The Evolution of the State Secret Privilege in the United States Legal System: Dissecting the Consequences on Government Accountability, Transparency, and People's Individual Rights

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I. Introduction: Historical Context and Definitions

During the reign of Charles I in England, a privilege known as the "Crown Privilege" was used to protect the public interest by preventing sensitive information from being disclosed (Center for Constitutional Rights). During Charles's time, the Crown Privilege stopped courts from asserting jurisdiction over "habeas corpus claims of prisoners" unless the Crown provided a valid reason for the detention. The Crown Privilege was somewhat controversial, as habeas corpus had been used since the Magna Carta was written in 1215 (Magna Carta, UK Parliament). Critics disapproved of this privilege, claiming that the Crown overstepped and abused its power, putting accountability and the rule of law in danger. The Petition of Rights in 1628 overturned the Crown's decision on habeas corpus, stopping Charles I from depriving the courts of jurisdiction over detention. Throughout the nineteenth century, the boundaries of the Crown Privilege remained unclear. While some believed the privilege could be used without a government claim, others began to question how the privilege could impact government accountability and individual rights (Sudha, 2009).

The United States' "State Secret Privilege" is derived from the English Crown Privilege. The State Secret Privilege (SSP) allows a court to withhold information in court proceedings if that information threatens national security (Center for Constitutional Rights). National security is the defense of the nation's needs and interests and includes the steps taken to defend a country against dangers like espionage, terrorism, or foreign conflict. The U.S. application of the SSP is modeled after English precedent; however, in the past, English courts have voiced concern over the broad application of the SSP in the United States legal system. The first formal use of the SSP can be traced back to the 1950s, around the time of the Cold War, when mass threats challenged the security of the United States (Sudha, 2009).

The SSP is not explicitly stated in the Constitution, as many argue that implementing it would go against its historical development as an evidentiary rule. Therefore, the privilege is in common law, not the Constitution (LexisNexis Case Brief, 2019). Simply put, common law is based on court decisions (Thomson Reuters, 2022). Advocates of the SSP push for its application to protect national security, intelligence methods, and international relations, among other reasons. In contrast, critics of the SSP argue that it can be used to avoid accountability, impede checks and balances, erode personal privacy and liberty, negatively impact public trust in the government, and lead to the overclassification of documents (ACLU, "Background," 2007). In 1953, the United States Supreme Court first recognized the State Secret Privilege (SSP), essentially the same concept as the Crown Privilege, in *United States vs. Reynolds*: a case regarding an Air Force plane crash and national security concerns. However, the Supreme Court did not examine the differences between England's and America's legal systems, as the U.S. upheld checks and balances. At the same time, the English monarchs were powerful during the time when the Crown Privilege was created.

Use of The State Secret Privilege

The State Secret Privilege allows the "head of an executive department" with control of information to withhold information from people and the courts if it threatens foreign relations or national security (Center for Constitutional Rights). The government can invoke the SSP by submitting an affidavit to the courts, which claims that the case proceeding would put national security at risk. As a result, the government requests the dismissal of the case, and the court decides whether to dismiss it.

In the past, the SSP has been used during the discovery phase of trials, restricting access to certain documents that allegedly contain classified information or witnesses. More recently, however, an unsettling trend has emerged in which the government has used the SSP at the beginning of a trial to dismiss cases entirely (Center for Constitutional Rights). Since the 1950s, the SSP has become increasingly apparent in the United States' legal system. This privilege is controversial, as many critics argue that the government has abused it to avoid accountability, silence people, and dismiss significant lawsuits (ACLU, ”Background,” 2007). This paper outlines the various cases in which this privilege has been used and the effects of its utilization. Similarly, this paper looks into the overall authority of the government within the legal system and the role of the FBI and CIA in various cases. Moreover, through the analysis of five significant court cases in which the SSP was controversially invoked, including *United States vs. Reynolds*, *El-Masri vs. Tenet*, *FBI vs. Fazaga*, *Mohamed vs. Jeppesen*, and *Al Haramain vs. Bush*, this paper argues that the broad application of the privilege undermines democracy and individual rights.

