

THE STATE SECRETS PRIVILEGE: OVERUSE CAUSING UNINTENDED CONSEQUENCES

Holly Wells*

The state secrets privilege is an evidentiary privilege that requires either the outright dismissal of a case or significant limitations on discovery where litigation would involve the disclosure of important state secrets. This Note focuses on the Bush Administration's attempt to dismiss all cases concerning the Extraordinary Rendition program and the National Security Agency's warrantless wiretapping program by asserting the state secrets privilege. This Note argues that the Bush Administration has been unsuccessful in keeping information regarding these two programs secret and has instead drawn more attention to these two programs by its refusal to cooperate with the plaintiffs in these cases. If future administrations wish to better protect state secrets, the privilege should be asserted less often, should only be used to block some discovery, and the use of special measures and procedures should be employed.

INTRODUCTION

Since the attacks of September 11, 2001, President George W. Bush's Administration has shown an increased trend towards secrecy and the denial of public access to information.¹ One of the tools repeatedly invoked by the Bush

* J.D. Candidate, University of Arizona James E. Rogers College of Law, 2009. I would like to thank Kelvin Jones II and my family for their helpful comments and feedback and for all the love and support.

1. See *Emerging Threats: Overclassification and Pseudo-classification: Hearing Before the Subcomm. on National Security, Emerging Threats and International Relations of the Comm. on Government Reform*, 109th Cong. 120 (2005) (statement of Thomas Blanton, Executive Director, National Security Archive), available at <http://www.access.gpo.gov/congress/house/pdf/109hrg/20922.pdf> (discussing overclassification of documents under the Bush Administration); William G. Weaver & Robert M. Pallitto, *State Secrets and Executive Power*, 120 POL. SCI. Q. 85, 85 (2005) (noting that the government has broadened the criteria for holding documents secret or confidential); OPENTHEGOVERNMENT.ORG, *SECRECY REPORT CARD 2005: QUANTITATIVE INDICATORS OF SECRECY IN THE FEDERAL GOVERNMENT 2* (2005), http://www.openthegovernment.org/otg/SRC2005_embargoed.pdf ("For every \$1 the federal government spent in 2004 releasing old secrets, it spent an extraordinary \$148 creating new secrets In contrast, from 1997 to 2001, the government spent less than \$20 per year keeping secrets for every dollar spent on declassifying them.").

Administration in an effort to deny access to information is the state secrets privilege,² an evidentiary privilege that requires either the outright dismissal of a case or significant limitations on discovery where litigation would involve the disclosure of important state secrets.³ The Bush Administration has reportedly invoked the state secrets privilege as grounds for dismissal in civil cases over thirty-nine times since 2001, more than double the average of the previous twenty-four years.⁴

Specifically, the Executive has sought dismissal in all cases concerning two government programs being used in the war on terror. The first is the Extraordinary Rendition program, in which the government removes suspected terrorists to foreign nations for interrogation that reportedly involves the use of torture.⁵ The second program is the National Security Agency's (NSA) warrantless wiretapping of communications of suspected terrorists, including the wiretapping of conversations involving both U.S. citizens and non-citizens residing in the United States.⁶

The Bush Administration has sought to dismiss cases concerning these two programs at the pleadings stage, arguing that the cases raise legal claims that can neither be proven nor defended against without the disclosure of important state secrets that could jeopardize national security.⁷ District courts have split on the issue of whether these two programs involve state secrets,⁸ and although the

2. See Weaver & Pallitto, *supra* note 1, at 101; OPENTHEGOVERNMENT.ORG, SECRECY REPORT CARD 2007: INDICATORS OF SECRECY IN THE FEDERAL GOVERNMENT 3 (2007), <http://www.openthegovernment.org/otg/SRC2007.pdf> [hereinafter SECRECY REPORT CARD 2007].

3. See generally *United States v. Reynolds*, 345 U.S. 1 (1953) (first official recognition of the privilege); *Kasza v. Browner*, 133 F.3d 1159, 1166–67 (9th Cir. 1998) (describing the three effects of invocation of the state secrets privilege); Amanda Frost, *The State Secrets Privilege and Separation of Powers*, 75 *FORDHAM L. REV.* 1931, 1931–32 (2007).

4. SECRECY REPORT CARD 2007, *supra* note 2, at 3.

5. See, e.g., *El-Masri v. Tenet*, 437 F. Supp. 2d 530, 532 (E.D. Va. 2006), *aff'd*, 479 F.3d 296 (4th Cir. 2007); *Arar v. Ashcroft*, 414 F. Supp. 2d 250, 256–57 (E.D.N.Y. 2006).

6. See, e.g., *Al-Haramain Islamic Found., Inc. v. Bush*, 451 F. Supp. 2d 1215 (D. Or. 2006), *rev'd*, 507 F.3d 1190 (9th Cir. 2007); *ACLU v. NSA*, 438 F. Supp. 2d 754 (E.D. Mich. 2006), *vacated*, 493 F.3d 644 (6th Cir. 2007); *Terkel v. AT&T Corp.*, 441 F. Supp. 2d 899, 901 (N.D. Ill. 2006); *Hepting v. AT&T Corp.*, 439 F. Supp. 2d 974, 978–79 (N.D. Cal. 2006). In *Conner v. AT&T*, the government stated that it plans to assert the state secrets privilege in all cases involving NSA wiretapping and would move for their dismissal. *Conner v. AT&T*, No. CV F 06-0632, 2006 WL 1817094, at *2 (E.D. Cal. June 30, 2006).

7. *Al-Haramain Islamic Found., Inc.*, 451 F. Supp. 2d at 1219; *ACLU*, 438 F. Supp. 2d at 758–59; *Terkel*, 441 F. Supp. 2d at 900; *Hepting*, 439 F. Supp. 2d at 985; *El-Masri*, 437 F. Supp. 2d at 535; *Arar*, 414 F. Supp. 2d at 252, 287.

8. See, e.g., *Al-Haramain Islamic Found., Inc.*, 451 F. Supp. 2d at 1225, 1233 (denying government's motion to dismiss a challenge to NSA warrantless wiretapping program on state secret grounds); *Terkel*, 441 Supp. 2d at 901 (accepting government's assertion of state secrets privilege in NSA case and dismissing case); *Arar*, 414 F. Supp. 2d

Supreme Court has denied review in one Extraordinary Rendition case⁹ and one NSA wiretapping case,¹⁰ many cases are still heading for appellate review.¹¹

The state secrets privilege dates back to the early 1800s,¹² but the Bush Administration is using the privilege in new ways by seeking to dismiss entire categories of cases in hopes of keeping information regarding Extraordinary Rendition and NSA wiretappings confidential.¹³ But information regarding the two programs is getting out in other ways,¹⁴ illustrating that the Bush Administration's frequent use of the privilege in entire categories of cases is not having its intended effect. Instead of keeping information regarding these two controversial programs out of public access, the Bush Administration is drawing more attention to the programs by its refusal to cooperate with the plaintiffs in these cases.¹⁵ Attention

at 287 (dismissing on other grounds case challenging Extraordinary Rendition program where state secrets privilege invoked).

9. *El-Masri v. United States*, 128 S. Ct. 373 (2007).

10. *ACLU v. NSA*, 128 S. Ct. 1334 (2008), *denying cert. to* 493 F.3d 644 (6th Cir. 2007).

11. *See, e.g., Al-Haramain Islamic Found., Inc.*, 451 F. Supp. 2d at 1215; *Terkel*, 441 F. Supp. 2d 899; *Hepting*, 439 F. Supp. 2d at 1011; *see also* Joe Palazzolo, *Litigation Over Spy Program on Hold; Dozens of Lawsuits Challenging Warrantless Surveillance Await Ruling from 9th Circuit on State Secrets Privilege*, LEGAL TIMES, Oct. 1, 2007, at 8.

12. *United States v. Burr*, 25 F. Cas. 30, 37 (C.C.D. Va. 1807) (No. 14692D); *see* Erin M. Stilp, Comment, *The Military and State-Secrets Privilege: The Quietly Expanding Power*, 55 CATH. U. L. REV. 831, 833 (2006) (tracing state secrets privilege to *Burr*, 25 F. Cas. at 30).

13. *See, e.g., Al-Haramain Islamic Found., Inc.*, 451 F. Supp. 2d at 1220; *ACLU*, 438 F. Supp. 2d at 758–59; *Terkel*, 441 F. Supp. 2d at 901; *Hepting*, 439 F. Supp. 2d at 985; *El-Masri v. Tenet*, 437 F. Supp. 2d 530, 535 (E.D. Va. 2006), *aff'd*, 479 F.3d 296 (4th Cir. 2007); *Arar*, 414 F. Supp. 2d at 250.

14. *E.g., Jared Perkins, The State Secrets Privilege and the Abdication of Oversight*, 21 BYU J. PUB. L. 235, 235 (2007); Stilp, *supra* note 12, at 831; *Boeing Unit Sued Over CIA Flights*, WASH. POST, May 31, 2007, at A9 [hereinafter *Boeing Unit Sued*]; Eric Lichtblau, *Role of Telecom Firms in Wiretaps Is Confirmed*, N.Y. TIMES, Aug. 24, 2007, at A13 [hereinafter *Lichtblau, Role of Telecom*]; Adam Liptak, *Judges Weigh Arguments in U.S. Eavesdropping Case*, N.Y. TIMES, Feb. 1, 2007, at A12; Josh Meyer, *The World: U.S. Anti-Terror Role Criticized; Two Top Officials in Europe Say Washington Has Undermined Key Prosecutions by Holding Back Information*, L.A. TIMES, May 26, 2007, at A3 [hereinafter *Meyer, The World*]; Susan Page, *Lawmakers: NSA Database Incomplete: Some Who Were Briefed About the Database Identify Who Participated and Who Didn't*, USA TODAY, June 30, 2006, at 2A; Editorial, *The Price of Secrecy: When the War on Terror Goes Awry, Victims like Khaled El-Masri Deserve an Apology and Compensation*, L.A. TIMES, Oct. 11, 2007, at A20 [hereinafter *When the War on Terror*]; Jon Van & Michael O'Neal, *Phone Giants Raise Doubts on NSA Story; Agency Didn't Get Local Call Data, Verizon Says*, CHI. TRIB., May 17, 2006, at 1.

15. *See, e.g., Perkins, supra* note 14, at 264 (arguing that the state secrets privilege has produced “[e]xtensive, routine, institutionalized secrecy that gives the government undue control over public information”); Stilp, *supra* note 12, at 863 (arguing that the Federal Rules of Evidence should be amended to “include checks on the state-secrets privilege”); Editorial, *Supreme Disgrace*, N.Y. TIMES, Oct. 11, 2007, at A30 [hereinafter *Supreme Disgrace*] (condemning the Supreme Court for refusing to accept appeal in *El-Masri* case and claiming the decision had established the nation as an enabler

concerning these two programs is growing as media reports remain steady¹⁶ and more cases challenging the programs are filed.¹⁷

Three factors strongly suggest that by asserting the state secrets privilege in cases concerning these two programs, the Bush Administration has failed to keep information about the programs secret. First, information regarding Extraordinary Rendition and NSA wiretapping has been widely reported in the news media,¹⁸ forcing the Bush Administration to admit to the existence of both programs.¹⁹ Second, by filing complaints, plaintiffs are able to bring attention to these two programs and the alleged constitutional violations taking place.²⁰ At the

“of the Bush Administration’s efforts to avoid accountability for its actions”); Editorial, *Too Many Secrets*, N.Y. TIMES, Mar. 10, 2007, at A12 [hereinafter *Too Many Secrets*] (urging courts to pay attention to the abuse of the state secrets doctrine by the Bush Administration); *When the War on Terror*, *supra* note 14, at A20.

16. E.g., *Boeing Unit Sued*, *supra* note 14, at A9; Barton Gellman & Arshad Mohammed, *Data on Phone Calls Monitored; Extent of Administration’s Domestic Surveillance Decried in Both Parties*, WASH. POST, May 12, 2006, at A1; Lichtblau, *Role of Telecom*, *supra* note 14, at A13; Eric Lichtblau & Scott Shane, *Bush Is Pressed over New Report on Surveillance*, N.Y. TIMES, May 12, 2006, at A1 [hereinafter Lichtblau & Shane, *Bush is Pressed*]; Liptak, *supra* note 14, at A12; Meyer, *The World*, *supra* note 14, at A3; Josh Meyer & Joseph Menn, *U.S. Spying Is Much Wider, Some Suspect*, L.A. TIMES, Dec. 25, 2005, at A1 [hereinafter Meyer, *U.S. Spying*]; Page, *supra* note 14, at 2A; Scott Shane, *On Torture, 2 Messages and a High Political Cost*, N.Y. TIMES, Oct. 30, 2007, at A18; Van & O’Neal, *supra* note 14, at 1.

