶⁸ Questioning the prudence of this, the dissent objected to “permit[ting] the removal of *entire allegations* resulting in out-and-out dismissal of the entire suit.”⁶⁹ It posited instead that the privilege was intended to operate at the pleading stage to except from the implications of Rule 8(b)(6) of the Federal Rules of Civil Procedure (FRCP) the refusal to answer certain allegations,⁷⁰ and not to permit the defendants to avoid filing a responsive pleading at all.⁷¹ To do otherwise, as the majority had done, would in effect turn the state secrets privilege—an evidentiary privilege—into an immunity doctrine.⁷²

The dissent also put an emphasis on the procedural aspect of the proceedings, namely that the government had requested a FRCP Rule 12 dismissal of the complaint on the basis of a failure to state a relevant claim. In this regard, it found itself unable to determine “whether the *Reynolds* evidentiary privilege applie[d] without (1) an actual request for discovery of specific evidence, (2) an explanation from Plaintiffs of their need for the evidence, and (3) a formal invocation of the privilege . . . with respect to that evidence, explaining why it must remain confidential.”⁷³ It concluded that neither the FRCP nor *Reynolds* allowed it “to dismiss [the] case for ‘failure to state a claim upon which relief can be granted,’ on the basis of an evidentiary privilege relevant, not to the sufficiency of the complaint, but only to the sufficiency of evidence available to later substantiate the complaint.”⁷⁴

In addition, the dissent criticized the majority’s dismissal of the “suit out of fear of ‘compelled or inadvertent disclosure’ of secret information during the course of litigation.”⁷⁵ It noted that it had “confidence in the ability of district court judges” to adjudicate sensitive matters without inadvertently divulging privileged information.⁷⁶ It berated the majority for assuming “that the government might make mistakes in what it produces, or that

⁶⁸ *Id.* at 1097–98 (Hawkins, J., dissenting).

⁶⁹ *Id.* at 1098.

⁷⁰ FED. R. CIV. P. 8(b)(6). This rule determines that an allegation is admitted if a responsive pleading is required and the allegation is not denied.

⁷¹ *Jeppesen*, 614 F.3d at 1098 (Hawkins, J., dissenting) (“[A] proper invocation of the privilege does not excuse a defendant from the requirement to file a responsive pleading; the obligation is to answer those allegations that can be answered and to make a specific claim of the privilege as to the rest, so the suit can move forward.”).

⁷² *Id.*

⁷³ *Id.* at 1100.

⁷⁴ *Id.* (quoting FED. R. CIV. P. 12(b)(6)).

⁷⁵ *Id.* at 1095 n.4.

⁷⁶ *Id.*

district courts might compel the disclosure of documents legitimately covered by the state secrets privilege.”⁷⁷

The dissent’s reasoning did not remain strictly theoretical. The minority mapped the voluminous public record materials submitted by the plaintiffs and appended to its opinion a table spanning over fifty pages and detailing the unclassified information that was available and could potentially support the plaintiffs’ claims.⁷⁸ This included not only media coverage and nongovernmental agency (NGO) reports, but also documents uncovered during inquiries conducted by the Council of Europe and European Parliament, as well as foreign governments and law enforcement agencies.⁷⁹ In doing so, the minority attempted to demonstrate the erroneousness of dismissing the complaint at the pleading stage without first allowing the suit to proceed based on nonclassified information. Finally, the dissent also rejected the alternative remedies suggested by the majority not only for being insufficient, but also for “understat[ing] the severity of the consequences to Plaintiffs from the denial of judicial relief.”⁸⁰

IV. MISAPPLICATION OF THE STATE SECRETS PRIVILEGE IN *JEPPESEN*

Analysis of the Ninth Circuit decision in *Mohamed v. Jeppesen* raises a number of important questions regarding contemporary application of the state secrets privilege. First is the question of timing—when should the privilege be asserted? Next is the question of how the assertion should be assessed, that is, what is the extent of a court’s role in establishing the validity of a claim of privilege? A third question focuses on the effects of a successful assertion of privilege. In other words, once the government has succeeded in asserting the privilege, how should this affect litigation? This requires looking beyond *Jeppesen* alone and critically revisiting the guidance set forth in *Reynolds* (or rather lack thereof). This Article suggests that the cumulative effect of the majority’s answer to these three questions resulted in the transformation of the state secrets privilege from an evidentiary privilege to a doctrine of nonjusticiability with far-reaching results.

⁷⁷ *Id.*

⁷⁸ *Id.* at 1102–31.

⁷⁹ *Id.* For instance, one such source was a public acknowledgement by the Egyptian Prime Minister during an NBC interview regarding Egypt’s role in cooperating with the U.S. rendition program. *Id.* at 1127.

⁸⁰ *Id.* at 1101.

A. *At What Stage of Litigation Should the State Secrets Privilege Apply?*

The majority in *Jeppesen* stressed the need to attempt to parse claims raised in cases involving a state secrets privilege claim, so as to ensure that as little evidence (or claims) as possible are precluded from the litigation of a case.⁸¹ However, it failed to do so itself by determining in a sweeping manner that any litigation of the case presented an unacceptable risk of revealing privileged information and that this danger could in no way be adequately mitigated or overcome.⁸²

The dissent, on the other hand, required *Jeppesen* to first answer the allegations against it or otherwise plead before a court begins to assess any particularized claims of privilege regarding evidence that might be divulged in future litigation.⁸³ While this course of action—requiring the defendant to first present a defense before determining whether substantiating that defense requires reliance on privileged information—may be sound in theory, it is possible that, in practice, *Jeppesen* is indeed incapable of pleading without already compromising privileged information.

Let us assume, for example, that a covert agreement did exist between *Jeppesen* and the U.S. government for the transportation of detainees to foreign countries for detention and interrogation under the extraordinary rendition program. Moreover, let us assume such a confidential agreement existed in writing, extensively detailing the obligations of the parties. It is highly likely that the provisions of such an agreement would prohibit disclosure by *Jeppesen* of its existence and of the understandings in it. As a result, *Jeppesen* could neither confirm nor deny the existence of an arrangement between the company and the government. Hence, it might have difficulty responding to an allegation on this particular matter in the complaint.

In order to resolve this difficulty, the dissent noted that the state secrets privilege could be employed in order to avoid the implications of refusing to answer certain allegations.⁸⁴ Hence, *Jeppesen* could invoke the privilege in order to avoid responding to specific and particularized allegations in the complaint without this resulting in an acknowledgement of the allegations. Under this rationale, *Jeppesen* could assert (via the government) the state secrets privilege at the pleading stage with regard to the existence or nonexistence of a covert agreement to provide services to the government.

⁸¹ *Id.* at 1092–93 (majority opinion).

⁸² *Id.* at 1090 (“[W]e conclude that even assuming plaintiffs could prove their entire case solely through nonprivileged evidence . . . any effort by *Jeppesen* to defend would unjustifiably risk disclosure of state secrets.”).

⁸³ *Id.* at 1098 (Hawkins, J., dissenting).

⁸⁴ *Id.*

The plaintiffs would be at liberty to attempt to prove the existence of such an agreement based on nonprivileged evidence at their disposal at later stages of the litigation.⁸⁵

The hypothetical example elucidates perhaps most vividly the diverging approaches of the en banc panel. The majority and dissent each chose to draw the line of their cost-benefit analysis at different stages of the litigation. The judges of the majority opinion were presumably concerned that by commencing the litigation, the defendants might inadvertently reveal state secrets. Hence, as a policy choice, they preferred to dismiss the case at this early stage in order to avoid the potential costs of allowing litigation to proceed (e.g., having the existence of a secret agreement divulged in the course of Jeppesen's defense).

The dissent, on the other hand, refused to dismiss the case in its entirety based on mere speculation as to what Jeppesen's potential defense would be and what evidence it might require to substantiate that defense.⁸⁶ It adopted a more surgical approach, hoping to carve away only those specific pieces of evidence that could not be revealed, while still allowing litigation to proceed to the extent possible. In other words, why prevent litigation altogether in an attempt to hypothetically protect our hypothetical agreement?

Why not allow, better yet, require, Jeppesen first to respond to the allegations to which it can and identify those to which it cannot, before determining whether it is possible to proceed with the litigation? Granted, this would create more work for the defendants, breaking down the allegations and assessing what can and cannot be said with regard to each (something any defense attorney would do anyway). It would also create

⁸⁵ Whether or not Jeppesen would have an interest in revealing the existence of such an agreement for purposes of its defense is a separate question. If anything, divulging the existence of such a document would at the very least corroborate plaintiffs' preliminary allegation regarding Jeppesen's active participation in the program (assuming the claim even required further support beyond publicly available information collected and presented to the court by the plaintiffs). Therefore, as a strategic matter, Jeppesen may have no interest in making the existence of the agreement known. This illustrates the potential for abuse or manipulation of the state secrets privilege—asserting privilege broadly in order to avoid disclosure of evidence that would strengthen the plaintiffs' case. Could there also be elements in the agreement that would nonetheless help Jeppesen's defense? Theoretically, yes, although it is understandably difficult to hypothesize as to the nature of such elements. For instance, such an agreement could include a provision stating that Jeppesen was given assurances by the government that the activity it would be participating in conformed to any legal obligations it was subject to. Even in the event that such a theoretical provision existed in our theoretical agreement, whether this alone would necessarily absolve Jeppesen of liability is far from certain, particularly if Jeppesen "knew or should have known" otherwise.

⁸⁶ *Jeppesen*, 614 F.3d at 1096 (Hawkins, J., dissenting) ("Making assumptions about the contours of future litigation involves mere speculation, and doing so flies straight in the face of long standing principles of [FRCP] Rule 12 law by extending the inquiry to what *might* be divulged in future litigation.") .

more work for the district court, having to determine whether the defendants' ability to effectively defend against the suit was compromised to an extent that justifies dismissing the suit. Yet is this not precisely the careful and exhaustive parsing that the majority demanded in an attempt "to salvage a case" before undertaking "the rare step of dismissal"?⁸⁷

In this context, it is important to emphasize that the majority was willing to assume that Jeppesen's defense *did not* inescapably depend on privileged evidence.⁸⁸ Accordingly, it did not dismiss the case due to a concern that Jeppesen would be unable to effectively respond to the complaint without divulging privileged information, and hence could be forced to forfeit its defense. Such reasoning would be justified and necessary in order to ensure defendants are not stripped of the ability to present to the court legitimate defense claims. However, this was not the underlying rationale for the majority's dismissal. It simply preferred a more convenient (or cautious, at best) approach with devastating results for the plaintiffs' lawsuit.⁸⁹

B. What Requires Protection? How Can Courts Assess the Validity of an Assertion of Privilege?

Within the microcosm of national security matters, the state secrets privilege is a most poignant illustration of the tension between the roles of the judiciary and the executive. As noted earlier, in order to properly raise a claim of state secrets privilege, the privilege must be asserted by the head of the department which has the responsibility for the information and evidence in question.⁹⁰ Once this procedural requirement is satisfied, though, what is expected of the court? How can a court assess the validity or sufficiency of the assertion? Supreme Court precedent tells us that courts must take into consideration, *inter alia*, the plaintiff's need for information to litigate the case, and also that, "[w]here there is a strong showing of necessity [by the plaintiff], the claim of privilege should not be lightly accepted."⁹¹

Aside from this, little guidance is provided as to how much deference should be given to the executive assertion. In fact, it has been noted by some critics that "[t]he extent to which a judge should defer to an executive official's claim of state secrets privilege is one of the law's 'open areas,' " which is an area with regard to which neither text nor precedent fully dictate

⁸⁷ *Id.* at 1092–93 (majority opinion).

⁸⁸ *Id.* at 1087.

⁸⁹ See Lyons, *supra* note 15, at 120 ("[E]arly dismissal is simply inconsistent with *Reynolds* and weakens its underlying value, namely to provide a forum for cases containing classified information while still protecting this information.").

⁹⁰ *United States v. Reynolds*, 345 U.S. 1, 7–8 (1953).

⁹¹ *Id.* at 11.

the judge's course of action.⁹² Once the state secrets privilege has been asserted by the proper official and the court is satisfied that the official is familiar with the material in question and is competent to assess it, has the court's inquiry come to an end?