II. United States vs. Reynolds

In 1952, the Supreme Court formally recognized the State's Secret Privilege in *United States vs. Reynolds*. An airplane with several civilians and military officers crashed due to a fire in the engine while testing "secret electronic equipment." After the crash, the families of the civilians on the plane sued the Air Force, wanting full disclosure of the accident report. Because the report included information regarding secret equipment, the Air Force refused to disclose it, stating that it would threaten national security.

The primary basis for the Air Force's claim of this privilege was Section 161 of Revised Statutes, which it argued grants the Air Force Secretary the authority to establish regulations regarding the utilization and storage of documents and records. The government argued that this case would introduce "difficult constitutional questions" regarding "the separation of powers" (General Mukasey, 2008). In an affidavit, the Judge Advocate General further stated that the material could not be shown "without seriously hampering national security." However, the affidavit also offered to present the surviving crew members for questioning by the plaintiffs and allow them to testify about everything unless it was classified. The plaintiffs significantly minimized their "showing of necessity" by rejecting the Judge Advocate General's offer in the affidavit (*Justia Law*). In a letter to the District Court, the Secretary stated that it would not be in the public's best interest to reveal the classified documents, explaining the need to regulate the utilization of accident reports. The question raised reads, "If the government invokes the privilege to withhold information in civil proceedings, must the trial court view the point on which evidence is withheld in the plaintiff's favor?" In a 6-3 decision, Chief Justice Fred Vinson upheld that to be utilized, the State Secret Privilege "must be reasonably demonstrated" (Oyez). Therefore, the court sided with the defendant without "reviewing the report in camera," claiming that the State's Secret Privilege is valid when the information may threaten national security (Brief of Amicus Curiae Public Citizen in Support of Respondents, 2021). Even if the information is essential to the plaintiff's case, the government can still invoke the privilege, making it more likely for the plaintiffs to lose the case.

Fifty-two years after the crash, in 2004, the Air Force finally declassified the report, revealing that the information did not include any details about the "secret equipment." According to the American Civil Liberties Union (ACLU), the motivation behind the government's use of the privilege was to "cover up its own negligence," as "ordinary negligence" caused the

deaths (ACLU, ”Background,” 2007). Similarly, critics argue that the government invoked privilege to "avoid liability and embarrassment." Jack B. Weinstein, former district judge of the United States, states that the use of the privilege, in this case, stemmed from the government's "executive impulse" to hide its errors and avoid reparation for those harmed. Due to "judicial failure" to look over the government's claims, the widows were "denied redress" (Brief of Amicus Curiae Public Citizen in Support of Respondents, 2021).

The declassification of the Air Force report reveals government misuse of the privilege. The issue lies in the government's sole power to determine what is deemed a threat to national security, which can hinder checks and balances and due process. Similarly, the lack of transparency in cases like Reynolds impedes public access to information, undermining plaintiffs' ability to seek justice. One would hope that the government would use SSP responsibly and appropriately. However, there are clear instances of misuse, such as *Reynolds,* which are alarming. The abuse of the privilege highlights the necessity of increased scrutiny to guarantee its justified use (Brief of Amicus Curiae Public Citizen in Support of Respondents, 2021). The State Secret Privilege was unwarranted in this case due to a lack of genuine concern about national security and government misconduct. The government did not provide specific or valid evidence illustrating that the report's exposure would harm national security, and the aircraft crash was not a secret. Similarly, this case demonstrates government misconduct due to the overclassification of documents; The report's declassification revealed no incentive to classify it in the first place.

Though the court acknowledged that it is the jury's responsibility to assess the validity of the government's claims when it asserts the SSP, it decided against automatically making the jury inspect the underlying information. The court explained that too much judicial scrutiny of the information would lead to disclosing sensitive information, yet too little judicial review would lead to abuses going unnoticed (Brief of Amicus Curiae Public Citizen in Support of Respondents, 2021). To balance these two outcomes, *Reynolds* established a two-step process to review the legitimacy of the SSP claims. The first step, a procedural check, ensures the privilege is not "lightly invoked." Therefore, after deliberation, the head of the department must invoke the privilege in writing. Next, the court must determine whether the underlying information, if revealed, would actually "expose military matters" that harm national security (Garvey, Liu, 2011).