17. See Palazzolo, *supra* note 11, at 8 (reporting that litigation concerning the NSA wiretapping program has now grown to over forty cases).

18. E.g., Nina Bernstein, *U.S. Defends Detentions At Airports*, N.Y. TIMES, Aug. 10, 2005, at B1; *Boeing Unit Sued*, *supra* note 14, at A9; Gellman and Mohammed, *supra* note 16, at A1; Lichtblau, *Role of Telecom*, *supra* note 14, at A13; Lichtblau & Shane, *Bush is Pressed*, *supra* note 16, at A1; Eric Lichtblau, *Spy Agency Mined Vast Data Trove, Officials Report*, N.Y. TIMES, Dec. 24, 2005, at A1 [hereinafter Lichtblau, *Spy Agency Mined*]; Liptak, *supra* note 14, at A12; Meyer, *The World*, *supra* note 14, at A3; Meyer, *U.S. Spying*, *supra* note 16, at A1; Page, *supra* note 14, at 2A; Van & O’Neal, *supra* note 14, at 1.

19. Lichtblau, *Role of Telecom*, *supra* note 14, at A13; *Morning Edition: U.S. Acknowledges Existence of Secret CIA Prisons*, (NPR radio broadcast Sept. 7, 2006), available at <http://www.npr.org/templates/story/story.php?storyId=5780585>; *President’s Radio Address* (Dec. 17, 2005), available at <http://www.whitehouse.gov/news/releases/2005/12/20051217.html> (announcing he had authorized the NSA “to intercept the international communications of people with known links to al Qaeda and related terrorist organizations”); U.S. DEPARTMENT OF JUSTICE, LEGAL AUTHORITIES SUPPORTING THE ACTIVITIES OF THE NATIONAL SECURITY AGENCY DESCRIBED BY THE PRESIDENT (Jan. 19, 2006), <http://www.usdoj.gov/opa/whitepaperonnsalegalauthorities.pdf> [hereinafter LEGAL AUTHORITIES]; U.S. Department of State, *Rice Says United States Does Not Torture Terrorists*, <http://www.america.gov/st/washfile-english/2005/December/20051205124753frllehtim0.2305872.html> (last visited July 26, 2008) (denying the use of torture but describing rendition as “a vital tool in the war against transnational terrorism”).

20. E.g., Complaint at 1–3, *Al-Haramain Islamic Found., Inc. v. Bush*, 451 F. Supp. 2d 1215 (D. Or. 2006) (No. 06-274) [hereinafter Complaint, *Al-Haramain*]; Complaint and Demand for Jury Trial at 2–4, *Arar v. Ashcroft*, 414 F. Supp. 2d 250

same time, the government, by asserting the state secrets privilege, is neither admitting nor denying these often very troubling allegations. Third, the consistent invocation of the state secrets privilege concerning these two programs has not deterred plaintiffs from filing suit. The number of challenges to NSA warrantless wiretapping, for example, grew to over forty cases²¹ before Congress passed a bill in July 2008 giving the phone companies who took part in the program legal immunity and effectively dismissing all forty cases.²²

By seeking to use the state secrets privilege in such a draconian way, the Bush Administration has only garnered more criticism and attention.²³ Future administrations should avoid the mistakes of the Administration in this area by using alternatives such as conducting an *in camera* trial,²⁴ entering strict protective orders, and/or appointing a special master.²⁵ These procedures will allow cases to go forward while still protecting state secrets and arguably will paint the executive branch in a more cooperative light.

In Part I, this Note explores the historical roots of the state secrets privilege and its original foundation in *United States v. Reynolds*.²⁶ In Part II, it briefly examines cases challenging Extraordinary Rendition and NSA warrantless wiretapping and how the use of the state secrets privilege has changed since *Reynolds*. In Part III, this Note argues that the overuse and modified use of the state secrets privilege has had the unintended effect of drawing attention to programs and activities that the Executive has sought to keep secret. Finally, in Part IV, this Note argues that future administrations should use tactics such as more limited assertion of the privilege, using the privilege to block discovery requests item by item, and special measures and procedures, rather than seeking complete dismissal in these two categories of cases. In conclusion, this Note posits that these other tactics will be more successful in keeping information regarding sensitive government programs out of the public discourse.

(E.D.N.Y. 2006) (No. CV-04-0249) [hereinafter Complaint and Demand for Jury Trial, *Arar*].

21. Palazzolo, *supra* note 11, at 8.

22. Eric Lichtblau, *Senate Approves Bill to Broaden Wiretap Powers*, N.Y. TIMES, July 10, 2008, at A1 [hereinafter Lichtblau, *Senate Approves Bill*].

23. See, e.g., Perkins, *supra* note 14, at 235; Stilp, *supra* note 12, at 831; *Supreme Disgrace*, *supra* note 15, at A30; *Too Many Secrets*, *supra* note 15, at A12; *When the War on Terror*, *supra* note 14, at A20.

24. *Halpern v. United States*, 258 F.2d 36, 43–44 (2d Cir. 1958) (denying government's request for dismissal at pleadings stage on state secrets grounds and ordering an *in camera* trial as long as district court could do so "without running any serious risk of divulgence of military secrets").

25. *Loral Corp. v. McDonnell Douglas Corp.*, 558 F.2d 1130, 1132–33 (2d Cir. 1977) (upholding trial court's decision to refer the case to a special master pursuant to Rule 53(b) of the Federal Rules of Civil Procedure where the government sought to dismiss on state secrets grounds).

26. 345 U.S. 1, 7 (1953).

I. THE STATE SECRETS PRIVILEGE AS ORIGINALLY ENVISIONED

The state secrets privilege is a common law evidentiary privilege instilled with constitutional overtones.²⁷ It protects information that, if released, would pose a danger to the nation's defense capabilities, intelligence gathering methods and means, and/or diplomatic relations with foreign governments.²⁸

A. Roots of the Privilege

Aaron Burr's trial for treason in 1807²⁹ is often cited as the beginning of the formulation of the state secrets privilege.³⁰ In that case, Burr sought to force production of a letter written to President Thomas Jefferson by General James Wilkinson, a key government witness in the case.³¹ The government refused to produce the letter, citing the private nature of communications between a president and his advisor and stating that the letter might hold state secrets that, if revealed, could jeopardize national security.³² The court decided the case on another issue, never reaching the issue of a privilege, but in dictum noted that the defendant's need for the evidence would be weighed against the government's need for secrecy and that if the letter contained information that "would be imprudent to disclose, which it is not the wish of the Executive to disclose, such matter, if it be not immediately and essentially applicable to the point, [would], of course, be suppressed."³³

The next important precedent in enunciation of the state secrets privilege was set in 1876 with *Totten v. United States*.³⁴ In *Totten*, the plaintiff sought unpaid wages resulting from a secret espionage contract he had made with the late President Abraham Lincoln during the Civil War.³⁵ The Court denied the claim, noting that "public policy forbids the maintenance of any suit . . . the trial of which would inevitably lead to the disclosure of matters which the law itself regards as

27. See *United States v. Nixon*, 418 U.S. 683, 710 (1974) (noting that privilege derives from the President's Article II powers as Commander-in-Chief and leader of foreign affairs); *Reynolds*, 345 U.S. at 6 n.9 (suggesting separation of powers as one basis of the privilege).

28. *Ellsberg v. Mitchell*, 709 F.2d 51, 57 (D.C. Cir. 1983), *cert. denied*, 465 U.S. 1038 (1984).

29. *United States v. Burr*, 25 F. Cas. 30, 30 (C.C. Va. 1807) (No. 14692D). Burr was on trial for planning to launch a military expedition into the American Southwest. It was believed that his intent was either to attack Spanish possessions or to detach territories from the United States and create for himself an independent nation. John Yoo, *Jefferson and Executive Power*, 88 B.U. L. REV. 421, 429 (2008).

30. See *Reynolds*, 345 U.S. at 7 n.18; *In re United States*, 872 F.2d 472, 474-75 (D.C. Cir. 1989).

31. *Burr*, 25 F. Cas. at 31-32.

32. *Id.*

33. *Id.* at 37. The court avoided the issue of suppression in this case, noting that there was no evidence before the court that the letter contained any information that could be dangerous to the public safety if disclosed. *Id.*

34. 92 U.S. 105 (1876).

35. *Id.* at 106.

confidential.”³⁶ The Court held that the existence of a contract for secret services with the government was itself a fact that could not be disclosed.³⁷ *Burr* and *Totten* laid the foundation on which the Supreme Court would later justify the existence of an explicit state secrets privilege.

B. Recognition of the Privilege: United States v. Reynolds

The first official recognition of the privilege came in *United States v. Reynolds*, a case involving the crash of a B-29 Air Force aircraft where six of the nine passengers were killed.³⁸ The widows of three civilian observers killed in the crash brought a wrongful death suit against the federal government.³⁹ During discovery, the plaintiffs sought production of the U.S. Air Force’s official accident investigation reports as well as statements taken from the three surviving crew members.⁴⁰ The U.S. Government objected, claiming that the requested material was privileged under Air Force regulations and must be kept secret to protect national security.⁴¹ The Secretary of the Air Force wrote a letter to the district court saying the aircraft and those on board were involved in a secret mission.⁴²

Additionally the Judge Advocate General of the Air Force filed an affidavit making a formal claim of privilege and argued that the requested information could not be subject to discovery without hampering national security and the development of technical and confidential military equipment.⁴³ The district court ordered that the documents be produced in camera for review.⁴⁴ When the Government refused, the district court found in favor of the plaintiffs on the negligence issue.⁴⁵

In its appeal to the Supreme Court, the Government argued that the district court’s ruling was an “unwarranted interference” with the authority of the executive branch.⁴⁶ The plaintiffs, in turn, argued that the Executive’s power to hold the documents had been waived by the Tort Claims Act.⁴⁷ The Court disagreed, concluding the Tort Claims Act was not a waiver of the state secrets privilege.⁴⁸ Thus, the privilege was formally established and the Court went on to explain the requirements for a successful invocation of the privilege.⁴⁹

The Court made clear that a bare assertion of the privilege by the executive branch is not enough. Instead, a court is to determine whether the

36. *Id.* at 107.

37. *Id.*

38. 345 U.S. 1, 3–4, 7 (1953).

39. *Id.* at 3–6.

40. *Id.* at 3.

41. *Id.* at 3–4.

42. *Id.* at 4.

43. *Id.* at 4–5.

44. *Id.* at 5.

45. *Id.*

46. Brief for the United States at 8, *United States v. Reynolds*, 345 U.S. 1 (1953)

(No. 21).

47. *Reynolds*, 345 U.S. at 6; see 28 U.S.C. § 2674 (2006).

48. *Reynolds*, 345 U.S. at 5, 12.

49. *Id.* at 10–12.

assertion of the privilege is appropriate under the circumstances.⁵⁰ A court should not, however, “force a disclosure of the very thing the privilege is designed to protect.”⁵¹ If the executive branch can show that there is a “reasonable danger” that disclosure could expose sensitive information, the court should not examine the contested material, not even in camera.⁵²

The Court then established the correct procedural measures required to invoke the privilege. The privilege belongs only to the government and cannot be invoked by a private party,⁵³ the privilege is “not to be lightly invoked,”⁵⁴ and the head of the department with control over the subject at issue must file a formal claim of privilege, but only “after actual consideration by that officer.”⁵⁵

Finally, the Court created a balancing test to determine when acceptance of the privilege would be justified.⁵⁶ The test weighs the necessity of the party seeking the information against the appropriateness of the government’s invocation of the privilege.⁵⁷ When the showing of necessity by the party seeking the information is strong, the privilege will not be lightly accepted.⁵⁸ When the showing of necessity is weak, the privilege will prevail.⁵⁹ However, even the most compelling necessity will not overcome the privilege if the court believes that secrets are at stake.⁶⁰ In this way, the privilege, once applied, is absolute.⁶¹

In *Reynolds*, the Court accepted invocation of the privilege and refused to allow disclosure of the requested documents.⁶² The case was remanded, however, and the plaintiffs were given the opportunity to prove their case without the barred material.⁶³ *Reynolds* demonstrates that, under the original conception of the state secrets privilege, a successful invocation of the privilege need not completely bar a case from adjudication.

50. *Id.* at 8.