Professor Robert Chesney elegantly illustrates the obscurity surrounding the role of the courts in assessing a claim of state privilege by presenting an excerpt from oral argument before the Ninth Circuit in *Hepting v. AT&T Corp.*,⁹³ a civil suit challenging another controversial national security policy, the warrantless wiretap program. Plaintiffs sued AT&T for its complicity in the program, and the government intervened, asserting that the state secrets privilege prevented the litigation from moving forward.⁹⁴ In the course of oral arguments, the judges attempted to discern defense counsel's approach as to who determines whether something is a state secret—courts or the executive—and inquired whether they should take the government's assertion of state secrets essentially at face value.⁹⁵ The defense, while denying that the court should “rubberstamp” the executive's assertion of privilege, failed to provide a coherent doctrinal approach to the judges' role, instead urging them to simply give “utmost deference” to the assertion.⁹⁶

In the context of the *Jeppesen* litigation, the government submitted a declaration by General Hayden (Public Declaration), as formally required under *Reynolds*, asserting that disclosure of the information related to the case “‘reasonably could be expected to cause serious—and in some instances exceptionally grave—damage to the national security of the United States.’”⁹⁷ The public declaration went on to list the information subject to the state secrets privilege, which included:

A. Information that may tend to confirm or deny whether Jeppesen or any other private entity assisted the CIA with any alleged clandestine intelligence activities, including the CIA terrorist detention and interrogation program;

⁹² Michael H. Page, Note, *Judging Without the Facts: A Schematic for Reviewing State Secrets Privilege Claims*, 93 CORNELL L. REV. 1243, 1244 (2008); see also Robert M. Chesney, *National Security Fact Deference*, 95 VA. L. REV. 1361, 1377 (2009) (“[N]o one appears to know quite what to make of this guidance despite decades of subsequent litigation involving the state secrets privilege.”).

⁹³ Oral Argument at 5–6, *Hepting v. AT&T Corp.*, 539 F.3d 1157 (9th Cir. 2008) (Nos. 06-17132 & 06-17137).

⁹⁴ *Hepting v. AT&T Corp.*, 439 F. Supp. 2d 974, 978–79 (N.D. Cal. 2006).

⁹⁵ Chesney, *supra* note 92, at 1377–78.

⁹⁶ *Id.*

⁹⁷ Motion to Dismiss at 1, *Mohamed v. Jeppesen Dataplan, Inc.*, 563 F.3d 992 (9th Cir. 2009) (No. C-07-02798-JW) [hereinafter *Jeppesen Motion to Dismiss*] (quoting the public declaration).

- B. Information that may tend to confirm or deny any alleged cooperation between the CIA and foreign governments regarding clandestine intelligence activities;
- C. Information concerning the scope and operation of the CIA terrorist detention and interrogation program, such as: the locations where detainees were held; whether or not the CIA cooperated with particular foreign governments or private entities in conducting this program; the interrogation methods used in the program; and the identities of any individuals detained by the CIA that have not already been publicly acknowledged; and
- D. Any other information concerning CIA clandestine intelligence activities that would tend to reveal any intelligence activities, sources, or methods.⁹⁸

The public declaration further explains, albeit only generally, why revealing such information could cause damage to national security. For example, disclosure by Jeppesen of whether or not it provided the alleged assistance to the government “would cause exceptionally grave damage to the national security by disclosing whether or not the CIA utilizes particular intelligence sources and methods, and, thus, revealing to foreign adversaries information about the CIA’s intelligence capabilities or lack thereof.”⁹⁹

Looking at category A of information detailed in the public declaration, several questions spring to mind. How would revealing the existence of a relationship between Jeppesen and the government have led to disclosing “particular intelligence sources and methods . . . thus, revealing to foreign adversaries information about the CIA’s intelligence capabilities?”¹⁰⁰ There appears to be a rather large distance between confirming that a contractual relationship existed between Jeppesen and the government and exposing intelligence collection methods.

The public declaration, then, appears to be overinclusive. Its initial underlying assumption is that disclosure of *any* details related to the extraordinary rendition program, including those details that are far removed from the intricacies of the Program itself, would inevitably lead to disclosure of information that would most likely result in serious damage. It adopts a slippery-slope premise that presumably goes something like this: if it is revealed that Jeppesen conducted flights for the government, the countries to

⁹⁸ Michael V. Hayden, Dir., Cent. Intelligence Agency, Formal Claim of State Secrets and Statutory Privileges, para. 20, *in* Motion to Dismiss, *supra* note 97, at 53 [hereinafter Public Declaration].

⁹⁹ *Id.* para. 22.

¹⁰⁰ *Id.*

which those flights took place will inevitably be disclosed. This will in turn lead to a revelation that the United States had clandestine agreements with those countries to which the detainees were taken to, which will lead to disclosure of the content of those clandestine agreements, and ultimately to a disclosure of the methods used to elicit information from those detainees. All of this could compromise the national security of the United States.

On the surface, at least, this sounds convincing. But if we break down the potential chain reaction of events, we discover cracks in the public declaration's ominous premise. Perhaps the plaintiffs in *Jeppesen* would have been able to substantiate their claim that Jeppesen had knowledge or should have known what it was contributing to, based exclusively on the confirmation of a business contract between Jeppesen and the government, together with publically available information and plaintiffs' testimony regarding the nature of the extraordinary rendition program. It is impossible to know with any certainty whether this would have sufficed for litigation purposes, but should the plaintiffs not be given a chance to try and do so? This is just the type of "parsing" that would have perhaps "salvaged" plaintiffs' lawsuit.¹⁰¹

One may potentially argue that the majority in *Jeppesen* simply adopted a more pragmatic and economic approach than the dissent. It recognized that the lawsuit would likely encounter challenges it would have difficulty overcoming at later stages of the litigation, given even the dissent's concession that the lawsuit involved state secrets, and taking into consideration the substantive legal questions at the heart of the lawsuit, which would surely raise strong claims of substantive nonjusticiability.¹⁰² By dismissing the lawsuit at a relatively early stage of the proceedings rather than allowing litigation to continue, it spared both the court and the parties an exercise in futility.

Such an assertion, however, seems misguided. While there is certainly value in avoiding superfluous litigation, this in itself does not justify careless application of the state secrets privilege. Moreover, enabling the plaintiffs to take the lawsuit forward as far along as possible carries with it considerable advantages. Almost inevitably, it brings to light more information about the government's policies, thus encouraging public debate and examination and

¹⁰¹ See, *Mohamed v. Jeppesen Dataplan Inc.*, 614 F.3d 1070, 1092–93 (9th Cir. 2010) (noting that all claims should be parsed in order to salvage a case from dismissal, which is a very high standard).

¹⁰² See *infra* notes 130–31 and accompanying text (suggesting that the *Jeppesen* majority applied the state secrets privilege broadly de facto as a doctrine of non-justiciability in a manner similar to the political question doctrine in order to avoid adjudication of sensitive national security matters).

potentially leading to reform. Also, as litigation continues, parties may have more opportunities and incentive to reach a settlement.¹⁰³

The obvious question is this: how are judges to determine what information is indeed deserving of special protection? The government in *Jeppesen* insisted, for example, that the interrogation methods employed in the program are deserving of protection. The public declaration noted briefly that revealing the interrogation methods employed by the CIA could give terrorists an opportunity to undergo special training in their interrogation resistance programs in order to better withstand such techniques.¹⁰⁴

Further details on this point were not included. However, the government also submitted a classified in camera, ex parte declaration (Classified Declaration).¹⁰⁵ While it is difficult to speculate what the Classified Declaration included, it is reasonable to assume that it elaborated on how revealing interrogation methods would compromise national security. *Reynolds* tells us that the greater the plaintiffs' need for the information, the deeper the court's probe should be into the government's assertion.¹⁰⁶ At the very least, we would expect a court to ensure that the government's assessment is based on relevant information (rather than pure conjecture) and provided by a competent professional.

On the other hand, if the court does not look any further, is it not indeed simply rubber stamping the government's assertion? Should the court bring in independent experts, perhaps former intelligence officers or psychologists, to assess whether such damage is indeed likely if interrogation methods were to be divulged?¹⁰⁷ Employing such tools in order to substantively assess the validity of a government's claim of state secrets privilege can be expected to draw criticism from those who advocate for "utmost deference" to the executive on such matters. It may also be time-consuming and costly. Alternatively a limited ability to assess independently the government's

¹⁰³ This is a desirable outcome assuming that the plaintiffs' lawsuit has merit and is not opportunistic or that it is the efficient outcome for all parties involved. *See infra* notes 212–13 and accompanying text (discussing the possibility that a less accommodating judicial approach to the government's assertion of privilege could inadvertently encourage plaintiffs to file disingenuous lawsuits).

¹⁰⁴ Motion to Dismiss at 16, *Mohamed v. Jeppesen Dataplan, Inc.*, 563 F.3d 992 (9th Cir. 2009) (No. C-07-02798-JW).

¹⁰⁵ Public Declaration, *supra* note 98, para. 21.

¹⁰⁶ *United States v. Reynolds*, 345 U.S. 1, 11 (1953).

¹⁰⁷ *See Chesney, supra* note 16, at 1311 (noting potential difficulties in appointing nonparty experts in the context of state secrets); Meredith Fuchs & G. Gregg Webb, *Greasing the Wheels of Justice: Independent Experts in National Security Cases*, 28 A.B.A. NAT'L SEC. L. REP., no. 4, 2006, at 1, 3–5, available at http://www.americanbar.org/content/dam/aba/migrated/natsecurity/nslr/2006/NSL_Report_2006_11.authcheckdam.pdf (discussing a variety of mechanisms for appointing expert advisers).

assertion of privilege may also come at a high cost, as illustrated by *Jeppesen*.

A new policy issued in September 2009 by the Obama administration with regard to the state secrets privilege attempts to address some of these concerns.¹⁰⁸ A Department of Justice memo issued by Attorney General Eric Holder (Holder Memo) sets forth a number of steps for invoking the privilege.¹⁰⁹ Beyond the obvious requirements of having a knowledgeable person attest to the sensitivity of the information and expected damage, as well as narrowly tailoring the assertion so that the privilege is invoked only to the extent necessary,¹¹⁰ the Holder Memo provides for what can be described as a supervisory mechanism. It requires the Assistant Attorney General for the division responsible for the subject matter to formally recommend in writing whether the Justice Department should defend the assertion in litigation.¹¹¹ A State Secrets Review Committee, consisting of senior Department of Justice officials, is tasked with evaluating such recommendations to determine whether invocation of the privilege is warranted.¹¹² The Committee then makes a recommendation to the Deputy Attorney General or his Associate, who in turn make a further recommendation to the Attorney General.¹¹³ Personal approval from the Attorney General is required for defending an assertion of the privilege in litigation.¹¹⁴

This construct has been termed by one commentator as “explanatory accountability”;¹¹⁵ the policy requires executive officials to explain and justify their privilege assertions, rather than political accountability, which assumes that politicians are accountable because they can be removed from office by voters and “involves the expectation that officials might actually be asked to justify their particular policy decisions to others or face negative consequences.”¹¹⁶ Nevertheless, Wells already points to a number of weaknesses in the policy.¹¹⁷

¹⁰⁸ Memorandum from Eric Holder, Attorney Gen., U.S., to Heads of Exec. Dep'ts & Agencies, U.S. (Sept. 23, 2009), available at <http://legaltimes.typepad.com/files/ag-memo-re-state-secrets-dated-09-22-09.pdf>.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.* at 2–3.

¹¹³ *Id.* at 3.

¹¹⁴ *Id.*

¹¹⁵ Christina E. Wells, *supra* note 25, at 629.

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 644–45. Wells criticizes the policy for creating a one-sided procedure, whereby the State Secrets Review Committee is required to “consult with the Director of National Intelligence only when it recommends against assertion of the privilege,” which “smacks of a mechanism allowing government officials one last attempt to convince [the Department of

It is difficult to assess at this stage the extent to which the Holder Memo will minimize the potential for abuse or overinclusiveness of assertions of privilege by the government. A quantitative drop in invocation or scope of the privilege may be one indication.¹¹⁸ At the same time, continued use of the privilege, consistent with that of the previous administration, may mean one of two opposite things: it may suggest that the Obama administration, like its predecessor, subscribes to the slippery-slope theory that divulging *any* information regarding its counterterrorism programs unduly risks causing damage to national security—an approach that seems to be overly broad or overly cautious at the expense of plaintiffs attempting to challenge controversial government policies. On the other hand, it may lend support to the theory that perhaps the Bush administration was justified in invoking the privilege in the manner that it did with regard to national security litigation if such assertions continue to be invoked by the present administration under a stricter and more closely supervised procedure.

C. Consequences of Successfully Asserting the Privilege: Lack of a Balancing Test Under Reynolds

Determining whether the assertion of the state secrets privilege by the government is warranted is no easy task. Nevertheless, once the court is convinced that the assertion is justified, what then? Under *Reynolds*, presumably this forecloses any chance of disclosing the privileged information, since “even the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that military secrets are at stake.”¹¹⁹ In *Jeppesen*, as well as other attempted challenges to the

Justice (DOJ)] to change its mind.” *Id.* at 644. She notes that this is “not a neutral accountability mechanism.” *Id.* She also criticizes the policy as being “too vague to force DOJ attorneys to act as explanatory accountability mechanisms.” *Id.* Moreover, she finds the breadth of the policy’s definition of national security encompassing “almost anything.” *Id.* The policy does not obviously provide a mechanism for DOJ officials to question privilege assertions. Finally, Wells charges that “there is no requirement that agency officials explain whether narrower options are available with respect to their assertion of the privilege,” despite the “necessity” requirement set forth in the Holder Memo. *Id.* at 645.

¹¹⁸ For the intrinsic weaknesses of such an examination, see Chesney, *supra* note 16, at 1252 (attempting to evaluate whether the Bush administration made greater use of the state secrets privilege than previous administrations and noting that “[t]he quantitative inquiry is a pointless one in light of the significant obstacles to drawing meaningful conclusions from the limited data available, including in particular the fact that the number of lawsuits potentially implicating the privilege varies from year-to-year”).

¹¹⁹ *United States v. Reynolds*, 345 U.S. 1, 11 (1953); see also *El-Masri v. United States*, 479 F.3d 296, 306 (4th Cir. 2007) (“[N]o attempt is made to balance the need for secrecy of the privileged information against a party’s need for the information’s disclosure; a court’s determination that a piece of evidence is a privileged state secret removes it from the proceedings entirely.”); *El-Masri v. Tenet*, 437 F. Supp. 2d 530, 537 (E.D. Va. 2006) (“[T]he

extraordinary rendition program, this essentially deprived those subjected to the government's policy from their day in court.

Reynolds presumably posits the necessity of the plaintiffs against the need to protect sensitive information, yet this is done only with regard to the initial stage of examining the assertion of privilege itself. Once the privilege has been established, *Reynolds* does not set forth any kind of balancing test between the plaintiff's need for the information and the government's need to protect such information. The government's interest receives exclusive and full protection, even at the cost of dismissal.

Yet what about other policy interests beyond those of a specific plaintiff? Should the government interest always trump those as well? If the government has authorized the use of arguably illegal interrogation methods, which may even amount to torture, against detainees under its control, why should this be afforded protection by the courts? Should not the courts be able to examine the validity of the interrogation methods, so as to ensure that the government is not engaging in illegal conduct with monstrous effects? There is a strong argument to be made for the public interest in adjudicating such a case and preventing the government, if need be, from continuing to engage in illegal conduct.¹²⁰

Indeed, some critics of the *Reynolds* analysis—which presumably does not allow balancing the risk to national security with other considerations—have read *Reynolds* to mean that judges should weigh the magnitude of the threatened harm to the public's security.¹²¹ In other words, an assertion by the government that divulging certain information would pose a security risk would not be enough. A judge would also have to weigh the *probability* that the event would actually harm the public.¹²² Others have rightly noted that *Reynolds* was a negligence suit, and, as such, provides little guidance on how the state secrets privilege should operate in cases in which the government stands accused of constitutional or statutory violations.¹²³

A balancing test involving national security might sound alarming to some, yet it is in fact something that courts do on a regular basis.¹²⁴ Courts

privilege is not subject to a judicial balancing of the various interests at stake.”); Frost, *supra* note 23, at 1943; Dhooge, *supra* note 23, at 496.

¹²⁰ For a discussion of the interference of a broad assertion of the state secrets privilege with public rights and the role of “the People” as a check of the government, see Lyons, *supra* note 15, at 126–29.

¹²¹ Page, *supra* note 92, at 1276–77.

¹²² *Id.* at 1277 (“If, for example, the concern is exposing the Central Intelligence Agency’s methods and capabilities, the executive official should explain to the court how disclosing such information would harm the public. If the harm is great but the causal chain is indirect, the risk may be low.”).

¹²³ Telman, *supra* note 31, at 521–22.

¹²⁴ See, e.g., *Hamdi v. Rumsfeld*, 542 U.S. 507, 529–533 (2004) (determining that the mechanism in place by the Government for the detention of a citizen deemed to be an “enemy

are often required to balance competing constitutional interests, and this includes myriad situations which involve national security interests. It is rare in the constitutional landscape to have one interest, albeit a central and weighty one such as national security, categorically and absolutely trump other interests, particularly civil liberties and human rights. In fact, various suggestions to create specialized courts for national security matters or specialized procedures such as in camera review or security clearance for attorneys,¹²⁵ are potential manifestations of what a balancing approach would look like. They are aimed at providing courts with tools to mitigate the injury that would otherwise be caused to plaintiffs as a result of dismissal, while at the same time not compromising national security.¹²⁶ The Israeli scheme for the protection of privileged information presented in detail in Part V is just one example of such a balancing test.

D. From an Evidentiary Privilege to a Doctrine of Nonjusticiability

Until now I have focused on the flawed manner in which the majority in *Mohamed v. Jeppesen* applied the *Reynolds* evidentiary privilege, as well as inherent flaws in the *Reynolds* analysis itself, which provides national security with absolute protection often at the expense of valuable competing interests. However, the manner in which the state secrets privilege was applied by the majority in *Jeppesen* (and its brethren cases)¹²⁷ carries great significance from a doctrinal perspective as well.

In terms of both timing and scope, the majority's opinion in *Jeppesen* effectively likened the privilege to a justiciability bar rather than an evidentiary privilege. Firstly, the assertion of privilege was made at the preliminary pleading stage. Moreover, as a result of the successful assertion

combatant" did not satisfy the due process requirement and that such an individual seeking to challenge his classification was entitled to receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker). The Court, after weighing the security concerns presented by the Government, found that " 'the risk of an erroneous deprivation' of a detainee's liberty interest is unacceptably high under the Government's proposed rule" and that "it [is] unlikely that this basic process [formulated by the Court] will have the dire impact on the central functions of warmaking that the Government forecasts." *Id.* at 532–34.

¹²⁵ See e.g., Chesney, *supra* note 16, at 1312–14 (proposing the referral of such cases in which the state secrets privilege has been successfully asserted to a secure judicial forum akin to the Foreign Intelligence Surveillance Court rather than having to dismiss entirely).

¹²⁶ Cf. Dhooge, *supra* note 23, at 500–01 (arguing that current state secret case law already strikes an appropriate balance between civil justice and national security, and that the formulation of special procedures that would facilitate litigation involving sensitive information "would be an inordinate exercise in judicial creativity without Congressional authorization or adequate precedent" that "would create considerable risk . . . to national security").

¹²⁷ See cases cited *supra* note 5.

of the privilege, the suit was dismissed without the government or the civil defendant having to respond to the substance of the allegations at all. Finally, it was not asserted in relation to particular pieces of evidence, but in relation to generalized subject matter with regard to which the government refused to divulge any information whatsoever. In fact, the split between the majority and dissent in *Jeppesen* reflects precisely the difference between applying the state secrets privilege as a justiciability bar versus applying it as an evidentiary privilege. The dissenting opinion in *Jeppesen* remains faithful to the concept of the state secrets privilege as an evidentiary privilege by seeking to move forward to discovery and having the privilege asserted with regard to particular evidence or information in a narrowly tailored manner.¹²⁸

The gist of the majority's opinion in *Jeppesen*, however, is as follows: the subject matter of the lawsuit is so sensitive that *any* attempt to litigate the matter poses an unacceptable risk to national security. When phrased this way, the privilege becomes reminiscent of another justiciability bar—the political question doctrine. Under *Baker v. Carr*,¹²⁹ courts are instructed to refrain from adjudication in certain cases which they are ill-suited to decide.¹³⁰ In essence, the majority's opinion follows the same underlying rationale and recognizes an additional category of nonjusticiable lawsuits: courts are ill-suited to adjudicate disputes which involve sensitive national security policies as a result of the complexities presented by classified information.

Presumably, the majority in *Jeppesen* was concerned with the ability of courts to ensure the adequate protection of privileged information in the course of litigation regarding the extraordinary rendition program. However, one cannot help but wonder to what extent these concerns were fueled by the plaintiffs' substantive claims themselves. Ultimately, the legal question at

¹²⁸ The original Ninth Circuit panel to hear the case on appeal from the district court took a similar approach, concluding that at this stage of the litigation, it could not evaluate the hypothetical claims of the state secrets privilege that had been raised and therefore remanding to the district court for consideration and determination whether any of the information is privileged and if so, whether it is indispensable to one of the parties. *Mohamed v. Jeppesen Dataplan Inc.*, 563 F.3d 992, 1008–09 (9th Cir. 2009).

¹²⁹ *Baker v. Carr*, 369 U.S. 186 (1962).

¹³⁰ *Id.* at 217 (“Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.”). For an overview of the development of the political question doctrine, see Mark Tushnet, *Law and Prudence in the Law of Justiciability: The Transformation and Disappearance of the Political Question Doctrine*, 80 N.C. L. REV. 1203 (2002).

the heart of the suit was whether the actions engaged in by the U.S. government were legal or not. Before it was able to determine Jeppesen's liability, a court would have to examine the legality of the interrogation techniques plaintiffs were subjected to and the liability of the U.S. government for facilitating the interrogation of detainees. Neither of these are questions a court would necessarily be eager to answer.

Viewed from this perspective, the underlying issue in *Jeppesen* becomes a classic question of justiciability—whether the court should adjudicate the question of the legality of the extraordinary rendition program and the potential effects of such adjudication on foreign relations. However, by broadly applying the state secrets privilege rather than addressing head-on the justiciability issue, the court circumvents the larger question of the role of the judiciary in keeping in check the executive's national security policies in the context of the “war on terror.” The lack of genuine analysis by the majority of why various protective measures, such as in camera review and protective orders, would be inefficient in addressing its concerns¹³¹ strengthens the sense that the heart of the matter is essentially one of justiciability.¹³²

The unfortunate effect of the majority opinion in *Jeppesen* is twofold: it creates bad precedent by applying the state secrets privilege very broadly in a manner that substantially hampers the ability to subject the most invasive government actions to judicial review and it avoids the real issue of the role of the courts in adjudicating questions pertaining to the legality of executive counterterrorism policy and to what extent such policies should remain isolated from judicial review. The result, of course, is a harsh one for the plaintiffs in this case—individuals who were allegedly subjected to horrid treatment at the (long) hands of the government—and others who have been subjected to various questionable national security policies. While the majority opinion in *Jeppesen* does discuss alternate potential avenues of

¹³¹ Under a formalistic interpretation of *Reynolds*, one could argue that the court, having determined the information is privileged, is barred from entertaining any measures which would enable the introduction of privileged information in the course of the proceedings. However, since the majority conceded that privileged information is not necessarily required by either party, such protective measures would not be employed in order to facilitate the introduction of privileged information, but rather to ensure that in case of inadvertent disclosure, the potential risks of such disclosure would be mitigated.

¹³² See John Cary Sims, *Ten Questions: Responses of John Cary Sims*, 33 WM. MITCHELL L. REV. 1593, 1598 (2007) for a not dissimilar perspective, which characterizes the state secrets privilege by the government as on its way to becoming “an additional and almost-impermeable immunity doctrine.” See also Telman, *supra* note 31, at 522 (positing that the invocation of the state secrets privilege before discovery has begun, even in cases in which plaintiffs do not need discovery in order to establish their prima facie cases, has transformed the privilege into a form of executive immunity).

relief for plaintiffs and others like them, as noted by the dissent,¹³³ these are insufficient and minimize the role of the judicial branch in maintaining checks and balances on the government and ensuring that the state respects the rule of law.¹³⁴

An additional byproduct of *Jeppesen* is the de facto immunity it provides not only to the executive but also to third-party actors who facilitate the government's actions. This immunity has the potential to adversely affect the accountability of private actors for business and policy decisions they make by exempting them from legal ramifications.¹³⁵ It runs counter to the policy schemes available in other public arenas, which are formulated to incentivize private actors and corporations to act responsibly. In today's market, companies are measured more and more by their environmental and social responsibility. Investors can direct their investments to companies that are socially responsible. Divestment and boycott movements target those corporations that are human rights violators or conduct business with oppressive regimes.¹³⁶ However, the holding in *Jeppesen* prevents a factual inquiry into Jeppesen's alleged involvement in the extraordinary rendition program and its legal and moral culpability. Although the public is at liberty to form its opinion on Jeppesen's actions absent a judicial ruling on the matter, potential human rights abuses by private parties are not deserving of immunity.¹³⁷

¹³³ See *supra* note 80 and accompanying text (describing the dissent's criticism of the majority's suggestion that alternate remedies could be made available to the plaintiffs to address their grievances).

¹³⁴ In fact, Frost has argued that if the judiciary accepts the government's recent position on application of the state secrets privilege, it is "abdicating its congressionally assigned task to restrain executive power." Frost, *supra* note 23, at 1954. According to Frost, "[w]hen a litigant claims that the executive has violated a statute or engaged in unconstitutional conduct—as [was alleged in *Jeppesen*—courts serve as a check on the potential abuse of" power based on the authority granted to them by Congress when it enacted "28 U.S.C. § 1331, which grants courts broad federal question jurisdiction." *Id.* at 1954–55. Frost concedes that the fact that

courts have authority to hear cases challenging executive action does not mean that they are constitutionally required to do so. It does suggest, however, that courts should examine more closely the role that the federal judiciary and Congress play in working together to check executive authority before granting executive demands to dismiss these cases.

Id. at 1956.

¹³⁵ See Donohue, *supra* note 2, at 98–99 (discussing both the abuse by companies of privileged information in order to coerce the government to intervene on their behalf in litigation and the use of the state secrets privilege in effect to give companies deeply embedded in the U.S. national defense industry a form of private indemnity).