51. *Id.*

52. *Id.* at 10.

53. *Id.* at 7.

54. *Id.*

55. *Id.* at 7–8.

56. *Id.* at 11.

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.* In *Reynolds*, the Court characterized the plaintiff’s showing of necessity as “dubious.” *Id.* The Court noted that the Government had offered to make the surviving crewmembers available for examination and stated that this alternative “greatly minimized” the necessity of the evidence requested. *Id.*

62. *Id.* The accident report was declassified years later and strongly suggested negligence by the government, but did not contain information dangerous to national security, namely state secrets. See *Herring v. United States*, No. 03-CV-5500, 2004 WL 2040272, at *7–8 (E.D. Pa. Sept. 10, 2004), *aff’d*, 424 F.3d 384 (3d Cir. 2005). In *Herring*, the court was presented with the question of whether the *Reynolds* case should be reopened based on the declassification of the accident report, but ultimately decided not to reopen the case. See *id.*

63. *Reynolds*, 345 U.S. at 11–12.

C. Clarification Following Reynolds

The privilege has evolved since *Reynolds*, and subsequent caselaw has clarified what happens when the government invokes the privilege. The invocation of the privilege has three possible effects on litigation.⁶⁴ First, invocation may bar the evidence in question from being admitted in the litigation.⁶⁵ If the plaintiff is able to proceed without the requested discovery, the case can go forward, but the case will be dismissed if the plaintiff cannot satisfy all elements of the claim necessary to prove a prima facie case.⁶⁶ Second, upon invocation, a judge may dismiss a case if the privilege denies the defendant information necessary to provide a valid defense.⁶⁷

Third, even if the plaintiff is able to prosecute a claim based on nonprivileged evidence, if the “very subject matter of the action” is a state secret, then the court must dismiss the case upon an assertion of the state secrets privilege.⁶⁸ The theory is that because the secrets are essential to the subject matter of the litigation, any attempts to move forward threaten disclosure of these secrets.⁶⁹ The third remedy is severe, as it allows a court to dismiss a case at the pleadings stage, prior to any actual discovery.⁷⁰ One court noted that, although it is harsh to dismiss a plaintiff’s potentially valid claim, “the state secret doctrine finds the greater public good”⁷¹

Caselaw has also established that the government need not be an original party to the litigation and can intervene in a case to invoke the privilege.⁷² The privilege can be invoked to protect the disclosure of information regarding military secrets, state secrets, diplomatic relations, foreign affairs, identities, methods and

64. See, e.g., *Edmonds v. U.S. Dep’t of Justice*, 323 F. Supp. 2d 65, 78 (D.D.C. 2004). There the court stated that “[i]t is generally understood that ‘[t]he application of the state secrets privilege can . . . have three effects.’” *Id.* (quoting *Doe v. Tenet*, 329 F.3d 1135, 1149 (9th Cir. 2003)); see also *Kasza v. Browner*, 133 F.3d 1159, 1166–67 (9th Cir. 1998) (describing the three effects of invocation of the state secrets privilege).

65. *Kasza*, 133 F.3d at 1166.

66. *Id.* The court stated that when the privilege is invoked over specific evidence, that evidence is then completely barred from the case. The plaintiff can then use the evidence not covered by the privilege to go forward with the case. *Id.* (citing *Reynolds*, 345 U.S. at 11). If the plaintiff cannot prove the prima facie elements of the case using only the nonprivileged evidence, then the court will dismiss the claim as it would with any plaintiff that cannot prove the essential elements of the case. *Id.*

67. *Edmonds*, 323 F. Supp. 2d at 78.

68. *Kasza*, 133 F.3d at 1166 (quoting *Reynolds*, 345 U.S. at 11 n.26).

69. *Fitzgerald v. Penthouse Int’l, Ltd.*, 776 F.2d 1236, 1241–42 (4th Cir. 1985).

70. See, e.g., *Weston v. Lockheed Missiles & Space Co.*, 881 F.2d 814, 814–15 (9th Cir. 1989); *Guong v. United States*, 860 F.2d 1063, 1064–65, 1067 (Fed. Cir. 1988); *Edmonds*, 323 F. Supp. 2d at 68, 81–82; *Nejad v. United States*, 724 F. Supp. 753, 757 (C.D. Cal. 1989).

71. *Bareford v. Gen. Dynamics Corp.*, 973 F.2d 1138, 1144 (5th Cir. 1992), *vacated in part on reh’g*, 973 F.2d 1138, 1145 (5th Cir. 1992) (“[T]he results are harsh in either direction . . . [dismissal of the plaintiff’s claim is] ultimately the less harsh remedy . . .”).

72. E.g., *DTM Research, L.L.C. v. AT&T Corp.*, 245 F.3d 327, 330 (4th Cir. 2001) (government intervened as a plaintiff to quash subpoena from AT&T).

modes of operation, and intelligence sources.⁷³ When invoking the privilege, the government may present open affidavits available to the public or classified affidavits to be viewed in camera, ex parte, or both.⁷⁴

D. The Totten Distinction

One scholar has argued that the current Administration's invocations of the privilege have expanded the original scope of the state secrets privilege such that the effect of its use is practically identical to the effect of the *Totten* bar.⁷⁵ In *Tenet v. Doe*,⁷⁶ although not directly addressing the state secrets privilege, the Supreme Court reaffirmed *Reynolds* in dicta.⁷⁷ The Court, while recognizing that the state secrets privilege has its roots in *Totten*,⁷⁸ also recognized the distinction between the state secrets privilege and the "*Totten* rule."⁷⁹ The *Totten* rule prohibits a trial where disclosure of matters that the law regards as secret would be inevitable⁸⁰ and operates as a complete and absolute bar to litigating a case.⁸¹ The Court noted that an assertion of the state secrets privilege, on the other hand, does not provide the "absolute protection" that was enunciated in *Totten*.⁸² The state secrets privilege is an evidentiary tool, as opposed to the preclusive effect of the per se *Totten* rule.⁸³

The *Totten* rule should be used narrowly in cases intrinsically involving state secrets, such as a secret espionage contract with the government.⁸⁴ In contrast, the *Tenet* holding suggests that the state secrets privilege, rather than allowing early dismissal of a case before discovery has begun, should be used to bar access to privileged material, but with the possibility of still allowing the plaintiff to go forward.⁸⁵ The Court in *Tenet* appeared to be cautioning lower

73. See *Halkin v. Helms (Halkin II)*, 690 F.2d 977, 990 n.53 (D.C. Cir. 1982); see also *In re United States*, 872 F.2d 472, 476 (D.C. Cir. 1989); *Ellsberg v. Mitchell*, 709 F.2d 51, 57 (D.C. Cir. 1983).

74. See generally *Ellsberg*, 709 F.2d at 57–64; *Halkin II*, 690 F.2d at 992.

75. Carrie Newton Lyons, *The State Secrets Privilege: Expanding Its Scope Through Government Misuse*, 11 LEWIS & CLARK L. REV. 99, 122 (2007).

76. 544 U.S. 1 (2005).

77. *Id.* at 8–9.

78. See *id.* at 9 ("When invoking the 'well established' state-secrets privilege, we indeed looked to *Totten*.").

79. *Id.* at 8–10. *Tenet* involved former Cold War spies who entered into a contract with the government to conduct espionage against their native country in exchange for financial and personal security in the United States. *Id.* at 2–3. The spies filed suit against the government for allegedly not meeting its obligations under the contract. *Id.* The Court ultimately dismissed the case. *Id.* at 3.

80. *Id.* at 8 (quoting *Totten v. United States*, 92 U.S. 105, 107 (1876)).

81. *Id.* at 3–4.

82. *Id.* at 9–10.

83. *Id.* at 10 ("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.").

84. *Id.* at 8 (quoting *Totten*, 92 U.S. at 107). In *Tenet*, the Court "preclude[d] judicial review in cases such as respondents' where success depends upon the existence of their secret espionage relationship with the Government." *Id.*

85. *Id.* at 9–11.

courts against applying the broad *Totten* per se rule where security concerns should only bar some of the evidence in a case and the plaintiff can still move forward.⁸⁶

The Court further distinguished the *Totten* rule from the state secrets privilege by reaffirming the balancing test established in *Reynolds*, which requires that the showing of necessity by the party seeking the information be weighed against the appropriateness of the invocation.⁸⁷ So while a careful consideration is needed when the state secrets privilege is invoked, the *Totten* rule absolutely bars litigation.

The Supreme Court has not directly addressed the state secrets privilege since *Reynolds*, but with several cases involving the privilege awaiting appellate review,⁸⁸ the time may be ripe for the Court to take a second look.

II. THE STATE SECRETS PRIVILEGE AFTER SEPTEMBER 11TH

The state secrets privilege has always been a powerful tool of the executive branch. Early cases involving the invocation of the state secrets privilege often allowed the case to continue while excluding the privileged evidence.⁸⁹ Since the formal recognition of the state secrets privilege in *Reynolds*, courts have broadly deferred to the executive branch's assertion of it by accepting the government's invocation of the privilege in the vast majority of cases,⁹⁰ causing one commentator to refer to the state secrets privilege as the "nuclear bomb of legal tactics."⁹¹

Given the deference shown to the Executive's invocation of the privilege, it is not surprising that a president would seek to test its outer limits and possibly expand its scope by both invoking the privilege and taking advantage of its effect on a case. Under the Bush Administration, the use of the privilege has expanded in

86. *Id.* at 11.

87. *Id.* at 9–11.

88. See Palazzolo, *supra* note 11, at 8 (noting the forty-some cases involving NSA wiretapping stuck in the federal courts); David G. Savage, *Secrecy Trumps Torture Appeal*, L.A. TIMES, Oct. 10, 2007, at A1 (noting the several NSA cases on appeal involving a state secrets claim). The new FISA bill may result in the dismissal of all the NSA cases, however the cases have not yet been dismissed and a suit challenging the constitutionality of the FISA bill has been filed. See *infra* Part II.B.3.

89. See, e.g., *United States v. Reynolds*, 345 U.S. 1, 7 (1953); *Halpern v. United States*, 258 F.2d 36, 44 (2d Cir. 1958) (denying government's request for dismissal at pleadings stage and ordering an *in camera* trial); *AT&T v. United States*, 4 Cl. Ct. 157, 162 (Cl. Ct. 1983) (upholding privilege while encouraging counsel to proceed with discovery); *Sigler v. LeVan*, 485 F. Supp. 185, 198–99 (D. Md. 1980) (upholding privilege but permitting case to proceed until the court believed litigation would lead to improper disclosure); *O'Keefe v. Boeing Co.*, 38 F.R.D. 329, 336 (S.D.N.Y. 1965) (holding that some documents regarding Air Force policy, opinions, speculations, or recommendations were privileged, but allowing case to go forward because not all documents were privileged); see also *Weaver & Pallitto, supra* note 1, at 101.

90. *Weaver & Pallitto, supra* note 1, at 102 ("In only four cases did courts ultimately reject the government's assertion of the privilege.")

91. *State Secrets Privilege Gets a Workout*, *Secrecy News*, Apr. 23, 2002, <http://www.fas.org/sgp/news/secrecy/2002/04/042302.html>.

two important ways:⁹² the number of cases involving the invocation of the privilege by the government has increased,⁹³ and a larger percentage of those cases have involved dismissal of the entire case due to the claimed sensitive nature of the information sought.⁹⁴ In some cases, the government has invoked the privilege even before answering the complaint and before receiving any discovery requests.⁹⁵ The Bush Administration is getting more dismissals in more cases through “blanket assertions of the privilege over every document, person, and shred of information regarding the case.”⁹⁶

By seeking to expand the breadth of cases in which the privilege can be invoked and the scope of the effect of the privilege once successfully invoked, the Administration has undercut the usefulness and advantages of the privilege. Increased use of the privilege has created skepticism about whether it is being used properly and has increased investigations into whether the “state secrets” the government seeks to protect are actually worthy of protection.⁹⁷ Below is a discussion of two categories of cases where the Bush Administration has sought to invoke the state secrets privilege, yet has been startlingly unsuccessful in keeping the underlying issues in the cases secret.

92. See LOUIS FISHER, IN THE NAME OF NATIONAL SECURITY: UNCHECKED PRESIDENTIAL POWER AND THE REYNOLDS CASE 245 (2006); Frost, *supra* note 3, at 1939. But see Robert M. Chesney, *State Secrets and the Limits of National Security Litigation*, 75 GEO. WASH. L. REV. 1249, 1301 (2007) (concluding that a review of the number of times the state secrets privilege has been invoked “does not support the conclusion that the Bush administration chooses to resort to the privilege with greater frequency than prior administrations”).