¹³⁶ See generally Lucien J. Dhooge, *Beyond Volunteerism: Social Disclosure and France's Nouvelles Rgulations Economiques*, 21 ARIZ. J. INT'L & COMP. L. 441, 452–63 (2004) (discussing the growing public demand for social disclosure by companies).

¹³⁷ On the other hand, the situation also prevents such private actors from exonerating

V. STATE SECRETS PRIVILEGE FROM A COMPARATIVE PERSPECTIVE

Whenever questions of national security are involved, there is a tendency toward a heightened sense of risk. More appears to be on the balance. The term national security will usually evoke an increased sense of urgency or vulnerability that is deserving of greater protection and deference. Accordingly, it is often difficult to break away from familiar legal approaches and conceptualize alternative approaches to national security issues.

In this context, a look at Israeli jurisprudence pertaining to classified information in national security litigation could be of great value. While some jurisdictions may be easily brushed aside as irrelevant, for they do not encounter the same security challenges as those faced by the United States since 9/11, this is hardly the case with regard to Israel.¹³⁸ In fact, targeted killings and interrogation techniques are issues that have been the subject of legal and political debate in Israel for the past two decades.¹³⁹ Moreover, both issues have been subject to substantive judicial review by Israel's Supreme Court, as will be discussed below.

While an analogy of the litigation regarding the legality of the extraordinary rendition program or drone-operated targeted killings to other areas of national security law may prove insufficient in terms of complexity, a comparison to adjudication of the same issues in Israeli jurisprudence may certainly provide valuable insight. Presently, U.S. case law may appear ill-equipped to effectively and efficiently handle national security litigation on these topics. However, the recognition that this has been done successfully

themselves from such allegations. Thus, companies may remain with a tarnished reputation without the ability to clear their names in court if they are bound by agreements that prevent them from publicly divulging information regarding the scope of their involvement in and knowledge of government activities. *Cf. Dhooge, supra* note 23, at 510 (citing the potential damage to Jeppesen's reputation as a result of litigation as justification for *upholding* the state secrets privilege claim).

¹³⁸ Setty, *supra* note 26, at 245 ("Israeli courts undertake a balancing analysis to determine whether national security-related litigation ought to continue or be dismissed as non-justiciable. This is particularly remarkable given the difficult national security situation Israel faces.").

¹³⁹ See *Commission of Inquiry into the Methods of Investigation of the General Security Service Regarding Hostile Terrorist Activity*, 23 ISR. L. REV. 146 (1989); H CJ 5100/94 Public Committee Against Torture v. Israel 53(4) PD 817, 826 [1999] (determining that certain interrogation methods could not be used by Israel's General Security Service); Amnon Reichman, "When We Sit To Judge We Are Being Judged": *The Israeli GSS Case, Ex Parte Pinochet and Domestic/Global Deliberation H CJ*, 9 CARDOZO J. INT'L & COMP. L. 41, 48-70 (2001) (describing the respective positions of the judiciary and the legislature in Israel with regard to the issue of interrogation techniques); 769/02 Public Committee Against Torture v. Israel, 69 Dinim Elyon 1089 [2006] (determining that in certain circumstances Israel's practice of preemptive targeted killing would be legal under international law).

in other jurisdictions may provide insight regarding potential directions and trends for future U.S. jurisprudence.¹⁴⁰

A. Privileged Evidence Under Israel's Evidence Ordinance

The Israeli Supreme Court is the highest appellate court in Israel.¹⁴¹ It enjoys original jurisdiction over actions by the state or its officials in its capacity as the High Court of Justice (HCJ).¹⁴² In such circumstances, it is a court of first and final instance to adjudicate such petitions. As a result, challenges to administrative decisions or executive policy requesting declarative or injunctive relief will usually be filed with the HCJ directly rather than with lower courts.¹⁴³

From a procedural perspective, proceedings before the HCJ are conducted in a manner similar to cases heard by the U.S. Supreme Court. Litigants rely primarily on written briefs supported by documents, affidavits, and oral arguments. Witnesses are typically not examined and discovery is not formally required and hence the proceedings are much more limited in scope than those before a trial court.¹⁴⁴

A mechanism similar to the state secrets privilege—privileged evidence—exists in Israel. Unlike the United States, the treatment of privileged evidence is codified in national legislation. Sections 44 to 46 of the Evidence Ordinance regulate the manner in which the privilege is to be

¹⁴⁰ Such a comparison is far from perfect and suffers from certain weaknesses, some of which can be attributed to the different procedural rules in each country, which in turn affect the cases that will reach the respective courts' dockets. This will be pointed out later in the discussion.

¹⁴¹ Basic Law: The Judiciary, art. 15(b)–(c), 5744-1984 (Isr.), available at http://www.knesset.gov.il/laws/special/eng/basic8_eng.htm.

¹⁴² *Id.* art. 15(d)(2).

¹⁴³ The issue of privileged information may of course come up before any court in Israel and not just before the HCJ. However, since most petitions challenging government action and requesting injunctive or declarative relief are filed with this court, it is helpful to focus on the handling of privileged information by the HCJ.

¹⁴⁴ See Civil Law Procedures for High Court of Justice Regulations, 1984, KT 4685, 2321 (Isr.) (setting forth the civil procedures that apply to litigation before the HCJ). Such is not the case with regard to regular civil proceedings (e.g., contract or tort related) between private parties and the state. Such proceedings, conducted before the relevant magistrate or district court, depending on the subject matter jurisdiction, are subject to the ordinary rules of procedure applicable to trial courts. Civil Law Procedures Regulations, 1984, KT 4685, 2220 (Isr.). As such, the government will have an obligation to provide documents and information in the course of discovery. Civil Law Procedures Regulations, 1984, KT 4685, 2220 ch. 9 (Isr.), sets forth the procedures for interrogatory (questionnaires) and disclosure (discovery) of documents. Before the HCJ, however, this obligation will be diminished, as it is not formally required. As an alternative, plaintiffs requiring certain documents in the course of proceedings before the HCJ may choose to employ the Freedom of Information Law, 5758-1998, S.H. No. 226 (Isr.), to gain access to such information.

asserted and subsequently treated by the courts.¹⁴⁵ The language of the sections is general and covers both criminal and civil proceedings.

The statute distinguishes between two types of privileged information, although the treatment of both is essentially the same: privilege for the State and privilege for the public interest. Under section 44, the Prime Minister or the Minister of Defense may certify evidence as privileged, if its disclosure is likely to impair the security of the State; and the Prime Minister or Minister of Foreign Affairs may also issue such a certificate with regard to evidence that is likely to impair the foreign relations of the State.¹⁴⁶ Under section 45, evidence may be deemed privileged by any government minister who certifies that disclosure of the evidence is likely to impair an important public interest.¹⁴⁷ As a result of such a determination, the evidence will be excluded entirely from the proceedings, with neither party able to make use of it.¹⁴⁸ As was the case in *Jeppesen*, the government may also intervene in lawsuits between private parties and present a certificate of privilege regarding confidential information relevant to the suit.¹⁴⁹

In contrast to the U.S. state secrets privilege, the protection provided to privileged evidence under Israeli law is not absolute. Despite the issuance of such a certificate of privilege by the government, a court may order the disclosure of the evidence if it finds that disclosing it “for the purpose of doing justice outweighs the interest of nondisclosure.”¹⁵⁰ A petition for disclosure of privilege for the State will be heard by a Justice of the Supreme Court;¹⁵¹ a petition for disclosure of privilege for the public interest will be heard by the court with jurisdiction to hear the case.¹⁵² Such a petition may be heard by the same judge who presides over the case, and who will be required to disregard the privileged information should she decide to reject

¹⁴⁵ Evidence Ordinance [New Version], 5731-1971, 2 LSI 198 §§ 44–46 (1968–1972) (Isr.), [hereinafter Israeli Evidence Ordinance].

¹⁴⁶ *Id.* § 44.

¹⁴⁷ *Id.* § 45.

¹⁴⁸ As a general matter, the admittance of secret evidence in legal proceedings is prohibited in Israeli law, notwithstanding a small number of specialized proceedings with regard to which the introduction of evidence *ex parte* has been explicitly allowed, e.g., administrative detention proceedings. See Daphne Barak-Erez & Matthew C. Waxman, *Secret Evidence and the Due Process of Terrorist Detentions*, 48 COLUM. J. TRANSNAT'L L. 3, 18–24 (2009) (discussing administrative detention of individuals).

¹⁴⁹ See, e.g., CA (TA) 33097/04 Freed v. Israeli Air Industry, [2004] (Isr.) (finding that a patent dispute case over satellites should be closed to the public due to national security issues). Similarly, a private litigant may ask the government to issue a certificate of privilege in the course of litigation involving another private party, even if the government is not and does not become a party to the proceeding. YAAKOV KEDMI, ON EVIDENCE, PART 2, 874 (2003) (in Hebrew).

¹⁵⁰ Israeli Evidence Ordinance, *supra* note 145, §§ 44(a), 45.

¹⁵¹ *Id.* § 44(a).

¹⁵² *Id.* § 45.

the petition for disclosure. Section 46 sets forth that a petition for disclosure of privileged evidence will be heard *in camera*.¹⁵³ The court may demand that the evidence or its contents be brought to its knowledge, and may receive *ex parte* explanations from the Attorney General (or his representative) or from the Ministry involved in the case when reviewing the petition for disclosure.¹⁵⁴

While it is typically criminal proceedings that are perceived as having the most devastating potential effects on a defendant, and hence present a stronger case for disclosing privileged information,¹⁵⁵ in some cases, administrative decisions or policies can also have serious effects on personal liberty. For instance, such decisions may lead to deportation,¹⁵⁶ to restrictions on travel,¹⁵⁷ or to loss of citizenship.¹⁵⁸

Particularly in proceedings before the HCJ, parties often forego the formal certification of privilege.¹⁵⁹ Plaintiffs may have an interest in conceding that the evidence is privileged and foregoing formal certification for a variety of reasons, for instance, an interest in expediting the process, an

¹⁵³ *Id.* § 46.

¹⁵⁴ *Id.* § 46(a).

¹⁵⁵ CA 2629/98 Minister of Internal Security v. Walfa 56(1) PD 786, 794 [2001] (Isr.) (“In a civil trial that does not involve delicate matters of life and death, the readiness to reveal evidence which could harm the public interest may become diminished”); CrimA 2379/01 Freedman v. Israeli Police 14 Dinim Elyon 841 [2001] (Isr.) (“The task of weighing whether or not to order the disclosure of evidence is different in criminal proceedings from the task in civil proceedings. In a criminal proceeding, non-disclosure of evidence harms the defendant’s constitutional right to due process and a fair trial; and a proceeding will not be fair and a trial will not be just unless the defendant is allowed to review all of the evidence related to the matter . . . such is not the case in a civil proceeding, with regard to which, in general, the forcefulness of the interest in disclosure compared with the interest of the state’s security is weaker . . .”); *see also* HCJ 497/88 Shachshir v. Military Commander in the West Bank 43(1) PD 529, 535–36 [1989] (Isr.) (noting the differences between a criminal and civil proceeding, which may affect the considerations when weighing a petition to remove privilege).

¹⁵⁶ *Id.* at 529; *see also* HCJ 792/88 Matour v. IDF Commander in the West Bank 43(3) PD 542 [1989] (Isr.) (affirming the military commander’s decision, based on privileged information undisclosed to petitioners, to issue deportation orders to petitioners).

¹⁵⁷ *See, e.g.*, HCJ 4706/02 Salah v. Minister of Interior 56(5) PD 695 [2002] (Isr.) (upholding the Minister of Interior’s decision, based on privileged evidence, prohibiting the petitioner from leaving Israel because security reasons outweighed the petitioner’s freedom of movement).

¹⁵⁸ *See, e.g.*, HCJ 1227/98 Malevsky v. Minister of the Interior 52(4) IsrSC 690 [1998] (Isr.) (holding that the Interior Ministry could cancel citizenship applications or citizenship on the basis of administrative evidence presented to it). Administrative detention hearings will also typically involve reliance by the government on privileged information. However, as noted above, specially tailored rules of procedure apply to such proceedings, which are outside the purview of this Article. Barak-Erez & Waxman, *supra* note 148, at 21.