93. Weaver & Pallitto, *supra* note 1, at 101. Between 1953, the year of the *Reynolds* decision, and 1976, there were four reported cases where the privilege was invoked. In contrast, between 1977 and 2001, there were fifty-one reported cases dealing with an assertion of the privilege. *Id.* But under the Bush Administration, the number of assertions has grown even more such that “the Bush administration lawyers are using the privilege with offhanded abandon.” *Id.* at 109; see also SECRECY REPORT CARD 2007, *supra* note 2, at 3.

94. See, e.g., *Tenet v. Doe*, 544 U.S. 1, 9–11 (2005) (dismissing case at pleadings stage in case involving attempt to enforce an alleged espionage contract with the government); *Black v. United States*, 62 F.3d 1115, 1116 (8th Cir. 1995) (affirming dismissal of case at pleadings stage); *Bowles v. United States*, 950 F.2d 154, 155 (4th Cir. 1991) (upholding dismissal of United States as a party to case where plaintiff was injured in car accident where car was owned by the government and operated by a government employee); *Zuckerbraun v. Gen. Dynamics Corp.*, 935 F.2d 544, 545 (2d Cir. 1991) (dismissing case at pleadings stage); *Fitzgerald v. Penthouse Int’l Ltd.*, 776 F.2d 1236, 1243 (4th Cir. 1985) (upholding dismissal of libel case at pleading stage because question at issue was itself a state secret); *Farnsworth Cannon, Inc. v. Grimes*, 635 F.2d 268, 281 (4th Cir. 1980) (en banc) (holding that plaintiff could not make out a prima facie case due to sensitive nature of issue involved); *Tilden v. Tenet*, 140 F. Supp. 2d 623, 624, 626–27 (E.D. Va. 2000) (dismissing at pleadings stage in case where CIA employee brought gender discrimination suit against Director of CIA); *Nejad v. United States*, 724 F. Supp. 753, 754, 756 (C.D. Cal. 1989) (dismissing at pleadings stage).

95. See *Tilden*, 140 F. Supp. 2d at 625; Appellant’s Brief at 12, *Sterling v. Tenet (Sterling I)*, 416 F.3d 338 (4th Cir. Dec. 20, 2004) (No. 04-1495).

96. Lyons, *supra* note 75, at 117.

97. See *infra* Part III.

A. The Privilege and Extraordinary Rendition

Extraordinary Rendition is the practice of detaining suspected terrorists and transporting them to foreign countries for interrogation.⁹⁸ Those detained as a result of the program have alleged that this interrogation involves the use of torture.⁹⁹ Although the Bush Administration is not the first administration to use Extraordinary Rendition,¹⁰⁰ the Bush Administration is most widely associated with the practice.¹⁰¹ Human rights organizations say they have identified between 150 and 200 cases of rendition since September 11, 2001.¹⁰² At least three cases have been filed challenging the practice,¹⁰³ and several other instances have been widely reported in the news media.¹⁰⁴ *El-Masri v. Tenet*¹⁰⁵ and *Arar v. Ashcroft*¹⁰⁶ are the two Extraordinary Rendition cases that have made it to the courts thus far. District courts have dismissed both cases on state secrets privilege and other grounds.¹⁰⁷

1. El-Masri v. Tenet

In 2005, Khaled El-Masri, a German citizen of Lebanese descent, filed a lawsuit in the United States District Court for the Eastern District of Virginia, claiming that he had been a victim of the United States' Extraordinary Rendition program.¹⁰⁸ El-Masri contended that he was captured in Macedonia on New Year's

98. See *El-Masri v. Tenet*, 437 F. Supp. 2d 530, 532 n.1 (E.D. Va. 2006), *aff'd*, 479 F.3d 296 (4th Cir. 2007); *Arar v. Ashcroft*, 414 F. Supp. 2d 250, 256 (E.D.N.Y. 2006); Stilp, *supra* note 12, at 849–50.

99. See *El-Masri*, 437 F. Supp. 2d at 534; *Arar*, 414 F. Supp. 2d at 256.

100. See Daniel Benjamin, *5 Myths About Rendition (and That New Movie)*, WASH. POST, Oct. 21, 2007, at B3. Benjamin, a former director for counterterrorism policy on the National Security Council Staff, reported that the practice of rendition first started under the Reagan Administration with the 1987 rendition of Lebanese hijacker Fawaz Younis. *Id.* Additionally, about seventy renditions were carried out before Sept. 11, 2001, mostly under the Clinton Administration. *Id.*

101. See, e.g., Frost, *supra* note 3, at 1931; Weaver & Pallitto, *supra* note 1, at 101; *Supreme Disgrace*, *supra* note 15, at A30; *Too Many Secrets*, *supra* note 15, at A12; *When the War on Terror*, *supra* note 14, at A20.

102. Sophie Arie, *Europe, U.S. Clash Over Terror War*, CHRISTIAN SCI. MONITOR, June 29, 2005, at 6.

103. *El-Masri*, 437 F. Supp. 2d at 532; *Arar*, 414 F. Supp. 2d at 252; First Amended Complaint at ¶ 2, *Mohamed v. Jeppesen Dataplan, Inc.*, 539 F. Supp. 2d 1128 (N.D. Ca. 2008) (No. C07-02798) [hereinafter Complaint, *Mohamed*].

104. See, e.g., Arie, *supra* note 102, at 6 (reporting that Egyptian Prime Minister Ahmed Nazif had previously told NBC news that sixty to seventy terrorism suspects had been taken to Egypt since Sept. 11, 2001); Dana Priest, *Jet is an Open Secret in Terror War*, WASH. POST, Dec. 27, 2004, at A1 (reporting on the rendition of Jamil Qasim Saeed Mohammed); *All Things Considered: Bush Concedes CIA Ran Secret Prisons Abroad* (NPR radio broadcast, Sept. 6, 2006), available at <http://www.npr.org/templates/story/story.php?storyId=5776968>; HUMAN RIGHTS WATCH, "OUTSOURCING" TORTURE, <http://www.hrw.org/campaigns/torture/renditions.htm> (last visited July 20, 2008).

105. 437 F. Supp. 2d at 530.

106. 414 F. Supp. 2d at 252.

107. *El-Masri*, 437 F. Supp. 2d at 541; *Arar*, 414 F. Supp. 2d at 287.

108. *El-Masri*, 437 F. Supp. 2d at 532–34.

Eve 2003 and transported against his will to Afghanistan where he was repeatedly interrogated, drugged, and tortured because the U.S. Government believed he had connections with al Qaeda.¹⁰⁹ El-Masri was eventually released on an abandoned road in Albania on May 28, 2004.¹¹⁰ Defendants named in the lawsuit included: the former Director of the Central Intelligence Agency (CIA), George Tenet; private corporations allegedly involved in the program; and twenty people, each identified as John Doe, who had allegedly participated in the abduction.¹¹¹

El-Masri strongly denied any involvement with al Qaeda, and claimed that his abduction and interrogation were the result of mistaken identity.¹¹² El-Masri filed three separate causes of action.¹¹³ The first alleged violations of El-Masri's Fifth Amendment right to due process; the second claim was brought under the Alien Tort Statute (ATS), 28 U.S.C. § 1350, alleging violations of international legal norms prohibiting prolonged, arbitrary detention; and the third claim was for each defendant's alleged violation of international legal norms prohibiting cruel, inhuman, or degrading treatment, also brought pursuant to the ATS.¹¹⁴

In response to the lawsuit, the United States filed a formal claim of state secrets privilege, supported by both an unclassified and a classified declaration by the Director of the CIA.¹¹⁵ To safeguard its interests, the United States also filed a motion to intervene and a motion to dismiss, maintaining that the continuation of the suit would inevitably lead to the revelation of important state secrets.¹¹⁶ The Government claimed it could neither confirm nor deny El-Masri's allegations, asserting that "even stating precisely the harm that may result from further proceedings in this case is contrary to the national interest."¹¹⁷

The district court granted the Government's motion to dismiss, finding that the privileged material was "central" to the claims and defenses raised in the litigation and, therefore, the privilege applied no matter how great the opposing interests at stake.¹¹⁸ The court concluded that the use of special procedures, such as

109. *Id.* For more details on the torture to which El-Masri was allegedly subjected, see *infra* Part III.B.

110. *El-Masri*, 437 F. Supp. 2d at 534.

111. *Id.*

112. *Id.*; see also *Supreme Disgrace*, *supra* note 15, at A30 ("German Chancellor Angela Merkel has said that Secretary of State Condoleezza Rice acknowledged privately to her that Mr. Masri's abduction was a mistake, an admission that aides to Secretary Rice have denied.").

113. *El-Masri*, 437 F. Supp. 2d at 534.

114. *Id.* at 534-35.

115. *Id.* at 535.

116. *Id.*

117. Memorandum of Points and Authorities in Support of the Motion by Intervenor United States to Dismiss or, in the Alternative, for Summary Judgment at 11-12, *El-Masri v. Tenet*, 437 F. Supp. 2d 530 (E.D. Va. 2006) (No. 01417).

118. *El-Masri*, 437 F. Supp. 2d at 538-39, 541. The court explained that a party's need for privileged information "affects only the depth of the judicial inquiry into the validity of the assertion and not the strength of the privilege itself, for 'even the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that military secrets are at stake.'" *Id.* at 537 (citation omitted).

clearing defense counsel for access to classified information, were not appropriate where the whole purpose of the suit was to prove the existence of events that, if true, would constitute state secrets.¹¹⁹ It noted that dismissal was appropriate in the case because nothing the court or the parties could do would adequately protect the privileged material.¹²⁰

Although the Government had publicly admitted the existence of Extraordinary Rendition and the program had been discussed in media and other reports, the court rejected the argument that the admission somehow undercut the claim of privilege.¹²¹ It drew a distinction between the general admission that the program exists and an admission or denial of the specific facts and allegations at issue.¹²² A general admission “provides no details as to the means and methods employed in these renditions, or the persons, companies or governments involved.”¹²³

Even with the dismissal of El-Masri’s complaint and his hope for a remedy through the judicial system, the court noted that if El-Masri’s claims were true and were the result of our government’s mistake, most would agree that he deserved some kind of remedy.¹²⁴ But, according to the court, the remedy would have to be found outside the judicial branch and through one of the other branches.¹²⁵

El-Masri’s lawyers appealed the case to the Supreme Court.¹²⁶ On October 9, 2007, the Court, without comment, refused to hear the case, allowing the ruling that dismissed the case on state secret grounds to stand.¹²⁷ By doing so, the Supreme Court declined the chance to elaborate on the privilege, which it has not squarely addressed in fifty years.¹²⁸

2. Arar v. Ashcroft

Maher Arar, a Syrian-born Canadian citizen, filed a suit alleging claims similar to those of El-Masri.¹²⁹ The complaint alleged that in September 2002, U.S. authorities detained Arar at J.F.K. International Airport in New York while he was stopped there on a layover to Canada.¹³⁰ Arar alleged that following his detention at the airport, he was held in solitary confinement at a Brooklyn detention center for several days and was initially not allowed to contact his family

119. *Id.* at 539.

120. *Id.* at 538–39 (citations omitted).

121. *Id.* at 537–38.

122. *Id.* at 537.

123. *Id.* (footnote omitted).

124. *Id.* at 541.

125. *Id.*

126. *El-Masri v. United States*, 128 S. Ct. 373 (2007).

127. *Id.*

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

129. *Arar v. Ashcroft*, 414 F. Supp. 2d 250 (E.D.N.Y. 2006), *aff’d* 532 F.3d 157 (2d Cir. 2008).

130. Complaint and Demand for Jury Trial. *Arar*, *supra* note 20, at 11–12.

or a lawyer.¹³¹ Later, authorities allowed Arar to call his family and lawyer, but Arar's captors then allegedly intentionally misinformed Arar's lawyer about Arar's whereabouts.¹³² Arar, who was accused of having links to al Qaeda,¹³³ was eventually shipped to Syria for ten months where his captors repeatedly interrogated and tortured him.¹³⁴ Syrian officials eventually released Arar almost twelve months after his initial detention.¹³⁵

In 2004, Arar brought suit in the United States District Court for the Eastern District of New York against John Ashcroft, then-Attorney General of the United States, and other government officials.¹³⁶ Arar asserted four claims for relief alleging violations of his Fifth Amendment rights, as well as violations under the Torture Victim Protection Act (TVPA).¹³⁷ The Government responded by asserting the state secrets privilege and, similar to the response in *El-Masri*, claimed it could neither admit nor deny Arar's allegations without harming national security.¹³⁸ The Government moved for summary judgment.¹³⁹ The district court dismissed the first three claims¹⁴⁰ for lack of standing and failure to meet the statutory requirements of the TVPA,¹⁴¹ choosing not to address the claim of privilege, and making the state secrets issue moot.¹⁴² On appeal, the Second

131. *Arar*, 414 F. Supp. 2d at 253. When Arar was first detained at the airport, he allegedly asked to speak to a lawyer and was told "only U.S. citizens [are] entitled to lawyers." Complaint and Demand for Jury Trial, *Arar*, *supra* note 20, at 11.