¹⁵⁹ HCJ 747/09 Asaid v. Military Commander of the West Bank, Petition to File a Response and Notice on behalf of Petitioners, at 2, 6 [2010] (Isr.) (on file with author) (in Hebrew).

assessment that the court is unlikely to order disclosure, or belief that the evidence will be detrimental to the plaintiff's case.¹⁶⁰ If the State has not formally asserted privilege, it will give its consent to ex parte review of the material by the court. If the plaintiff does not oppose this review, the court will then be able to consider the material. Moreover, even in cases where a formal assertion of privilege has been successfully made, although the State is not obligated to present the information to the court, Ministry of Justice guidelines instruct government attorneys to give their consent to ex parte review absent extraordinary circumstances.¹⁶¹

As a practical matter, typically in proceedings before the HCJ challenging an administrative decision or action, petitioners will often times give their consent to review of privileged evidence by the court ex parte rather than having the evidence excluded altogether. If a petitioner believes that the privileged evidence serves her case, she may benefit from providing the court with an opportunity to weigh the evidence despite not being able to see it herself (including her counsel).¹⁶² Moreover, under Israeli administrative case law, a presumption of propriety exists in favor of the State that the relevant administrative agency made a reasonable decision.¹⁶³ Accordingly, in the context of legal challenges to administrative decisions that were made based on privileged information, opposition by the petitioner to the

¹⁶⁰ *Id.* Of course, if the plaintiff and the government disagree as to the nature of the information and whether it is privileged, the State will be required to issue a certificate of privilege in accordance with Section 44 or Section 45 of the Evidence Ordinance if it seeks to prevent disclosure of the information. Israeli Evidence Ordinance, *supra* note 145, §§ 44–45.

¹⁶¹ GUIDELINES OF THE STATE ATTORNEY 12.9 (2007), available at <http://www.justice.gov.il/NR/rdonlyres/D594CB40-F512-4332-887F-51F7E89B3D5D/0/129.pdf>. While these guidelines address the issue of privileged information specifically in prisoner appeals, they are indicative of the government's attitude in general toward ex parte review of privileged information. The scope of the certificate of privilege will be tailored or revised in order to facilitate review by the court of what was previously considered "privileged" information (and remains so as far as the plaintiff is concerned). *See also, e.g.*, CA 6763/06 Chiat v. Israel Airports Authority 67 Dinim Elyon 692 [2006] ("I am ordering the removal of the privilege for the purpose of review by the trial court . . . under the following conditions: the material will not be revealed to the petitioners and their counsel and will not be mentioned in the court's publically available decision.").

¹⁶² *See, e.g.*, HCJ 792/88 Matour v. IDF Commander in the West Bank 43(3) PD 542, 549 [1989] (Isr.) (inviting petitioners to consent to review of the privileged evidence by the court ex parte in order to "improve" petitioners' chances of success).

¹⁶³ For cases describing the presumption of propriety in favor of the State where a petitioner does not consent to ex-parte review by the court of privileged evidence, see: HCJ 1227/98 Malevsky v. The Minister of the Interior 52(4) IsrSC 690, 711 [1998] (Isr.); AdminA 5237/05 Ministry of the Interior v. Carlson 25 Dinim Elyon 813, para. 9 [2006] (Isr.); HCJ 7712/05 Pollard v. the Government of Israel 34 Dinim Elyon 347, para. 12 [2006] (Isr.); HCJ 3519/05 Uared v. Commander of IDF Forces in the West Bank 45 Dinim Elyon 104, para. 6 [2006] (Isr.). This is meant to avoid a situation in which the plaintiff will exploit the government's legitimate inability to defend its decision because of the sensitivity of the information on which it was based.

presentation of privileged material to the court *ex parte* will make it extremely difficult to refute this presumption.

While a successful assertion of privilege under Israeli law may substantially hamper a plaintiff's ability to substantiate her claims, ultimately leading to dismissal, Israeli practice shows that a claim of privileged information will not be raised as a basis for dismissal of a lawsuit at the outset (unlike the situation in the United States). As explained above, under some circumstances the government may concede to having sensitive information presented to the court *ex parte*, subject to special arrangements that will ensure confidentiality. Such arrangements may include storage of the privileged information in the courthouse safe or redaction of privileged information from the court's opinion.¹⁶⁴ In those particular cases in which the plaintiff has security clearance, such as with former employees of the security services or industry, the government may be willing to disclose sensitive information to the plaintiff and to counsel with similar clearance.¹⁶⁵

¹⁶⁴ See CA 6763/06 Chiat v. Israel Airports Authority 67 Dinim Elyon 692 [2006] (Isr.). Plaintiffs sued the government for alleged mistreatment in the course of a security check at the airport, claiming they had been subjected to discriminatory and derogatory security checks, which had also exacerbated an existing medical condition; in the course of discovery, they requested disclosure of the state's guidelines regarding airport security checks, arguing these were necessary in order to prove that officials involved in the incident had acted unreasonably and exceeded their authority; the State, after asserting privilege under Section 44 of the Evidence Ordinance, agreed to disclose *ex parte* the information and provide the court with further explanations and answers, subject to the following conditions: that the information would not be disclosed to the plaintiffs or their counsel; that it would not be mentioned in the decision; that it would be kept in accordance with the security guidelines provided by the relevant security agencies; and that the court's opinion would be provided to the state prior to its publication in order to ensure privileged information was not inadvertently revealed. *Id.*

¹⁶⁵ Such arrangements have been made for instance in lawsuits against Israel's Nuclear Research Center (NRCN) by employees or their benefactors suing for damages, claiming they became ill due to exposure to dangerous chemicals at the workplace. See CA 7114/05 State of Israel v. Chizy 62 Dinim Elyon 1263 [2007] (Isr.). Plaintiffs requested during discovery to receive epidemiological studies conducted with regard to the NRCN's employees. Plaintiffs' attorney refused to submit to a security check absent a formal assertion of privilege by the State. Two lower court decisions sided with the plaintiffs. The Supreme Court, on appeal, rejected the State's arguments as well, ruling that absent a formal assertion of privilege, the State had no legal means of compelling the plaintiffs to consent to any such conditions. The State therefore had the option of either revealing the information without counsel undergoing a security check or formally asserting privilege, in which case the plaintiffs would be at liberty to challenge the assertion. Following the decision, legislation was proposed to address this lacuna and provide the government with authority to require counsel and experts to obtain security clearance under certain circumstances. A provision in Israel's penal code enables the Minister of Defense to require that a criminal defendant be represented by counsel with security clearance, but a similar provision which applies to civil proceedings or to participants in the proceedings other than defense counsel does not exist. For a critical analysis of the proposal, see Letter from the Association for Civil Rights in Israel to Deputy State's Attorney, Shai Nitzan (Oct. 13, 2009), available at <http://www.acri.org.il/he/?p=2543>, and Proposed Amendments of the Israel Bar Association Attached to the Protocol of Meeting of the Military

The State may also provide an unclassified summary of the privileged information or concede to certain statements of fact required for litigation.¹⁶⁶ At the end of the day, plaintiffs may nonetheless remain unable to gain access to information valuable to their case if the court has determined that the privilege outweighs the plaintiffs' interests.

B. Judicial Review of National Security Policies in Israel

The issues of interrogation methods and targeted killings—two national security policies that are central in legal debate in the United States today—have both come under judicial review in Israel. A petition challenging the interrogation techniques employed by Israel's Security Agency (ISA) was adjudicated in the 1990s.¹⁶⁷ The ISA is the central domestic intelligence agency in Israel. For years, the ISA's activities were shrouded in secrecy (and to a great extent remain so today).¹⁶⁸ The agency's interrogation methods were examined in the past by a governmental commission, which issued a report on the matter (the Landau Commission Report) that included

and Security Committee, 19–26 (Dec. 12, 2008), *available at* http://www.israelbar.org.il/uploadfiles/_11513446W9V.doc.

¹⁶⁶ H CJ 672/88 Al-Levadi v. Military Commander in the West Bank 43(2) IsrSC 227, 236 [1989] (Isr.) (“Additional data reports were provided to the plaintiff in the form of a paraphrase, while omitting any identifying information which could reveal their sources. The Court reviewed these reports in full and is convinced that the majority of information included in them has been revealed in accordance with the standards of Article 44 of the [Evidence Ordinance]. Additional data reports . . . were partially disclosed to [Plaintiff]. The rest of the data reports, approximately 50, remained privileged after review by the judge.”); *see also* H CJ 497/88 Shachshir v. Military Commander in the West Bank 43(2) PD 529, 533 [1989] (Isr.) (“[T]he state representatives have agreed to add the contents of some additional documents to the list of information that can be disclosed to the plaintiff and his counsel.”); H CJ 2459/10 Estate of Wahaba v. Ministry of Defense 137 Dinim Elyon 1409 [2010] (Isr.) (involving a civil suit for damages due to a military air strike in Gaza in the course of which civilians were killed; the court, after weighing the importance of the information to the plaintiffs' case and the security concerns involved, concluded that a certain paraphrase could be released to the plaintiffs; the government agreed to release a paraphrase confirming that “on 21.6.2006 an [attempted] targeted killing did take place (the details and justifications of which cannot be disclosed). The target was missed and the missile struck in close proximity to its target.”).

¹⁶⁷ H CJ 5100/94 Public Committee Against Torture v. Israel 53(4) PD 817 [1999] (Isr.).

¹⁶⁸ The identity of the Head of the ISA was classified until the mid-1990s. A statute formally detailing the ISA's responsibilities and functions wasn't enacted until 2002. General Security Service Law 5762-2002, SH No. 1832 (Isr.), *available at* <http://www.jewishvirtuallibrary.org/jsource/Politics/GeneralSecurityServicesLaw.pdf>. Nevertheless, even today, Article 19(a)(1) of the ISA Law specifically provides that the “[r]ules, Service directives, Service procedures and the identity of past and present Service employees and of persons acting on its behalf and other particulars in respect of the Service to be prescribed by regulations are privileged and the disclosure or publication thereof is prohibited.” *Id.* art. 19(a)(1). In addition, the ISA is exempt from releasing information under Israel's Freedom of Information Law, 5758-1998, S.H. 226 (Isr.), art. 14(a)(2).

a confidential section with guidelines regarding permissible interrogation techniques.¹⁶⁹ A parliamentary committee was responsible for monitoring implementation of the regulations.¹⁷⁰

In the years following the Landau Commission Report, the HCJ heard many petitions of detained Palestinians who complained that physical force and psychological pressure were used against them during ISA interrogations.¹⁷¹ Until its decision in 1999, the HCJ rejected a large percentage of the petitions. In isolated cases, the HCJ issued orders to show cause and interim orders temporarily prohibiting the ISA from using all or some of the methods. The HCJ regularly refused to rule on questions of principle, such as whether such interrogation methods constituted torture and whether they were legal under Israeli and international law.

The HCJ's substantive ruling on the matter in 1999 related to seven separate petitions that had been consolidated.¹⁷² Two were general in nature and the remaining five were filed on behalf of individuals who had been interrogated by the ISA while in custody,¹⁷³ each of whom claimed they had been subjected to illegal interrogation techniques.¹⁷⁴ The HCJ examined each of the contested interrogation techniques in light of Israel's legal obligations under domestic and international law, and ultimately struck down several of the interrogation techniques that had up until that time been employed by the ISA.¹⁷⁵

Clearly disclosure in open court of the ISA's interrogation techniques was problematic. The government was prepared to present such information in camera, however, petitioners opposed this. As a result, the information before the HCJ was provided by the petitioners. Nonetheless, the government did not deny the use of these interrogation methods, and even offered justifications for these methods. The HCJ felt that it was provided with a sufficient picture of the interrogation practices of the ISA which enabled it to make a determination as to their legality.¹⁷⁶

¹⁶⁹ Symposium, *Report of the Commission of Inquiry into the Methods of Investigation of the General Security Service Regarding Hostile Terrorist Activity*, 23 ISR. L. REV. 141, 148 (1989).

¹⁷⁰ *Public Committee Against Torture*, 53(4) PD at 826.

¹⁷¹ *Public Committee Against Torture in Israel*, B'TSELEM.ORG, <http://www.btselem.org/english/Torture/Background.asp> (last visited Mar. 10, 2012).

¹⁷² *Public Committee Against Torture in Israel*, 53(4) PD at 817.

¹⁷³ *Id.* at 824–26.

¹⁷⁴ *Id.* at 836–40. These included: shaking; “shabach position,” i.e., seating a handcuffed suspect on a small and low chair, whose seat is tilted forward toward the ground, head covered with a sack and exposed to loud music; frog crouch position, the suspect crouched on his toes with hands tied behind the back; excessively tight handcuffs; and sleep deprivation.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 826. Following the decision, Israel established procedures for addressing complaints lodged against ISA personnel with regard to interrogations and founded an independent

Israel's targeted killings policy was also litigated before the HCJ, which issued a monumental decision on the issue in late 2006.¹⁷⁷ A petition filed a year earlier on the same issue was dismissed by the HCJ in a brief, one-paragraph decision which stated that "the choice of weapons used by the government to thwart murderous terror attacks was not a matter in which the HCJ intervened, especially in a petition lacking any concrete factual foundation that seeks a sweeping remedy."¹⁷⁸ Nonetheless, when subsequent petitions were filed later that year raising the issue yet again, the HCJ requested extensive briefs from the parties addressing various questions of applicable domestic and international law.