132. *Arar*, 414 F. Supp. 2d at 253–54.

133. Complaint and Demand for Jury Trial, *Arar*, *supra* note 20, at 13. Arar contended that he continually denied these charges while in custody. *Id.* at 12. Both Syrian and Canadian officials reportedly have cleared Arar of any terrorist connections. See Bernstein, *supra* note 18, at B1.

134. *Arar*, 414 F. Supp. 2d at 254–55. Arar alleged that he was placed in a "grave" cell that measured six feet long, seven feet high, and three feet wide. *Id.* at 254. The cell was damp, dark, cold and infested with rats. *Id.* Arar alleged that he was interrogated for eighteen hours a day and was "physically and psychologically tortured." *Id.* at 255. Arar's captors repeatedly beat him with their fists and with a two-inch-thick electric cable. *Id.* His captors also placed him in a room where he could hear the screams of other prisoners. *Id.* Arar stated that while in Syrian custody, he eventually confessed to training with terrorists because he wanted the torture to stop. Complaint and Demand for Jury Trial, *Arar*, *supra* note 20, at 16.

135. Complaint and Demand for Jury Trial, *Arar*, *supra* note 20, at 18–19.

136. *Arar*, 414 F. Supp. 2d at 252.

137. *Id.* at 257–58.

138. Memorandum in Support of the United States' Assertion of State Secrets Privilege at 2–3, *Arar v. Ashcroft*, 414 F. Supp. 2d 250 (E.D.N.Y. Jan. 18, 2005) (No. 04-CV-249) [hereinafter Memorandum in Support of United States] (disclosure surrounding Arar's claims "would interfere with foreign relations, reveal intelligence-gathering sources or methods, and be detrimental to national security").

139. *Id.*

140. *Arar*, 414 F. Supp. 2d at 287–88. The Government did not seek dismissal of Arar's fourth claim, which concerned his alleged mistreatment while detained in the United States on state secrets grounds. *Id.* However, dismissal of this claim was sought on other grounds. Memorandum in Support of the United States, *supra* note 138.

141. *Arar*, 414 F. Supp. 2d at 287.

142. *Id.*

Circuit affirmed the holding of the district court and also refused to address the state secrets issue.¹⁴³

Although the government succeeded in blocking discovery and ultimately dismissing the cases, in both *El-Masri* and *Arar*, it failed to keep the issues surrounding Extraordinary Rendition out of the public discourse.¹⁴⁴ In fact, the judiciary's acceptance of the state secrets privilege in both cases only sparked heightened attention and criticism. After the rulings, articles, editorials, and columns appeared criticizing both the government's actions in conducting the program and the judicial branch's refusal to deal with the issues.¹⁴⁵

B. The Privilege and NSA Wiretapping

The National Security Agency began its warrantless wiretapping program in 2001, shortly after the September 11th attacks.¹⁴⁶ An article published in the *New York Times* in December 2005 brought attention to this secret domestic surveillance program,¹⁴⁷ and soon thereafter, President Bush publicly acknowledged the existence of the program.¹⁴⁸ President Bush explained that the NSA was authorized to intercept communications when it had reason to believe the communications either originated or terminated in a foreign country and that one of the parties in the communication was a member of or somehow affiliated with al Qaeda.¹⁴⁹

143. *Arar v. Ashcroft*, 532 F.3d 157, 192 (2d Cir. 2008).

144. See, e.g., Richard Bernstein, *Skepticism Seems to Erode Europeans' Faith in Rice*, N. Y. TIMES, Dec. 7, 2005, at A5; Bob Herbert, Editorial, *It's Called Torture*, N. Y. TIMES, Feb. 28, 2005, at A5; Charles M. Sennott, *Italy Seethes at US Abduction of Imam*, BOSTON GLOBE, July 3, 2005, at A9; Andrew Zajac, *Bush Wielding Secrecy Privilege to End Suits; National Security Cited Against Challenges to Anti-terror Tactics*, CHI. TRIB., Mar. 3, 2005, at C1.

145. E.g., Linda Greenhouse, *Justices Turn Aside Case of Man Accusing C.I.A. of Torture*, N. Y. TIMES, Oct. 10, 2007, at A20; *Supreme Disgrace*, supra note 15, at A30; *Too Many Secrets*, supra note 15, at A12; *When the War on Terror*, supra note 14, at A20.

146. See Palazzolo, supra note 11, at 8; James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005, at A1.

147. See Risen & Lichtblau, supra note 146.

148. United States' Reply in Support of the Assertion of the Military and State Secrets Privilege and Motion to Dismiss or, in the Alternative, for Summary Judgment By the United States at 6, *Hepting v. AT&T Corp.*, 439 F. Supp. 2d 974 (N.D. Cal 2006) (No. 0672) (citing Press Release, Press Conference of the President (Dec. 19, 2005), available at <http://www.whitehouse.gov/news/releases/2005/12/20051219-2.html>).

149. Press Release, Press Conference of the President (Dec. 19, 2005), available at <http://www.whitehouse.gov/news/releases/2005/12/20051219-2.html>. The U.S. Attorney General and the Department of Justice have also acknowledged the program. Press Release, White House, Press Briefing by Attorney General Alberto Gonzales and General Michael Hayden, Principal Deputy Director for National Intelligence (Dec. 19, 2005), available at <http://www.whitehouse.gov/news/releases/2005/12/20051219-1.html> [hereinafter Press Briefing by Attorney General]; LEGAL AUTHORITIES, supra note 19.

Over forty cases have been filed challenging the NSA warrantless wiretapping program,¹⁵⁰ and before the passage of the Foreign Intelligence Surveillance Act (FISA) Amendments Act of 2008, most of these were waiting in the United States District Court for the Northern District of California, pending a procedural appeal.¹⁵¹ Following the widespread media reports about the program¹⁵² and the subsequent criticism of it,¹⁵³ oversight of the program shifted from the Bush Administration to the Foreign Intelligence Surveillance Court in early 2007.¹⁵⁴ Within the cases challenging the wiretapping programs, there are two types: (1) actions brought against the plaintiffs' telecommunications provider for injuries flowing from the telecommunications provider's collaboration with the government;¹⁵⁵ and (2) actions brought against the government asking for relief from the illegal surveillance.¹⁵⁶

1. *Hepting v. AT&T Corp.*

In *Hepting*,¹⁵⁷ the plaintiffs filed suit in the United States District Court for the Northern District of California against their telecommunications provider, AT&T, for injuries flowing from the company's alleged collaboration with the government in surrendering their records to the NSA.¹⁵⁸ Plaintiffs alleged that AT&T, in collaborating with the government, illegally eavesdropped on the

150. See, e.g., *Al-Haramain Islamic Found., Inc. v. Bush*, 451 F. Supp. 2d 1215 (D. Or. 2006), *rev'd*, 507 F.3d 1190 (9th Cir. 2007); *ACLU v. NSA*, 438 F. Supp. 2d 754 (E.D. Mich. 2006), *vacated*, 493 F.3d 644 (6th Cir. 2007); *Terkel v. AT&T Corp.*, 441 F. Supp. 2d 899, 900 (N.D. Ill. 2006); *Hepting v. AT&T Corp.*, 439 F. Supp. 2d 974, 978 (N.D. Cal. 2006).

151. Cases pending throughout the country were transferred to the United States District Court for the Northern District of California under an order of the Judicial Panel on Multidistrict Litigation. ELIZABETH B. BAZAN, *THE FOREIGN INTELLIGENCE SURVEILLANCE ACT: A BRIEF OVERVIEW OF SELECTED ISSUES* 14 (2008). The panel found that all of the cases shared similar factual and legal questions regarding government surveillance and centralization of the cases was necessary in order to eliminate duplicative discovery and inconsistent pretrial rulings. *Id.*

152. See, e.g., Gellman & Mohammed, *supra* note 16, at A1; Lichtblau & Shane, *Bush Is Pressed*, *supra* note 16, at A1; Lichtblau, *Role of Telecom*, *supra* note 14, at A13; Lichtblau, *Spy Agency Mined*, *supra* note 18, at A1; Liptak, *supra* note 14, at A12; Meyer, *U.S. Spying*, *supra* note 16, at A1; Page, *supra* note 14, at 2A; Risen & Lichtblau, *supra* note 146, at A1; Van & O'Neal, *supra* note 14, at 1.

153. See, e.g., Frost, *supra* note 3, at 1963 (referring to the NSA program as "constitutionally questionable conduct"); Perkins, *supra* note 14, at 260 (arguing that "we have traded the oversight that acts as guarantor of our civil liberties for a strong national security"); Press Release, American Civil Liberties Union, *ACLU Demands Records About Warrantless Spying by National Security Agency* (Dec. 20, 2005), available at <http://www.aclu.org/safefree/spying/23150prs20051220.html>.

154. Palazzolo, *supra* note 11, at 8.

155. See, e.g., *Hepting*, 439 F. Supp. 2d at 978; *Terkel*, 441 F. Supp. 2d at 900.

156. See, e.g., *Al-Haramain Islamic Found., Inc. v. Bush*, 451 F. Supp. 2d 1215, 1218 (D. Or. 2006), *rev'd*, 507 F.3d 1190 (9th Cir. 2007); *ACLU v. NSA*, 438 F. Supp. 2d 754 (E.D. Mich. 2006), *vacated*, 493 F.3d 644 (6th Cir. 2007).

157. *Hepting*, 439 F. Supp. 2d at 974.

158. *Id.* at 978-79.

communications of millions of Americans, violating their First and Fourth Amendment rights, as well as FISA and various other state and federal laws.¹⁵⁹

The Government moved to intervene and for dismissal on state secret grounds, asserting that the suit could not go forward without disclosing information that would jeopardize national security.¹⁶⁰ Public declarations from the Director of National Intelligence and from the Director of the NSA supported the assertion of the privilege.¹⁶¹ The Government asserted that dismissal on state-secrets grounds was appropriate for three reasons: first, the “very subject matter” of the action concerned state secrets; second, the plaintiffs would not be able to make out a prima facie case without the privileged information; and third, the absence of the privileged information would deprive AT&T of a defense.¹⁶² The Government also asserted that the case qualified for dismissal under *Totten v. United States*,¹⁶³ because it concerned a covert agreement between AT&T and the government.¹⁶⁴

The court first rejected the argument that the *Totten* bar required dismissal.¹⁶⁵ Although AT&T had not publicly confirmed or denied its participation in the NSA program, it had stated that “when the government asks for our help in protecting national security, and the request is within the law, we will provide that assistance.”¹⁶⁶ The court concluded that this made AT&T’s involvement in the program public information and thus did not support the argument that the relationship was covert.¹⁶⁷

Addressing the state secrets privilege, the court considered the government’s repeated public disclosures of the program, along with the extensive media coverage, in declining to accept the assertion of the state secrets privilege as grounds for dismissal of the case.¹⁶⁸ It noted that the very subject matter of the action was not itself a secret because public disclosures made by both the government and AT&T strongly suggested that AT&T was in fact assisting the government in surveillance.¹⁶⁹ In conclusion, the court determined that discovery in the case should proceed and that the court would then assess whether information held pursuant to the state secrets privilege would require dismissal of the suit.¹⁷⁰

The Government immediately petitioned the United States Court of Appeals for the Ninth Circuit for interlocutory review.¹⁷¹ The Ninth Circuit heard

159. *Id.*

160. *Id.* at 979–80.

161. *Id.* at 979.

162. *Id.* at 985.

163. 92 U.S. 105 (1876).

164. *Hepting*, 439 F. Supp. 2d at 985, 991.

165. *Id.* at 993.

166. *Id.* at 992 (citations omitted).

167. *Id.* at 993.

168. *Id.* at 990.

169. *Id.* at 994.

170. *Id.* at 994, 1011.

171. Petition by Intervenor United States for Interlocutory Appeal Under 28 U.S.C. 1292(b), *Hepting v. AT&T Corp.*, 439 F. Supp. 2d 974 (N.D. Cal. 2006) (No. 672).

arguments in the case in August 2007, along with a companion case, *Al-Haramain Islamic Foundation v. Bush*.¹⁷² Although a ruling in *Al-Haramain* was announced in November 2007, the court did not issue an opinion in *Hepting*, issuing instead a brief order stating that the *Hepting* and *Al-Haramain* cases had been severed.¹⁷³ As discussed further below, it is now expected that the FISA bill will cause the complete dismissal of *Hepting* and all other cases challenging NSA wiretapping.

2. *Al-Haramain Islamic Foundation v. Bush*

Al-Haramain Islamic Foundation is a Muslim charity active in over fifty countries.¹⁷⁴ The Office of Foreign Assets Control of the Department of the Treasury designated it a “Specially Designated Global Terrorist [Organization]” in 2004.¹⁷⁵ In 2006, *Al-Haramain* brought suit challenging the government’s wiretapping program and alleging violations of the Fourth Amendment, FISA, international law, and other constitutional provisions.¹⁷⁶ Essential to *Al-Haramain*’s claim was a classified document, known as the “Sealed Document,” that the government had inadvertently given to *Al-Haramain* in a separate proceeding to freeze the organization’s assets.¹⁷⁷ *Al-Haramain* contended that the Sealed Document provided clear evidence that the organization had previously, if not currently, been the subject of warrantless wiretapping.¹⁷⁸

The United States asserted the state secrets privilege and filed a motion to dismiss, asserting that continuation of the litigation would pose a risk to national security.¹⁷⁹ The Government also moved to bar *Al-Haramain* from access to the Sealed Document.¹⁸⁰ John F. Hackett, Director of the Information Management Office of the Office of the Director of National Intelligence, filed a declaration asserting that “it is not possible to describe the document in a meaningful manner without revealing classified information, including classified sources and methods of intelligence.”¹⁸¹

The district court rejected the Government’s contention that the very subject matter of the litigation was a state secret and therefore warranted

172. 451 F. Supp. 2d 1215 (D. Or. 2006), *rev’d*, 507 F.3d 1190 (9th Cir. 2007); Henry Weinstein, *Another Court Backs Bush on Secrets: This Time It’s the Liberal 9th Circuit that Rules Against Disclosure*, L.A. TIMES, Nov. 17, 2007, at A1.

173. Weinstein, *supra* note 172, at A1.

174. *Al-Haramain Islamic Found., Inc. v. Bush*, 507 F.3d 1190, 1194 (9th Cir. 2007).

175. *Id.* at 1194, 1198.

176. *Id.* at 1195.

177. *Id.* at 1193. In August 2004, during *Al-Haramain*’s civil designation proceeding, the Department of the Treasury produced several unclassified materials and gave them to *Al-Haramain*’s counsel and two of the organization’s directors. *Id.* at 1194. Among the documents was the Sealed Document, which was labeled “TOP SECRET.” *Id.* at 1194–95. In late August, the FBI discovered the inadvertent disclosure of the document, and in October 2004 the FBI retrieved all copies of the Sealed Document from *Al-Haramain*’s counsel. *Id.* at 1195.

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.* (quoting the May 12, 2006 declaration).

dismissal.¹⁸² The court stated that because information regarding the program was widely known, there was no “reasonable danger” that a confirmation or denial of any surveillance of Al-Haramain would threaten national security.¹⁸³ The district court next granted the Government’s motion to bar the plaintiffs’ access to the Sealed Document. Because the Sealed Document was essential to the plaintiff’s prima facie case, the court allowed the litigation to go forward by permitting Al-Haramain’s witnesses to file in camera affidavits attesting from memory to the contents of the document.¹⁸⁴

On appeal, the Ninth Circuit agreed with the district court’s finding that the very subject matter of the action was not a state secret.¹⁸⁵ It stated that the Bush Administration had chosen to actively engage in public discussion regarding the program and that its “many attempts to assuage citizens’ fears that *they* have not been surveilled now doom the government’s assertion that the very subject matter . . . is barred by the state secrets privilege.”¹⁸⁶

The court also agreed with the district court that the Sealed Document was protected by the state secrets privilege and that the inadvertent disclosure of the document did not amount to its declassification.¹⁸⁷ It based its holding on a review of the Sealed Document in camera and stated that, in matters concerning foreign policy or national security, deferral is given to the executive branch.¹⁸⁸ The court next reversed the district court’s order allowing Al-Haramain’s witnesses to reconstruct the document from memory, stating that this would create “a back door around the privilege and would eviscerate the state secret itself.”¹⁸⁹ The Sealed Document, its contents, and any memories concerning its contents were thus completely barred from further disclosure.¹⁹⁰

The court held that, without the Sealed Document, Al-Haramain could not establish an injury in fact and therefore lacked the standing to sue.¹⁹¹ Instead of completely dismissing the case, however, the court remanded the case to the district court to determine whether FISA preempts the state secrets privilege.¹⁹²

The Supreme Court recently denied review of a case with facts similar to *Al-Haramain*. In *ACLU v. NSA*,¹⁹³ the American Civil Liberties Union, along with several lawyers, reporters, and scholars, argued that, as a result of the illegal program, they have been forced to alter how they communicate with foreigners

182. *Id.*

183. *Al-Haramain Islamic Found., Inc. v. Bush*, 451 F. Supp. 2d 1215, 1224 (D. Or. 2006), *rev’d*, 507 F.3d 1190 (9th Cir. 2007).

184. *Id.* at 1229.

185. *Al-Haramain Islamic Found., Inc.*, 507 F.3d at 1193.

186. *Id.* at 1200; *see id.* at 1193 (noting the “cascade of acknowledgements and information coming from the government, as officials have openly, albeit selectively, described the contours of the program”).

187. *Id.* at 1193.

188. *Id.* at 1203.

189. *Id.* at 1193.

190. *Id.* at 1204–05.

191. *Id.* at 1205.

192. *Id.* at 1205–06.

193. 128 S. Ct. 1334 (2008).

who are likely to be targets of wiretapping.¹⁹⁴ The Sixth Circuit dismissed the suit, finding the plaintiffs could not prove that the program harmed them because they could not prove their communications had in fact been monitored.¹⁹⁵ By denying certiorari, the Supreme Court allowed this holding to remain intact.

3. Legislative Response

In July 2008 President Bush signed the FISA bill, which provided legal immunity for phone companies that took part in the NSA wiretapping program and also broadened the government's spy powers under the program.¹⁹⁶ The surveillance legislation shielding telecommunications companies from lawsuits concerning their participation in the NSA wiretapping program was the subject of much debate in Congress,¹⁹⁷ with President Bush calling previous failures to pass the bill "unfair" because the companies were told by government leaders that their help was both legal and essential to national security.¹⁹⁸ The bill has been called the "biggest restructuring of federal surveillance law in thirty years"¹⁹⁹ and will effectively end the forty-some lawsuits that have been filed in the federal courts.²⁰⁰ The bill does provide for a narrow review by the district court to determine whether the phone companies being sued did receive formal requests or directives from the Bush Administration to take part in the wiretapping program.²⁰¹ Because the Bush Administration has already acknowledged that such directives were given to the phone companies, however, the lawsuits will likely be summarily dismissed.²⁰²

Upon passage of the bill, the ACLU quickly filed a lawsuit in a New York federal court.²⁰³ The suit was filed on behalf of human rights organizations, journalists, and labor organizations who claim they fear the law will allow the U.S. government to monitor their activities, violating constitutional free speech and privacy concerns.²⁰⁴

Prior to the passage of the FISA bill, consideration of the state secrets privilege in NSA wiretapping cases proved more challenging for district courts, with some accepting an assertion of the privilege and others rejecting it. In *Hepting* and *Al-Haramain*, both district courts specifically considered the media coverage and public government disclosures surrounding the NSA wiretapping program when concluding that the cases did not involve state secrets. In this area, far more

194. *ACLU v. NSA*, 438 F. Supp. 2d 754, 767 (E.D. Mich. 2006), *vacated*, 493 F.3d 644 (6th Cir. 2007).

195. *ACLU v. NSA*, 493 F.3d 644, 687–88 (6th Cir. 2007).

196. Randall Mikkelsen, *Bush Signs Spy Bill and Draws Lawsuit*, REUTERS, July 10, 2008.

197. David Stout & Brian Knowlton, *Bush Calls Surveillance Bill an "Urgent Priority,"* N.Y. TIMES, Feb. 28, 2008, at A1.

198. *Id.* (quoting President Bush).

199. Lichtblau, *Senate Approves Bill*, *supra* note 22, at A13.

200. *Id.*

201. *Id.*

202. *Id.*

203. Mikkelsen, *supra* note 196.

204. *Id.*

than in Extraordinary Rendition cases, the Bush Administration has failed to keep the details of the NSA wiretapping program a state secret. NSA wiretapping is being discussed in Congress, in the media, and by the Administration itself.

III. THE UNINTENDED EFFECTS OF OVERUSE OF THE PRIVILEGE

The Bush Administration's growing use of the privilege, along with its attempts to dismiss entire categories of cases, has had the unintended effect of drawing attention to these two programs. News stories concerning NSA wiretapping and Extraordinary Rendition are widespread.²⁰⁵ The Executive has also arguably failed to keep important information about Extraordinary Rendition and NSA wiretapping secret because plaintiffs have been able to file complaints providing details about what they claim took place.²⁰⁶ Even if plaintiffs suspect that their case will not be successful, they can file public court documents providing important, if perhaps unverified, details regarding NSA wiretapping and Extraordinary Rendition. The media, in turn, uses these complaints as sources in coverage of the two programs.²⁰⁷ The assertion of the state secrets privilege has also not stopped plaintiffs from filing suit.²⁰⁸ This section will discuss: (1) media attention surrounding the two programs; (2) the information provided in plaintiffs' complaints; and (3) the continued filing of claims.

A. Media Attention

As mentioned, information regarding both Extraordinary Rendition and NSA wiretapping, and the cases challenging these two programs, have been diligently followed by the press.²⁰⁹ The warrantless wiretapping of U.S. citizens and others within the United States by the NSA was first brought to the public's attention in a December 2005 *New York Times* article.²¹⁰ The *New York Times*, along with other major newspapers, has continued to report extensively on the program.²¹¹ In court the Government has insisted that the program is a state secret;

205. See *supra* notes 196, 198, 205, and accompanying text.

206. See *infra* Part III.B.

207. See, e.g., Richard Willing, *Sen. Specter Says He Won't Support Telecom Immunity in FISA Bill Until He Gets Answers*, USA TODAY, Oct. 17, 2007, at 10A; Cathy Young, Op-Ed., *National Security vs. Our National Soul*, BOSTON GLOBE, Sept. 25, 2006, at A11.

208. See Complaint, *Mohamed*, *supra* note 103, at 1; Palazzolo, *supra* note 11, at 8.

209. See, e.g., Greenhouse, *supra* note 145, at A20; *Top Court Rejects ACLU Domestic Spying Lawsuit*, N.Y. TIMES, Feb. 19, 2008, at A1; Weinstein, *supra* note 172, at A1.