Unlike the recent attempt in the United States to challenge the government's targeted killing policy,¹⁷⁹ the Israeli targeted killing petition did not challenge the prospective targeted killing of a specific individual. Instead, due to Israel's relatively relaxed standing requirements, the petition was general in nature. Accordingly, the HCJ was not required to examine intelligence information relating to a particular target or weigh the danger that individual posed to national security.¹⁸⁰

Rather, the HCJ examined whether the general practice conformed to Israel's legal obligations under international law, particularly the law of armed conflict. Eventually the HCJ determined that under certain conditions, which it set forth, targeted killings would be legal. Before reaching this conclusion, it examined several legal questions: the applicable legal framework to the hostilities between Israel and Palestinian armed

investigatory body within the Ministry of Justice, whose determinations are subject to judicial review by Israel's Supreme Court. Irit Kohn et al., *Israel's Position on the Administered Territories*, 41 JUST. 4, 6–7 (2005), available at <http://www.intjewishlawyers.org/main/files/Justice%20No.41%20Spring%202005.pdf>. Moreover, in 2002 the General Security Services Law was enacted. General Security Service Law 5762-2002, SH No. 1832 (Isr.), available at <http://www.jewishvirtuallibrary.org/jsource/Politics/GeneralSecurityServicesLaw.pdf>. For the first time in its history, the authority, missions and functions of the ISA were anchored in a statute. In the course of the following two years, regulations and procedures were enacted in order to set forth the ways in which the ISA would be authorized to act. These rules and regulations, in accordance with Sections 19 and 22 of the Law, are to remain confidential. *Id.* §§ 19–22.

¹⁷⁷ HCJ 769/02 Public Committee Against Torture v. Israel 69 Dinim Elyon 1089 [2006] (Isr.).

¹⁷⁸ HCJ 5872/01 3114/02 Barakeh v. Prime Minister and Minister of Defense 56(3) PD 1 [2002] (Isr.).

¹⁷⁹ *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1 (D.D.C. 2010).

¹⁸⁰ *Public Commission Against Torture*, 69 Dinim Elyon. *But cf. Al-Aulaqi*, 727 F. Supp. 2d at 46 (explaining that judicial resolution of the suit would require the court to decide, inter alia, the precise nature of Al-Aulaqi's affiliation with Al-Qaeda in the Arabian Peninsula, whether his alleged terrorist activity rendered him a "concrete, specific, and imminent threat to life or physical safety"); *id.* at 47 (concluding that "there are no judicially manageable standards by which courts can endeavor to assess the President's interpretation of military intelligence and his resulting decision—based on that intelligence—whether to use military force against a terrorist target overseas").

groups, determining that these were governed by the rules pertaining to an international armed conflict;¹⁸¹ the legal status of terrorists participating in hostilities against Israel;¹⁸² and whether such individuals could be targetable under international law, ultimately determining that those directly participating in hostilities could be targeted.¹⁸³

What is remarkable is that privileged evidence was not a central issue in either of the cases and received no attention in the HCJ's judgments.¹⁸⁴ The HCJ limited its review to the general legal questions before it, i.e., whether the alleged methods of interrogation and the targeting of terrorists conformed with Israel's legal obligations. To some extent, this was made possible due to the HCJ's jurisprudence on standing,¹⁸⁵ which enables public petitioners to challenge the legality of executive policy. Under some circumstances, this ability facilitates adjudication of the legal questions concerning the policy that is divorced from its implementation with regard to a particular individual.

Hence, in the targeted killings case, the HCJ did not need to review the information in the government's possession regarding a particular individual or the options available to the government to apprehend that individual.¹⁸⁶

¹⁸¹ *Public Commission Against Torture*, 69 Dinim Elyon at 1089, para. 21.

¹⁸² *Id.* paras. 27–28.

¹⁸³ *Id.* paras. 29–40.

¹⁸⁴ The court briefly mentioned the inability to review evidence *ex parte* in the interrogation techniques case. HCJ 5100/94 Public Committee Against Torture v. Israel 53(4) PD 817, 826 [1999]. In fact, in a comparative piece on the state secrets privilege, Setty reviews several high-profile national security cases in Israel, including the targeted killings case. Setty, *supra* note 26, at 244–49. She states positively that “Israel does not apply a standardized doctrine comparable to the U.S. state secrets privilege.” *Id.* at 244. This overlooks the legislative scheme set forth in sections 44–46 of the Evidence Ordinance. Interestingly, Setty instead focuses on the Israeli Supreme Court's analysis of *justiciability* or what can be likened to the political question doctrine in the United States. This lends support to the earlier assertion that the majority's analysis of the state secrets privilege in *Jeppesen* is far more analogous to a doctrine of nonjusticiability than it is to a traditional evidentiary privilege of exclusion.

¹⁸⁵ See generally HCJ 910/86 Ressler v. Minister of Defense 42(2) PD 441, 457–72 [1988] (Isr.) (discussing fundamental legal problems of standing and justiciability in regards to a petition by citizens who perform reserve duty challenging the exemption given to Orthodox Yeshiva students from mandatory national military service); Aharon Barak, *Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 16, 106–10 (2002) (arguing for a liberalized concept of standing, as outlined in his opinion in *Ressler*); Baruch Bracha, *Judicial Review of Security Powers in Israel: A New Policy of the Courts*, 28 STAN. J. INT'L L. 39, 96 (1991) (noting that the Israeli Supreme Court has broadened standing and curtailed the nonjusticiability doctrine).

¹⁸⁶ A petition retrospectively challenging the targeted killing of an individual, Salah Shechade, has also been adjudicated by Israel's Supreme Court. HCJ 8794/03 Hass v. Judge Advocate General 91 Dinim Elyon 254 [2008], available at http://www.adh-geneva.ch/RULAC/pdf_state/H CJ-decision-8794-03-1-.pdf. However, the Israeli Supreme Court has yet to contend with a petition similar in nature to *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1 (D.D.C. 2010), challenging the prospective targeting of a particular individual.

Instead, it analyzed and set forth the circumstances under which targeted killing would be legal.¹⁸⁷ The Israeli government has since been obliged to carry out targeted killings in accordance with those criteria. Conversely, the HCJ could have determined that as a general legal matter, international or domestic law proscribed targeted killing altogether under the circumstances of the conflict between Israel and Palestinian armed groups. By separating the legal question from the application of the policy to a particular individual, the HCJ overcame the barrier of confidentiality relatively easily.

The interrogation techniques litigation presented a greater degree of complexity in this regard. Defending the interrogation methods alleged by the plaintiffs would presumably amount to confirmation of their use—something which must have been of obvious concern to the ISA. Similarly, denying the use of some methods would serve as confirmation regarding the use of others. These were certainly concerns of the U.S. government in *Jeppesen*.¹⁸⁸ Here, too, however, the court elevated its analysis to the theoretical level and chose to examine whether the interrogation methods alleged by the plaintiffs could be reconciled with Israel's legal obligations.¹⁸⁹

In practice, the government did actively defend the legality of the interrogation methods alleged by the plaintiffs. One may say that the fact that the government argued the case on the merits was de facto an admission that it was using these methods. At the same time, one must question whether there is still any real question today as to the interrogation techniques employed by the U.S. government on national security detainees. The consistency of personal testimony regarding these techniques,¹⁹⁰ coupled with the disclosure of the Justice Department's Office of Legal Counsel (OLC) memoranda regarding the legality of some interrogation

¹⁸⁷ See *supra* notes 181–83 and accompanying text (concluding that those directly participating in hostilities could be targeted).

¹⁸⁸ See Motion to Dismiss at 73–75, *Mohamed v. Jeppesen Dataplan, Inc.*, 563 F.3d 992 (9th Cir. 2009) (No. C-07-02798-JW) (“Denial of such allegations in this case would tend to confirm similar allegations in other cases in which the CIA could not deny such allegations.”).

¹⁸⁹ See *supra* notes 175–76 and accompanying text (discussing the interrogation techniques reviewed by the court and its ultimate ruling).

¹⁹⁰ See *Mohammed v. Obama*, 704 F. Supp. 2d 1 (D.D.C. 2009) (describing a habeas corpus case brought by Guantanamo Bay detainee Farhi Saeed Bin Mohammed, in which the government sought to rely on statements obtained from Binyam Mohamed, the plaintiff in *Jeppesen*). Judge Kessler, who presided over the case, found Binyam Mohamed's account of rendition and torture credible, explaining that it was “extraordinarily detailed” and noting that the fact that Mohamed was vigorously pursuing his claims in British courts “suggest[ed] that the horrific accounts of his torture were not simply stories created solely to exculpate himself. . . . His persistence in telling his story demonstrates his willingness to test the truth of his version of events in both the courts of law as well as the court of public opinion.” *Id.* at 25–26. Judge Kessler eventually refused to recognize that Mohamed's statements presented reliable evidence and ordered the government to release the petitioner. *Id.* at 32.

techniques,¹⁹¹ leave little doubt as to the contours of the extraordinary rendition program in terms of interrogation methods.

The technique employed by the Israeli Supreme Court to adjudicate substantive legal questions pertaining to national security policies would not be functional in a case such as *Jeppesen*, in which the plaintiff is a private actor. Both the interrogation techniques and the targeted killings cases in Israel were essentially prospective in nature, requesting injunctive relief from further government action. A substantive ruling in *Jeppesen*, however, would have ultimately required a factual determination regarding *Jeppesen's* liability for its past actions; an analysis of the legality of the extraordinary rendition program alone would not suffice. It would, perhaps, in a case against the government requesting declaratory or injunctive relief.

All the same, such a lawsuit would encounter other hurdles. First and foremost, U.S. Supreme Court precedent pertaining to standing might preclude adjudication of such a suit by a plaintiff who could not show a likelihood of being detained and subjected to interrogation.¹⁹² In light of this state of affairs, the decision in *Jeppesen* is even more perplexing, since one

¹⁹¹ It is important to distinguish between different types of legal opinions provided with regard to interrogation techniques and extradition: those memos analyzing the legality of particular interrogation methods utilized by the CIA itself, e.g., Memorandum from Jay S. Bybee, Office of Legal Counsel, to John Rizzo, Acting Gen. Counsel of the CIA, Interrogation of al Qaeda Operative (Aug. 1, 2002), available at <http://www.fas.org/irp/agency/doj/olc/zubaydah.pdf>, and those memos analyzing the general applicability of U.S. constitutional and domestic law, as well as the U.S. obligations under international law, to detainees held outside the United States, e.g., Memorandum from John Yoo, Office of Legal Counsel, to William J. Haynes, II, Military Interrogation of Alien Unlawful Combatants Held Outside the United States (Mar. 14, 2003), available at <http://www.fas.org/irp/agency/doj/olc-interrogation.pdf> (despite finding these legal sources did not apply to the detention of individuals outside the United States, the memo nevertheless analyzed the legality of particular interrogation methods under these sources). In addition, the OLC also conveyed its position regarding the legality of transferring detainees in U.S. custody to foreign countries. See Memorandum from Jay S. Bybee, Office of Legal Counsel, to William J. Haynes, II, Re: The President's Power as Commander in Chief to Transfer Captured Terrorists to the Control and Custody of Foreign Nations (Mar. 13, 2002), available at <http://www.justice.gov/opa/documents/memorandumpresidentpower03132002.pdf>. It is unlikely that the OLC would analyze the legality of interrogation techniques employed by foreign governments on behalf of the CIA. Rather, the OLC in its memo regarding the transfer of detainees to custody in foreign nations discussed the criminal prohibition on the transfer for the purpose of having such individuals tortured. For a relatively comprehensive, although not exhaustive, list of OLC memos, see INDEX OF BUSH-ERA OLC MEMORANDA RELATING TO INTERROGATION, DETENTION, RENDITION AND/OR SURVEILLANCE, AM. CIV. LIBERTIES UNION (2009), available at http://www.aclu.org/pdfs/safefree/olcmemos_2009_0305.pdf.

¹⁹² See *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983) (allowing plaintiff to sue the City of Los Angeles for damages caused after city officers subjected him to a chokehold, but finding he could not ask the court to enjoin the city's officers from using the chokehold in the future, since the likelihood of him being subjected to the action again in a city as big as Los Angeles was slim).

would expect courts in the United States to be more, rather than less, accessible to those plaintiffs who can actually substantiate personal harm, instead of creating an additional barrier to adjudication under the auspices of the state secrets privilege. Moreover, in light of the role played by political question doctrine in the U.S.,¹⁹³ such a lawsuit would likely be susceptible to traditional claims of nonjusticiability by the government.¹⁹⁴

C. Analysis of the Israeli and U.S. Mechanisms from a Policy Perspective

The analysis conducted by an Israeli court adjudicating a petition to disclose privileged information differs substantially from that conducted by a U.S. court. Under *Reynolds*, a court is required to examine whether information is entitled to the privilege.¹⁹⁵ It may balance competing interests only at this preliminary stage of review. In contrast, the Israeli scheme diverts focus away from whether or not the information itself is privileged and instead requires the court to balance the competing interests even after it is satisfied that the evidence *is* privileged.¹⁹⁶

When determining whether or not to order disclosure of the privileged information, an Israeli court determines which party—the individual or the government—should internalize the costs of asserting the privilege. If the court believes that the plaintiff’s interests (or the interest of justice) outweigh the interest in keeping the information confidential, it will order the government to disclose the information.¹⁹⁷ Alternatively, if the court is

¹⁹³ See *supra* note 130 (reviewing *Baker v. Carr*’s political question justiciability doctrine); see also *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1, 44–52 (D.D.C. 2010) (noting that “national security, military matters and foreign relations are ‘quintessential sources of political questions’”).