210. See Risen & Lichtblau, *supra* note 146, at A1.

211. E.g., Peter Baker & Jim VandeHei, *Clash Is Latest Chapter in Bush Effort to Widen Executive Power*, WASH. POST, Dec. 21, 2005, at A1; Leslie Cauley, *NSA Has Massive Database of Americans Phone Calls: 3 Telecoms Help Government Collect Billions of Domestic Records*, USA TODAY, May 11, 2006, at 1A; Gellman & Mohammed, *supra* note 16, at A1; Lichtblau & Shane, *Bush Is Pressed*, *supra* note 16, at A1; Lichtblau, *Role of Telecom*, *supra* note 14, at A13; Lichtblau, *Spy Agency Mined*, *supra* note 18, at A1; Liptak, *supra* note 14, at A12; Meyer, *U.S. Spying*, *supra* note 16, at 1; Page, *supra* note 14, at 2A; Van & O'Neal, *supra* note 14, at 1.

however, it has also helped spark attention concerning NSA wiretapping.²¹² President Bush confirmed the existence of the program the day after the *New York Times* published its article,²¹³ and other government officials have spoken publicly about it since then.²¹⁴ The court in *Al-Haramain* referred to the “government’s plethora of voluntary disclosures”²¹⁵ and noted that much of the information concerning the program “was spoon-fed to the public by the President and his administration.”²¹⁶ The Bush Administration has chosen carefully what aspects of the program to reveal and as the court in *Al-Haramain* suggested, has only revealed information in an attempt to justify the program and to calm fears about the use of warrantless wiretapping.²¹⁷

The Extraordinary Rendition program has also gained attention in the news media.²¹⁸ The controversy over the program has even inspired a major motion picture, *Rendition*, which questions the program’s constitutional and ethical bases.²¹⁹ Bringing still more attention to the issue are the responses of public officials in foreign governments to reports of Extraordinary Rendition. In Italy, the Senior Investigative Magistrate opened a criminal case after the alleged abduction of a Muslim cleric from a Milan street in 2003.²²⁰ The investigation led to charges being filed against thirty-three people, including twenty-six U.S. citizens.²²¹ CIA officers have also been criminally charged in Germany in connection with Extraordinary Rendition cases.²²² In Canada, the Prime Minister urged the U.S. government to “come clean” about the case of Maher Arar.²²³ These foreign responses led one editorialist to comment that Extraordinary Rendition “is being actively discussed all over the world. The only place it cannot be discussed, it seems, is in a United States courtroom.”²²⁴ This widespread attention extends to

212. See *President’s Radio Address*, *supra* note 19; Press Briefing by Attorney General, *supra* note 149; LEGAL AUTHORITIES, *supra* note 19; Letter from Alberto Gonzales, Attorney General, to Patrick Leahy and Arlen Specter, Senators (Jan. 17, 2007), available at <http://leahy.senate.gov/press/200701/1-17-07%20AG%20to%20PJL%20Re%20FISA%20Court.pdf>.

213. *President’s Radio Address*, *supra* note 19.

214. Press Briefing by Attorney General, *supra* note 149; Letter from Alberto Gonzales to Patrick Leahy and Arlen Specter, *supra* note 212; LEGAL AUTHORITIES, *supra* note 19.

215. *Al-Haramain Islamic Found., Inc. v. Bush*, 507 F.3d 1190, 1192–93 (9th Cir. 2007).

216. *Id.* at 1192.

217. See *id.* at 1193, 1200; *President’s Radio Address*, *supra* note 19; Press Briefing by Attorney General, *supra* note 149; Letter from Alberto Gonzales to Patrick Leahy and Arlen Specter, *supra* note 212; LEGAL AUTHORITIES, *supra* note 19.

218. E.g., *C.I.A. Confirms Rendition Report*, N.Y. TIMES, Feb. 21, 2008, at A1; Meyer, *The World*, *supra* note 14, at A3; Shane, *supra* note 16, at A18.

219. *RENDITION* (New Line Cinema 2007).

220. Meyer, *The World*, *supra* note 14, at A3.

221. *Id.*

222. Greenhouse, *supra* note 145, at A20; Shane, *supra* note 16, at A18.

223. *When the War on Terror*, *supra* note 14, at A20.

224. *Supreme Disgrace*, *supra* note 15, at A30.

the 2008 U.S. presidential election, where the candidates repeatedly face questions about the proper scope of interrogation.²²⁵

Attention is also growing in the legal community with an increase in scholarly articles in the last two years concerning the state secrets privilege.²²⁶ Much, if not all, of this commentary is critical of the Bush Administration's use of the privilege and, contrary to this Note, which suggests that future presidents should change the way the privilege is used without altering its essential features, other legal commentaries suggest drastic changes to the contours of the state secrets privilege itself.²²⁷ As one scholar noted, under the Bush Administration, the state secrets privilege is beginning to look "like a doctrine of broad government immunity."²²⁸ Another commentator argues the increase in the use of the state secrets privilege creates a risk that the Administration is not really protecting state secrets, but is instead "hiding incompetence or gross error from public scrutiny, accountability, and correction."²²⁹ As evidenced by the variety and quantity of media attention, invocation of the state secrets privilege in Extraordinary Rendition and NSA wiretapping cases has been ineffective in keeping information about the programs out of the public discourse.

B. Plaintiff Complaints

Even though the plaintiffs in many of the Extraordinary Rendition and NSA wiretapping cases have been unsuccessful in getting to the merits of their claims,²³⁰ they have succeeded in drawing attention to possible constitutional

225. Bob Egelko, *Obama Says Clinton Has Wavered on Torture*, SAN FRANCISCO CHRONICLE, Mar. 12, 2008, at A2; Shane, *supra* note 16, at A18.

226. See, e.g., Louis Fisher, *Congressional Access to National Security Information*, 45 HARV. J. ON LEGIS. 219, 220 (2008); Frost, *supra* note 3, at 1931; Lyons, *supra* note 75, at 99; Perkins, *supra* note 14, at 235; Stilp, *supra* note 12, at 831; Stephanie A. Fichera, Note, *Compromising Liberty for National Security: The Need to Rein in the Executive's Use of the State-Secrets Privilege in Post-September 11 Litigation*, 62 U. MIAMI L. REV. 625, 627–28 (2008).

227. See Frost, *supra* note 3, at 1963 ("[W]hen the executive is engaged in constitutionally questionable conduct that lasts for a period of years, and occurs during a time when the nation's populace is relatively safe, our constitutional structure demands that it be subject to oversight . . ."); Lyons, *supra* note 75, at 118 ("[T]he government is not carefully considering its invocation but unnecessarily invoking it."); Perkins, *supra* note 14, at 237 ("The confluence of a grave threat from international terrorism, public anger and fear resulting from high-profile terrorist attacks, and an ambitious presidency intent upon expanding executive power have created strong incentives for the president to push for more latitude to operate in secrecy . . .") (footnote omitted); Stilp, *supra* note 12, at 843–44 (noting that since 2001 there has been a significant increase in the amount of documents being classified and that this makes it "more likely that the Government can assert the state-secrets privilege based on a document which is unnecessarily or improperly classified" (footnote omitted)).

228. Henry Lanman, *Secret Guarding: The New Secrecy Doctrine So Secret You Don't Even Know About It*, SLATE, May 22, 2006, <http://www.slate.com/id/2142155/>.

229. Perkins, *supra* note 14, at 260 (footnote omitted).

230. E.g., *Arar v. Ashcroft*, 414 F. Supp. 2d 250, 287 (E.D.N.Y. 2006); *El-Masri v. Tenet*, 437 F. Supp. 2d 530, 541 (E.D. Va. 2006), *aff'd*, 479 F.3d 296 (4th Cir. 2007).

violations by making public the allegations in their complaints.²³¹ The case of Khaled El-Masri provides a potent example. In his appellate brief,²³² El-Masri alleges that, after his seizure, he was imprisoned in a Skopje, Macedonia hotel room for twenty-three days, enduring constant interrogation about his purported association with al Qaeda, an association he denies.²³³ He alleges he was then taken from the hotel room to a building, where he was beaten and stripped of his clothing.²³⁴ El-Masri contends that his interrogators were members of a CIA “black renditions” team.²³⁵ He claims that he was blindfolded, shackled, and drugged with a sedative before getting on an airplane that took him to Kabul, Afghanistan.²³⁶ He was imprisoned in a CIA-run facility where he was repeatedly interrogated about his association with terrorists.²³⁷ El-Masri alleges that, throughout this ordeal, he was frequently beaten and, on one occasion, was sodomized with a foreign object.²³⁸ He also alleges that at the end of four months, when he was deposited on the side of a road in Albania, he had lost sixty pounds.²³⁹

In response to these allegations of horrendous torture and kidnapping, the government filed a brief asserting the state secrets privilege and claiming that it could neither admit nor deny such allegations without jeopardizing national security.²⁴⁰ Thus, although the merits of the case may never be reached, the ability to draw attention to these two programs and the alleged constitutional violations is a powerful tool for plaintiffs. In *Al-Haramain*, the court noted the power of public court documents by stating that NSA wiretapping had been discussed “extensively in publicly-filed pleadings, televised arguments in open court in this appeal, and in the media”²⁴¹ Even more damaging to the Bush Administration’s public image than the plaintiff complaints is the fact that many of the allegations in the NSA and Extraordinary Rendition cases have been substantiated by European investigations and U.S. news reports.²⁴²

231. *E.g.*, Complaint, *Al-Haramain*, *supra* note 20; Complaint and Demand for Jury Trial, *Arar*, *supra* note 20.

232. Opening Brief for Plaintiff-Appellant at 1–3, *El-Masri v. Tenet*, 479 F.3d 296 (4th Cir. 2007) (No. 06-1667).

233. *Id.* at 2–3.

234. *Id.* at 3.

235. *Id.*

236. *Id.*

237. *Id.* at 4.

238. *Id.* at 3.

239. *El-Masri v. Tenet*, 437 F. Supp. 2d 530, 534 (E.D. Va. 2006). *El-Masri* protested his treatment by engaging in a hunger strike. *Id.*

240. Brief of the Appellee, *El-Masri v. Tenet*, 479 F.3d 296 (4th Cir. 2007) (No. 06-1667).

241. *Al-Haramain Islamic Found., Inc. v. Bush*, 507 F.3d 1190, 1198 (9th Cir. 2007) (footnote omitted).

242. *See, e.g.*, *Hepting v. AT&T Corp.*, 439 F. Supp. 2d 974, 992 (N.D. Cal. 2006) (statement of AT&T); Ariel Salzmann, Comment, *What Will We Learn from L'affaire Arar?*, *GLOBE & MAIL*, Dec. 2, 2006, at A27; Bruce Zagaris & Chris Ronk, *International Criminal Law*, 40 INT’L LAW. 263, 273 (2006).

Thus, a strong inference has been drawn that the Bush Administration is engaging in unconstitutional behavior but chooses to turn a blind eye by refusing to answer the allegations and throwing litigants out of court. The Bush Administration's assertion of the state secrets privilege in these cases has failed to keep these serious allegations against the government, and the details of the two programs, from becoming part of the public dialogue.

C. *Filing of Suits Not Deterred*

The repeated assertion of the state secrets privilege has also failed to deter plaintiffs from filing suit challenging Extraordinary Rendition and NSA warrantless wiretapping. Amazingly, over forty challenges to the NSA program had been filed before the passage of the FISA bill.²⁴³ Although similar numbers are not seen challenging the Extraordinary Rendition program, the ACLU filed a lawsuit in May 2007 against a Boeing subsidiary for participation in CIA kidnapping and torture flights.²⁴⁴ These plaintiffs have not been deterred from filing suit, even though, prior to the passage of the FISA bill, NSA plaintiffs were facing contrary decisions and a slow appeals process, and Extraordinary Rendition plaintiffs are facing bad odds, as the two Extraordinary Rendition cases that have gone to trial were both dismissed on state secrets privilege and other grounds. The Bush Administration's assertion of the state secrets privilege has failed to stop the filing of complaints and has actually kept the issues involving these two programs before the courts and in the public spotlight.

IV. THE ADVANTAGES OF OTHER TACTICS

Several commentators, noting the increased use of the state secrets privilege to dismiss cases at the outset, argue that courts can and should use other measures to let these cases go forward.²⁴⁵ Suggestions include protective orders, in camera proceedings, and shifting evidentiary burdens to the government.²⁴⁶ These commentators argue, and *Reynolds* indicates, that it is the job of the judiciary to be skeptical of the privilege and to allow the case to go forward if possible.²⁴⁷ So far, courts have not provided the oversight that many think is warranted.²⁴⁸ Disregarding the issue of whether courts have acted correctly in addressing state secrets issues during this period of increased and changed use of the privilege, this Note argues that future administrations will be more successful in keeping these programs secret by taking a different approach in litigating these cases.

While assertion of the privilege has always garnered some media attention, the dramatic increase in use of the privilege and the attempt to dismiss cases before discovery have drawn significantly more attention to the privilege and

243. Palazzolo, *supra* note 11, at 8.

244. Complaint at 6–7, *Mohamed*, *supra* note 103.

245. *E.g.*, Frost, *supra* note 3, at 1958; Stilp, *supra* note 12, at 857–59.

246. *E.g.*, Frost, *supra* note 3, at 1958; Stilp, *supra* note 12, at 857–58.

247. *See* *United States v. Reynolds*, 345 U.S. 1, 9–11 (1953); Frost, *supra* note 3, at 1934; Lyons, *supra* note 75, at 104; Perkins, *supra* note 14, at 253; Stilp, *supra* note 12, at 857–59.

248. Frost, *supra* note 3, at 1931–32; Lyons, *supra* note 75, at 117; Perkins, *supra* note 14, at 253; Stilp, *supra* note 12, at 831.

the cases it is used in. The state secrets privilege was originally intended to be used infrequently and, even then, only to limit discovery. The Bush Administration's refusal to follow these two guidelines has brought new attention and criticism to the privilege.

This new use is draconian in that the Bush Administration seeks to prevent entire categories of cases from being litigated and does so by moving for dismissal before the case has even begun. Legal scholars appear to be most concerned with the consistent assertion by the government that the very subject matter of the litigation is a state secret requiring dismissal before discovery and before the government even answers the complaint.²⁴⁹ The current use also blurs the line between the *Totten* bar and the state secrets privilege. While *Totten* claims are completely barred, traditionally cases involving state secrets did not have to be categorically dismissed.²⁵⁰ The Government avoids this distinction by attempting to dismiss cases at the outset.

The Bush Administration's new state secrets practice makes the executive branch appear uncooperative and has led to speculation that the Administration is simply trying to cover up its mistakes.²⁵¹ The information that has surfaced regarding Extraordinary Rendition and NSA wiretapping has led to attacks on the programs and policies of the Bush Administration. Criticism is focused not only on the legality of the two programs, but importantly, is also focused on the secrecy of the executive branch and its apparent refusal to cooperate with wronged litigants.²⁵²

The legal community and the public at large are less likely to respect an assertion of the state secrets privilege if the commonly held view is that the privilege is being misused. This appears to be the predominant response to the Bush Administration's use of the privilege.²⁵³ The current use appears not to be based on careful considerations of national security, but instead on a sense of entitlement by the executive branch.²⁵⁴

A feeling of misuse has also led to intense pressure from legal scholars, human rights organizations, foreign governments, and the public for more government disclosures and better oversight of the executive branch.²⁵⁵ Although Extraordinary Rendition and NSA wiretapping would undoubtedly have been hot

249. See, e.g., Frost, *supra* note 3, at 1958; Lyons, *supra* note 75, at 118.

250. Lyons, *supra* note 75, at 122.

251. See Perkins, *supra* note 14, at 260.

252. See, e.g., *Supreme Disgrace*, *supra* note 15, at A30; *Too Many Secrets*, *supra* note 15, at A12; *When the War on Terror*, *supra* note 14, at A20.

253. See, e.g., Editorial, *Congress, Spying, and the Rule of Law*, PHILADELPHIA DAILY NEWS, Feb. 5, 2007, at 21; *Too Many Secrets*, *supra* note 15, at A12; Editorial, *Whose Privilege?*, N.Y. TIMES, Apr. 18, 2008, at A24.

254. See, e.g., Frost, *supra* note 3, at 1958; Lyons, *supra* note 75, at 118; Jeremy Telman, *Our Very Privileged Executive: Why the Judiciary Can (And Should) Fix the State Secrets Privilege*, 80 TEMP. L. REV. 499, 499 (2007) (stating that the privilege has been transformed into a form of "executive immunity").

255. See *supra* Part II.

topics for the media in any event, the Bush Administration's response exacerbated national interest in the two programs.²⁵⁶

The state secrets privilege in many ways is contrary to popularly held notions that every person deserves his or her day in court, and that, if the government has harmed an individual, there is a process by which he or she can seek redress. These apparent contradictions also contribute to the intense media attention and criticism surrounding the Bush Administration's assertion of the privilege.

Much of this attention and criticism could have been avoided if the Bush Administration had taken a different approach when addressing cases with state secrets concerns. There are several ways in which the executive branch could have continued to protect national security while minimizing the impact of a valid privilege claim on individual litigants. By looking at the mistakes in the Bush Administration's handling of these two categories of cases, future administrations can better avoid the exposure of state secrets.

First, the Bush Administration could have been more selective in asserting the privilege.²⁵⁷ Extraordinary Rendition quite possibly presented the ideal case for assertion of the state secrets privilege. It involves questions of national security, terrorism, and covert actions by the government.²⁵⁸ The program no doubt involves state secrets. If the program is being used to catch dangerous terrorists and to prevent them from harming U.S. citizens, then arguably it is essential for the government to keep information concerning how the program operates confidential. The NSA wiretapping cases, however, present a different picture.

One could argue that the same concerns, namely national security and terrorism, justify the assertion of the privilege in NSA cases; however, this argument is undercut by the Bush Administration's willingness to reveal so much about the program.²⁵⁹ Although the Bush Administration would likely not have publicly discussed the program without the prodding of the *New York Times* article, several details concerning the program were voluntarily released by the government after the article was published.²⁶⁰ The Administration's willingness to discuss the program suggests that it was not necessary to assert the state secrets privilege in the NSA cases because it was not a program the government was that

256. See, e.g., Editorial, "State Secrets" the Only Defense, SAN FRANCISCO CHRON., Aug. 17, 2007, at B10 (stating that by asserting the state secrets privilege the Bush Administration is hiding "behind its shield of secrecy"); *Too Many Secrets*, *supra* note 15, at A12.

257. Much of the attention focused on the Bush Administration's use of the privilege has been on the sheer number of times the Administration has asserted it. See, e.g., Frost, *supra* note 3, at 1939; Weaver & Pallitto, *supra* note 1, at 101; SECRECY REPORT CARD 2007, *supra* note 2, at 3.

258. See *El-Masri v. Tenet*, 437 F. Supp. 2d 530, 539 (E.D. Va. 2006) (noting that if the events were true they would constitute state secrets).

259. See *President's Radio Address*, *supra* note 19; Press Briefing by Attorney General, *supra* note 149; Letter from Alberto Gonzales to Patrick Leahy and Arlen Specter, *supra* note 212; LEGAL AUTHORITIES, *supra* note 19.

260. See sources cited *supra* note 259.

interested in protecting from disclosure. The recent passage of the FISA bill does suggest, however, that a majority of Congress did find the program worthy of protection.²⁶¹ By giving legal immunity to the phone companies and by calling for the dismissal of pending cases challenging the NSA program,²⁶² the bill will prevent the revelation of additional details about the wiretapping that took place.

Second, the Bush Administration could have chosen to use the state secrets privilege as it had been used traditionally since *Reynolds*. In cases following *Reynolds*, the state secrets privilege was applied narrowly and used to block specific requested discovery while still allowing the case to move toward a decision on the merits.²⁶³ Courts considered discovery requests item by item to determine what information should be blocked, in many cases providing litigants with enough information to go forward with the case.²⁶⁴ Instead of filing for a motion to dismiss at the outset, the executive branch could have attempted to disentangle information that posed a threat to state secrets from information that could safely be used in court.

Once again, Extraordinary Rendition is the harder case to make for use of this measure. Although the government has admitted to the existence of the program, in contrast to NSA wiretapping, the government has been careful to guard against disclosure of the details of the program.²⁶⁵ One way to allow some discovery to proceed in these cases would be to limit discovery to only information regarding the particular case being litigated. General information about the program likely presents the greatest risks because it could give insight into future uses of Extraordinary Rendition. Therefore, details concerning the program as a whole, including how it is run, who is involved, and who generally authorizes action, would still be protected.

261. See Lichtblau, *Senate Approves Bill*, *supra* note 22, at A13 (citing Senator John D. Rockefeller IV, Democrat from West Virginia, as saying the bill is essential to protecting national security). Even though the bill passed, several members of Congress criticized President Bush's actions in conducting warrantless wiretapping without supervision or approval from the FISA court or another independent agency. *Id.* The bill includes a provision that makes clear that the surveillance law is the exclusive means of conducting intelligence wiretaps. *Id.*

262. The bill provides that upon the finding that the phone companies were operating under a formal request or directive by the Bush Administration all lawsuits "shall be promptly dismissed." 50 U.S.C. § 1885(a) (2006).

263. See, e.g., *Northrop Corp. v. McDonnell Douglas Corp.*, 751 F.2d 395, 400 (D.C. Cir. 1984); *Ellsberg v. Mitchell*, 709 F.2d 51, 59–60 (D.C. Cir. 1983); *Halpern v. United States*, 258 F.2d 36, 44 (2d Cir. 1958); *Sigler v. LeVan*, 485 F. Supp. 185, 198–99 (D. Md. 1980); *In re Franklin Nat'l Bank Sec. Litig.*, 478 F. Supp. 577, 581, 588 (E.D.N.Y. 1979); *Jabara v. Kelley*, 75 F.R.D. 475, 495 (E.D. Mich. 1977).

264. See *In re United States*, 872 F.2d 472, 478–79 (D.C. Cir. 1989) (approving of item by item determination when state secrets privilege is asserted); *Jabara*, 75 F.R.D. at 495–97 (E.D. Mich. 1977) (upon assertion of state secrets privilege evaluating each specific interrogatory question and discovery request item by item).

265. As the court in *El-Masri* noted, although the Bush Administration has admitted to the existence of the program, the important details surrounding the practice have been kept secret. *El-Masri v. Tenet*, 437 F. Supp. 2d 530, 537–38 (E.D. Va. 2006).

The NSA cases present a much stronger argument for disentangling sensitive information from non sensitive information. As the Bush Administration has exemplified through its many disclosures, not all of the information regarding the program is sensitive. The public knows how the program operates, what telecommunications companies are participating, and what happens to information collected from the monitoring.²⁶⁶ Arguably the only piece of evidence litigants would need to successfully present a prima facie case in these cases would be whether the litigant was, in fact, subject to government monitoring. This information could be revealed without much harm to national security, because the plaintiffs themselves, as well as the public, already suspect who the government is targeting. With the passage of the new FISA bill, however, Congress has foreclosed further litigation on this issue.

Third, the Bush Administration could have developed special measures and procedures to protect government secrets. The assertion of the state secrets privilege has been unsuccessful in keeping information regarding NSA wiretapping and Extraordinary Rendition secret.²⁶⁷ The executive branch should now take the lead by changing the way it responds to complaints, signaling to the courts that it is willing to make information available in a restricted form to satisfy security measures, to stipulate to certain facts, or to use pseudonyms when necessary. The executive branch could encourage Congress to create special courts or legislation allowing special masters with security clearance to litigate these cases. A few, if not all, of these special measures could be used successfully by future administrations in state secrets cases to serve the dual objectives of allowing litigants to go forward while protecting national security.

Although it may be too late to safeguard information about Extraordinary Rendition and NSA wiretapping, a change in the current practice of asserting the state secrets privilege will be more successful in keeping information secret in future cases. All of the strategies listed above would make the executive branch seem more cooperative with litigants and would assure the public that litigants do have some chance of redress. Even if courts ultimately side with the executive branch, the process itself would create legitimacy. The public is more likely to believe that government practices and programs are valid if litigants at least had a chance to make their case.

Similarly, the state secrets privilege is more likely to be accepted and respected if the public perceives that the executive branch is only asserting it when absolutely necessary and that, even with a valid assertion, litigants still have a chance to argue the merits of their case. Foreign governments are also less likely to get involved or to comment if they know that there is an opportunity for redress available in the United States. Future administrations could be more successful at dodging the attention and subsequent criticism by using alternate practices, which would not be hard to implement, considering that many of them have already been

266. See *Hepting v. AT&T Corp.*, 439 F. Supp. 2d 974, 990, 994 (N.D. Cal. 2006) (discussing the many disclosures by the government about the NSA program and the media attention such disclosures have received).

267. See *supra* Part III.

used in state secrets cases and in other contexts.²⁶⁸ Alternate practices would bring more legitimacy to the government, reduce public and media attention, and still adequately protect state secrets.

CONCLUSION

The current use of the state secrets privilege has been ineffective in keeping information about Extraordinary Rendition and NSA wiretapping secret. Politicians, media, and the public continue to focus their attention on the two programs, cases continue to be filed, and critics are mounting. If the state secrets privilege is really intended to protect state secrets as enunciated in *Reynolds*, and if national security interests are in fact at stake, then future administrations should decline to follow the Bush Administration's example. Invoking the privilege only in the rarest of cases, attempting to proceed with discovery, however limited it might be, and using special procedures when necessary would lend legitimacy to the executive branch's treatment of sensitive cases. If the executive branch is perceived to be adequately handling these important cases, there will be less reason to speculate as to what state secrets are involved. Then, perhaps the state secrets privilege can better serve its original purpose: keeping state secrets *secret*.

268. See *Loral Corp. v. McDonnell Douglas Corp.*, 558 F.2d 1130, 1132 (2d Cir. 1977) (referring a state secrets case to a special master); *Halpern v. United States*, 258 F.2d 36, 43 (2d Cir. 1958) (responding to assertion of the state secrets privilege by remanding the entire case for an *in camera* trial); see also *Batson v. Kentucky*, 476 U.S. 79 (1986) (holding that the burden of proof should shift to the government once plaintiff has offered a *prima facie* case of an equal protection violation during *voir dire*).