¹⁹⁴ It may perhaps be argued that a decision setting out the legal requirements for a particular policy and detached from the circumstances of a particular case is similar in nature to an advisory opinion, which U.S. federal courts are not at liberty to issue. See generally R.H. FALLON, JR. ET AL., *HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 79–85 (5th ed. 2003) (discussing U.S. federal courts and advisory opinions). However, this is not the case. Such petitions in Israel have not been filed by other branches of government regarding prospective behavior the government is contemplating. Rather, they are usually filed by interested parties regarding a policy already in place which affects them and as such, does amount to a concrete “case or controversy.” Most importantly, the Israeli Supreme Court’s rulings in these cases are hardly advisory in nature, in the sense that the government is not at liberty to overrule or disregard these judicial decisions.

¹⁹⁵ See *supra* notes 21–22 and accompanying text (discussing the court’s required duties under the test).

¹⁹⁶ See *supra* note 150 and accompanying text (discussing the court’s ability to issue a disclosure order if it finds that the interest in justice outweighs the need for confidentiality).

¹⁹⁷ As noted above, Sections 44 and 45 of the Evidence Ordinance provides that a court may order disclosure of privileged information if it “finds that the necessity to disclose it for the purpose of doing justice outweighs the interest of non-disclosure.” Israeli Evidence Ordinance, *supra* note 145, §§ 44–45.

convinced that the security interest in keeping the information confidential outweighs other interests, it will dismiss the petition for disclosure, even if as a result, the plaintiff's ability to substantiate the case is significantly hampered.¹⁹⁸

However, it is important to emphasize that even when the court reaches the conclusion that disclosure of the privileged information is required, the government can still avoid disclosure if it so chooses. In criminal cases, the prosecution has the option of either disclosing the evidence or protecting it by withdrawing the indictment.¹⁹⁹ In civil cases in which the State is the respondent or defendant, the State has the option of settling the case if it wishes to prevent disclosure.²⁰⁰ Hence, the disclosure of information can be avoided at several junctions—plaintiff, for various reasons, may decide not to challenge an assertion of privilege; if the assertion is challenged, the court may determine that disclosure is unwarranted; and finally, even if the court orders disclosure, the state may take action to obviate that need.

As a result, under Israel's legislative scheme, at times it will be the government that is forced to internalize the costs of disclosing privileged information. Courts may still make a determination, and will often do so, that the privileged information is to remain undisclosed, in effect substantially hampering the other party's ability to plead its case. Nevertheless, contrary to the U.S. scheme, this will not automatically be the result of any successful assertion of privilege.

Under *Jeppesen* and its brethren, however, it is the individual that is left to bear the costs of the government's assertion of privilege entirely. In this context, the Ninth Circuit's decision in *Al-Haramain Islamic Found., Inc. v.*

¹⁹⁸ See cases cited *supra* note 155 and accompanying text (discussing the balance conducted by courts in civil proceedings involving privileged evidence).

¹⁹⁹ Ami Kobo, *Privileged Evidence and State Security Under the Israeli Law: Are We Doomed to Fail?*, 5 CARDOZO PUB. L. POL'Y & ETHICS J. 113, 116 (2006). See, for example, CrimA 2489/09 Braude v. State of Israel 54 Dinim Elyon 890 [2009] (Isr.), available at <http://elyon1.court.gov.il/files/09/890/024/t03/09024890.t03.pdf>, in which the State withdrew the indictment against the appellant after it was ordered by the Supreme Court, in accordance with Section 46 of the Evidence Ordinance, to hand over to the defendant privileged information which could potentially be of use for purposes of his defense. Although the defendant was initially charged with two counts of aggravated assault for shooting and injuring two individuals in the course of an altercation between Jewish and Arab residents in Hebron, the government's position was that the price to the public of revealing the information outweighed the public interest in proceeding with the prosecution.

²⁰⁰ Nevertheless, there will still be cases in which the State may be ordered to disclose privileged information relevant to a proceeding between two private parties, in which case its ability to avoid such disclosure will be very limited or simply nonexistent. See CA 2629/98 *Walfa* 56(1) PD at 794, in which the State was ordered to reveal whether the defendant in a civil suit had served as a police informant in a criminal investigation regarding the plaintiff, since the information had bearing on a contractual obligation between plaintiff and defendant.

Bush,²⁰¹ is particularly telling (and puzzling). The plaintiff attempted to challenge the government's warrantless wiretap program.²⁰² In an effort to substantiate standing to sue, the plaintiff relied on a confidential document that was inadvertently disclosed to it by the government in an unrelated matter.²⁰³ Upon learning of the inadvertent disclosure, the FBI retrieved all copies of the document from Al-Haramain's counsel, but not from its directors.²⁰⁴ The district court granted the government's motion to bar Al-Haramain from access to the document on the basis that it was protected by the state secrets privilege;²⁰⁵ however, it allowed the plaintiff to file in camera affidavits attesting to the contents of the sealed document to support its assertion of standing.²⁰⁶

The Ninth Circuit reversed this part of the district court's decision, ruling that the district court erred in allowing plaintiffs to reconstruct the document's contents from memory, as this circumvented the document's privilege (which both courts agreed had not been abrogated by the inadvertent disclosure).²⁰⁷ While from a purely doctrinal perspective the ruling may comport with *Reynolds*' rationale that once asserted successfully, the privilege is absolute, common sense nonetheless begs the question of precisely what interests the Ninth Circuit's ruling was attempting to protect, given that the information had already been revealed to the plaintiffs and hence the damage already done.²⁰⁸

²⁰¹ Al-Haramain Islamic Found., Inc. v. Bush, 507 F.3d 1190 (2007).

²⁰² *Id.* at 1193.

²⁰³ *Id.*

²⁰⁴ *Id.* at 1195.

²⁰⁵ *Id.* at 1195–96.

²⁰⁶ *Id.* at 1196.

²⁰⁷ *Id.* at 1204.

²⁰⁸ Further disclosure of the contents of the sealed document could have been prevented using various protective measures, such as redactions where necessary in the court's opinion. The lawsuit nonetheless survived due exclusively to the fact that it related to surveillance (as opposed to the matter of rendition at the heart of *Jeppesen*). FISA requires the government in the course of discovery to make available even those materials whose disclosure would harm national security (such information may be reviewed in camera and ex parte) so that a court may determine whether the surveillance of an "aggrieved person" was lawfully authorized and conducted. The court may even disclose such information to an aggrieved person using protective measures. The Ninth Circuit therefore remanded the case for the lower court to determine whether the legislative scheme under FISA preempted the state secrets doctrine. The district court eventually found that FISA *did* trump the state secrets privilege and went on to review the document and enter summary judgment for the plaintiff. See Lee Tien, *Litigating the State Secrets Privilege*, 42 CASE W. RES. J. INT'L L. 675, 681–83 (2010) (discussing the *Al-Haramain* litigation). The end result of the *Al-Haramain* litigation further emphasizes the absurdity of preventing introduction of the document in the first place (when protective measures could be employed to prevent its full public disclosure) or alternatively requiring the government to concede to certain facts supported by the document for the purpose enabling Al-Haramain to establish standing.

From a policy perspective, this trend of the Ninth Circuit makes little sense.²⁰⁹ It hardly motivates the government to assert the privilege less rather than more often. On the contrary, asserting the privilege carries no disadvantages for the government—it does not require making special arrangements that will allow the court to consider the information in the course of litigation and does not require the government to make certain concessions that will allow litigation to proceed. Under *Jeppesen*,²¹⁰ if the government succeeds in convincing a court that even some of the information related to the lawsuit is privileged—even if this information is not crucial to prove or refute the allegations—it may be exempt from the litigation altogether. Such a convenient state of affairs for the government hardly encourages rare use of the privilege.²¹¹

Chesney, however, cautions against a legal scheme which obliges the government to choose between permitting the suit to go forward or else having judgment rendered for the plaintiff, rather than simply receiving the benefit of having the complaint dismissed.²¹² While he recognizes the “virtue of forcing the government rather than the individual to internalize the costs of maintaining government secrecy, . . . [i]t has a vice as well . . . as the lack of a merits inquiry might encourage a multiplicity of suits not all of which would be warranted.”²¹³ He further warns that “[t]he government-pays solution also is impractical and undesirable for litigants seeking nonmonetary relief, such as injunctions against the further conduct of certain government policies.”²¹⁴

In light of the Israeli experience, neither concern seems necessarily warranted. Some mechanisms already in place, such as the standing requirement²¹⁵ and FRCP rules requiring plaintiffs to state a valid claim,

²⁰⁹ See Telman, *supra* note 31, at 512 (arguing that “there is no justification for the self-interested invocation of the state secrets privilege in *favor* of the government when it is adverse to persons who are seeking enforcement of statutory or constitutional rights” (emphasis added)).

²¹⁰ *Mohammed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070 (9th Cir. 2010).

²¹¹ *Id.* at 511 (commenting that the invocation of the state secrets privilege appears to be relatively costless for the government); Weaver & Pallitto, *supra* note 24, at 102 (noting that “[i]t is hardly surprising that” the executive would be tempted to employ “such an effective tool . . . with increasing frequency and in a variety of circumstances”).

²¹² Chesney, *supra* note 16, at 1313.

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ Article III standing jurisprudence, as developed by the U.S. Supreme Court over the years, requires that plaintiffs meet three requirements in order to substantiate standing and proceed with their suit: the showing of an injury-in-fact which is concrete and particularized; the existence of a causal link between the injury suffered and the allegedly unlawful conduct; and a showing that the requested relief will likely redress the injury. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992). In particular, plaintiffs must substantiate standing for each type of relief requested. See *Lyons*, 461 U.S. at 95 (allowing plaintiff to sue the City of

would help safeguard from unwarranted lawsuits. Moreover, plaintiffs would still be required to show that the privileged information is indeed relevant and necessary for litigation of the case. Hanging a lawsuit loosely on privileged information, which is of little relevance to the case or is not necessary, would not suffice to back the government into the corner and force it to settle. Moreover, additional safeguards could be put in place to further ensure that the system is not abused (i.e., giving the court the option of reviewing the evidence *ex parte* or *in camera*, implementing a presumption in favor of the government if the plaintiff refuses to consent to *ex parte* review). Given the potentially high litigation costs, plaintiffs would still be deterred from initiating frivolous lawsuits. As for those plaintiffs seeking nonmonetary relief, the same legal scheme could essentially apply, the difference being that internalization by the state of the costs of withholding information from such plaintiffs could result in the government having to abstain from the challenged conduct.²¹⁶

Given U.S. precedent on state secrets privilege, such an approach may seem radical. However, in essence it is no more radical than current jurisprudence, which categorically prefers the interests of the government over those of the individual and grants privileged information absolute protection.²¹⁷ In fact, it is less extreme, as it still allows courts to prevent disclosure altogether in appropriate circumstances. The effect of the current judicial approach in the United States, which results in dismissal of cases in which the state secrets privilege is successfully asserted, is complete

Los Angeles for damages caused after city officers subjected him to a chokehold, but finding he could not ask the court to enjoin the City's officers from using the chokehold in the future, since the likelihood of him being subjected to the action again in a city as big as Los Angeles was slim). For recent cases dismissing plaintiffs' attempt to challenge the legality of the government's warrantless wiretap program due to lack of standing as a result of plaintiffs' inability to substantiate that they had been subjected to surveillance in the context of post-9/11 national security litigation, see *American Civil Liberties Union v. National Security Agency*, 493 F.3d 644 (6th Cir. 2007), *Amnesty International U.S.A v. McConnell*, 646 F. Supp. 2d 633 (S.D.N.Y. 2009), *rev'd*, *Amnesty Int'l USA v. Clapper*, 638 F.3d 118 (2d Cir. 2011), and *Jewel v. National Security Agency*, 2010 WL 235075 (N.D. Cal. 2010), *rev'd*, *Jewel v. NSA*, 2011 U.S. App. LEXIS 25951 (9th Cir. 2011). See also *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1 (D.D.C. 2010) (refusing to recognize plaintiff's standing to challenge the alleged targeting by the U.S. government of his son, a terrorist operative with links to Al-Qaeda).

²¹⁶ Similarly, see, *H CJ 5100/94 Public Committee Against Torture v. Israel* 53(4) PD 817, 826 [1999] ("The petitioner . . . was arrested and interrogated. He turned to this Court . . . [and] claimed that he was being deprived of sleep and was being seated in the "Shabach" position. The Court issued an *order nisi* and held oral arguments immediately. During the hearing, the state informed the court that 'at this stage of the interrogation, the GSS is not employing the alleged methods.' For this reason, no interim order was granted.") (author translation).

²¹⁷ See Dhooge, *supra* note 23, at 496 (concluding that "even the most compelling need demonstrated by" Jeppesen plaintiffs would be insufficient to overcome the "absolute" state secrets privilege).

internalization of the costs of asserting state secrets privilege by the individual rather than the State. From a utilitarian perspective, this may seem justified—the dismissal of a few individual lawsuits is preferable to the cessation of important national security programs simply because the government wishes to avoid disclosure of sensitive information. However, this dichotomy is clearly too simplistic. Current U.S. jurisprudence on state secrets privilege, as reflected by *Jeppesen*, affects more than a single plaintiff. It in effect insulates from judicial review legally controversial government action, such as the warrantless wiretap program or the extraordinary rendition program. Such programs may affect countless individuals. Moreover, it is not only the potential adjudication of these issues that could adversely affect foreign relations, but also their lack of adjudication and legal scrutiny that may tarnish the U.S. reputation.²¹⁸

One could argue that the balance struck by Israeli courts when they encounter privileged information goes too far in accommodating the interests of plaintiffs challenging government action or seeking compensation, and compromises security, and as such, would be undesirable for the United States.²¹⁹ From an empirical perspective, it is obviously difficult to assess

²¹⁸ Domestic litigation may even have pragmatic impacts in the international arena. For instance, the adjudication by the Israeli H CJ of the petition in the matter of the Shechade targeted killing contributed to the dismissal in Spain of a criminal complaint against high-ranking Israeli officials presumably responsible for the operation under Spain's universal jurisdiction provisions. The Spanish Supreme Court was satisfied that Israel had a genuine and credible judicial system, inter alia, in light of the litigation that had taken place on the matter before the H CJ, as a result of which the government had appointed an investigative commission. Ido Rosenzweig & Yuval Shany, *Update on Universal Jurisdiction: Spanish Supreme Court Affirms Decision to Close Inquiry into Targeted Killing of Salah Shehadeh*, ISR. DEMOCRACY INST. (Apr. 5, 2010), <http://en.idi.org.il/analysis/terrorism-and-democracy/issue-no-17,-may-2010/update-on-universal-jurisdiction-spanish-supreme-court-affirms-decision-to-close-inquiry-into-targeted-killing-of-salah-shehadeh/>.

²¹⁹ Many in Israel would disagree with such a positive assessment of the Israeli mechanism. Much of this criticism is directed at administrative detention proceedings, which under law may be conducted on the basis of evidence introduced ex parte. See, e.g., HAMOKED CTR. FOR DEF. INDIVIDUAL, WITHOUT TRIAL: ADMINISTRATIVE DETENTION OF PALESTINIANS BY ISRAEL AND THE INTERNMENT OF UNLAWFUL COMBATANTS LAW (2009), http://www.btselem.org/Download/2009_10_Without_Trial_Eng.pdf. However, criticism of the general legal mechanism described in this article is abundant as well. See generally Kobo, *supra* note 199, at 118–25. Also of interest in the context of litigation involving privileged information are the circumstances surrounding H CJ 2028/08 Public Committee Against Torture v. Minister of Justice (*withdrawn*). For the circumstances surrounding H CJ 2028/08 *Public Committee Against Torture in Israel*, see *The Judges Heard Classified Material — The NGOs Withdrew Their Petition*, PUB. COMMITTEE AGAINST TORTURE ISR. (Mar. 24, 2009), <http://www.stoptorture.org.il/en/node/1205>, and Ido Rosenzweig & Yuval Shany, *Human Rights NGOs Withdraw from a Constitutional Petition*, ISR. DEMOCRACY INST. (May 2009), <http://en.idi.org.il/analysis/terrorism-and-democracy/issue-no-5,-may-2009/human-rights-ngos-withdraw-from-a-constitutional-petition/>. Petitioners, several human rights organizations, challenged the constitutionality of provisions of the Criminal Procedure, which extended the period of detention in custody of suspects in security offenses

whether or not, or to what extent, Israeli security has been compromised as a result of the jurisprudence on privileged information.²²⁰ One potential method of assessing the suitability of the current mechanism is to examine whether demands for legislative reform have been made in response to the current jurisprudence. For instance, as noted earlier, in 2007, the Israeli Supreme Court refused to recognize the right of the government, absent a formal assertion of privilege, to condition the disclosure of evidence on the fulfillment of certain requirements by plaintiffs and counsel, such as security clearance.²²¹ In response, proposed legislation was introduced which would enable the government to require that counsel and experts on behalf of plaintiffs receive security clearance as a condition for conducting civil litigation.²²² Nevertheless, since the formulation of the privileged information scheme in Israeli legislation, it has not been altered or amended.²²³ In fact, as detailed above, courts have developed a number of means for handling privileged information which are meant to enable litigation to proceed.²²⁴

From a substantive perspective, perhaps a more appropriate question is not whether national security is compromised by a more liberal approach to state secrets, but rather to what extent *some* reduction in security would still be justified by the strengthening of other values society holds dear, such as the protection of personal liberties, due process, or the redress of injuries inflicted by the government. If one's starting point is that national security deserves absolute protection or deference, then this would indeed result in the striking down of any legislative or judicial scheme which interferes (even a little) with national security. However, if one is willing to concede that

prior to being brought before a judge and enabled courts to conduct some hearings regarding custody without the presence of the suspect. The court agreed to review evidence presented by the government ex parte in support of the legislation despite petitioners' objection (the basis for this decision is not entirely clear, as the court did not publish a detailed decision). In response, petitioners refused to continue to take part in the proceedings and withdrew the petition. *The Judges Heard Classified Material — The NGOs Withdrew Their Petition*, *supra* note 219; Rosenzweig & Shany, *supra* note 219.

²²⁰ One potential way for examining whether damage has been done to national security interests would be to consult experts in the field. However, the reliability of this method and its accuracy are hardly scientific. Moreover, challenges could be encountered when attempting to define the group of cases to be looked at and assessed. Not all cases may be available for examination and the damage caused in some cases may be difficult to quantify. At any rate, such an assessment is beyond the scope of this Article.

²²¹ CA 7114/05 State of Israel v. Chizy Dinim Elyon 1263 (62) [2007] (Isr.).

²²² For a description of proposed legislation and its critical analysis, see *supra* note 164 and accompanying text.

²²³ Sections 44–46 of the Evidence Ordinance have remained unchanged since the statute's enactment in 1971.

²²⁴ See *supra* notes 164–66 and accompanying text (detailing the protective measures agreed to by the state in order to enable ex parte review of privileged materials in the case).

national security should be balanced with other interests, even at a certain cost to national security (or perhaps simply increasing the monetary costs borne by the government), then the question becomes one of how such a balance should be struck. This Article seeks to demonstrate that although national security is a top concern in both Israel and the United States, Israel has chosen a different balancing point than the United States with regard to privileged information. Such a balance may not be ideal, nor should it necessarily be adopted “as is” by the United States, but it does illustrate an alternative approach to the issue of state secrets—an approach to which the U.S. administration appears to have been unreceptive so far.

On a final note, a discussion of contemporary use of the state secrets privilege in the United States would be incomplete without mentioning proposed legislation seeking to formalize use of the privilege and delineate its borders. The State Secrets Protection Act (SSPA) was first introduced in the Senate during the 110th Congress in 2008.²²⁵ The bill is partially modeled after its criminal law counterpart, the Classified Information Procedures Act (CIPA),²²⁶ “and designed to codify a ‘safe, fair, and responsible’ state secrets privilege.”²²⁷ It addresses many of the current weaknesses of the state secrets privilege discussed above and incorporates a number of mechanisms which purport to mitigate the damaging effects that asserting the privilege may have on national security litigation. Specifically with regard to the timing of asserting the privilege, the bill sets forth that a court shall not grant a motion to dismiss or motion for summary judgment based on the privilege until the party adversely affected “has had a full opportunity to complete nonprivileged discovery and to litigate the issue or claim to which the privileged information is relevant.”²²⁸ Moreover, in cases in which privileged information is necessary and it is impossible to create a nonprivileged substitute, courts are allowed to “weigh the equities and make appropriate orders in the interest of justice.”²²⁹

These and other aspects of the proposed litigation are similar in nature to the Israeli practice relating to privileged information. In fact, the bill goes

²²⁵ State Secrets Protection Act, S. 2533, 110th Cong. (2008).

²²⁶ 18 U.S.C. app. 3 §§ 1–16 (1980). “CIPA creates procedures for the disclosure and utilization of classified information relating to national security in federal criminal prosecutions. These procedures include: pretrial conferences, protective orders, rules relating to discovery, in camera hearings, and restrictions upon admissibility.” Dhooge, *supra* note 23, at 502 n.159.

²²⁷ Sean Michael Ward, Note, *The State Secrets Protection Act (SSPA): Statutory Reform of the State Secrets Privilege*, 7 GEO. J.L. & PUB. POL’Y 681, 682 (2009).

²²⁸ State Secret Protection Act, H.R. 984, 111th Cong. § 7(c) (2009).

²²⁹ *Id.* § 7(d). These include: “striking the testimony of a witness, finding in favor of or against a party on a factual or legal issue to which the information is relevant or dismissing a claim or counterclaim.” *Id.*

beyond Israeli legislation in prescribing the various orders and methods that courts can employ.²³⁰ It has the potential to infuse the current application of the state secrets privileged with much-needed balance. As Chesney opined shortly after introduction of the bill:

[U]nder the SSPA the litigation process will proceed through the pleading and discovery stages, with the privilege being wielded as a scalpel rather than a bludgeon. Combined with the other procedural elements of the SSPA—including especially the role of special masters, guardians-ad-litem, and the emphasis on finding substitutions when possible—the net effect of this “proceduralization” of the privilege should ensure more careful tailoring to the facts and evidence in a particular case. This in turn should reduce the risk of erroneous application (and thus injustice). Though this benefit will come at the cost of increased litigation expense and complexity, it is a cost that is most likely worth bearing. At the very least, the experiment is worth undertaking.²³¹

It remains to be seen, however, whether and when such legislation will be passed and what its final contours would be.

VI. CONCLUSION

The Ninth Circuit’s en banc decision in *Mohamed v. Jeppesen* exposes the weaknesses of the state secrets privilege as prescribed under *United States v. Reynolds*. Beyond that, *Jeppesen* serves as an illustration of the misapplication by courts of the state secrets privilege in a manner that transforms it into a threshold claim of nonjusticiability rather than an evidentiary privilege. Disguising this emerging justiciability barrier under a state secrets analysis circumvents the larger debate regarding the role of the judiciary in monitoring the executive when it comes to national security policies.

The current leniency that U.S. courts have shown toward the government’s assertion of state secrets privilege as grounds for dismissal is creating a worrisome precedent. The current scheme disincentivizes the

²³⁰ While Israeli legislation formalizes the assertion of the privilege and recognizes that judges may exercise discretion to balance competing interests of the parties, it does not formally set out the methods which courts may employ in order to protect privileged information while facilitating litigation.

²³¹ Robert M. Chesney, *Legislative Reform of the State Secrets Privilege*, 13 ROGER WILLIAMS U. L. REV. 443, 467 (2008).

government from carefully sifting through its information and separating privileged from nonprivileged information or searching for creative solutions that will enable adjudication of these core issues to move forward. Furthermore, once the privilege is successfully asserted, the plaintiff fully internalizes the costs. As the application of the privilege widens and results in dismissal, these costs become devastating for the plaintiff's case.

Israel, a country which is no stranger to security threats and has been dealing with questions pertaining to national security policies for many years, has in place a statutory mechanism which regulates the handling of privileged evidence in legal proceedings. Unlike the state secrets privilege under *Reynolds*, Israel's statutory scheme incorporates a balancing test that allows disclosure of such information in the interest of serving justice. While privileged information may still ultimately be excluded from litigation, in effect devastating a plaintiff's chances of success, this will not necessarily be the outcome every time the privilege is successfully asserted. Under some circumstances, a court may recognize that information is privileged and still order its disclosure. Moreover, the privilege has never been invoked as a threshold claim for dismissal.

Granted, the specific circumstances of litigation surrounding interrogation techniques and the targeted killing policy in Israel differ from those in the United States. The ability to conduct such litigation in Israel is effected by several factors, among them, the identity of the parties, Israeli jurisprudence pertaining to standing, and the Israeli Supreme Court's rules of procedure when sitting in its capacity as the High Court of Justice. Nonetheless, the fact that the legality of these policies was successfully litigated in a society that places great importance on national security deserves consideration.

At the end of the day, the value of the Israeli experience is not only that it presents an alternative legal mechanism to the one currently in place in the United States, but also that it presents a different attitude altogether toward national security litigation and privileged information. In the present environment in the United States, it is difficult to even conceive of adjudication of such sensitive matters. However, Israeli jurisprudence shows that such adjudication is possible given not only a more accommodating legal scheme but also a more receptive mindset.