Furthermore, *Reynolds* left some aspects of the privilege undecided, including which information qualifies as confidential and can be protected by the SSP. Therefore, lower courts have varied in their application of the privilege over the years, concluding that the SSP can have various effects on litigation. First, based on *Reynolds's* explanation of the privilege, it is evident that the SSP can exclude evidence from being discussed in court. If this occurs, the plaintiff will continue without the evidence, but complete dismissal of the case will only happen if the plaintiff cannot argue their case without it. Next, if using the SSP stops the defendant from obtaining vital information for their defense, the court can "grant summary judgment" to them. Finally, if the subject matter of the case includes a state secret, the entire case can be dismissed (*Cornell Law School*).

III. The Causes And Effects of Overclassification

Like the overclassification of the Air Force document in *Reynolds*, overclassification can cause adverse effects. First, it harms self-governance because it stops the American public from participating in discussions. It undermines the rule of law, providing a means for the government to conceal wrongdoing. It harms the oversight among the branches of government, thus harming the separation of powers. Overclassification occurs due to many factors but comes down to skewed motives and broad discretion. Official Classification Authorities (OCAs) have almost unrestricted judgment to classify information if they say its disclosure could harm national security. The information needs to fall into a category stated in the executive order, but many of these categories are broad in their descriptions. For example, the category “foreign relations or foreign activities of the United States” can encompass a wide range of types of information (Goitein, 2023).

Concerning the use of the SSP and overclassification, the judicial branch shows a level of limitation, but the executive branch lacks this restraint. The lack of restriction is evident in the overclassification that has occurred in the past decades. This trust is rooted in the belief that the executive branch would only classify secret documents, but this has not been the case. Additionally, the vast amount of classified information held by the United States challenges the assumption that all classified information is a secret. The sheer amount of information deemed classified is astonishing. In just 2004, there were 15.6 million “classification actions.” The price of the classification program increased from around 4.7 billion (2002) to 7.2 billion (2004). Prominent government officials, such as former Secretary of Defense Donald Rumsfeld, the former Secretary of Defense for Security and Counterintelligence Carol Haave, and former CIA director Porter Gross, have acknowledged the significant overclassification in the government. Haave acknowledged that up to half the information labeled as “classified” lacks a valid reason to be characterized as such. This acknowledgment of overclassification logically suggests that a significant portion of the classified information could be unclassified without consequences for national security or the nation’s well-being (Simpson, 2008).

After *Reynolds* asserted that the privilege "should not be lightly invoked," for over two decades, the government seldom utilized the privilege, but this changed in the 1970s. Beginning in 1977, the privilege was employed more frequently by Republican and Democratic administrations (Frost, 2009).

Years	Amount of times the SSP was used
1960-1970	2 times
1971-1980	14 times
1981-1990	23 times
1991-2000	26 times

(Chesney, 2006).

Since its application in *Reynolds,* the government has used the SSP in areas including killings, Extraordinary Rendition, government contracts, surveillance, and terrorism (*Congressional Research Service*).

IV. El-Masri vs. Tenet

After the terrorist attacks on September 11 and President George W. Bush's subsequent "War on Terror," the CIA increasingly used the "Extraordinary Rendition" procedure. Simply put, this procedure involves severe interrogation methods that do not adhere to common standards. Critics argue that extraordinary rendition involves sending a suspect to foreign countries, giving them to “security services” that abusively interrogate them. The United States would benefit from any intelligence gained from the interrogations while maintaining plausible deniability. The United States government has denied using this procedure; however, in the past, the United States has admitted to extraordinary rendition in a general and limited manner. Because the War on Terror involved illegal and controversial government activities, the government applied the SSP more frequently in its aftermath (Chesney, 2006).

El-Masri's Story

On December 31, 2003, while a German man named Khaled El-Masri was traveling in Macedonia on vacation, he was forcefully detained and questioned in a hotel room for twenty-three days. The then director of the CIA, George Tenet, was notified that El Masri had not committed any crimes and that they were torturing an innocent man. Nevertheless, the torture and interrogation proceeded for another two months. El Masri was "stripped, beaten, and raped." Men dressed in ski masks and black clothing, "apparently a CIA rendition team," tied and hooded him. The CIA team repeatedly abused and interrogated him and accused him of lying about his German identity and being an Egyptian terrorist. He was not allowed outside contact, entirely cut off from his family. After being transported to Afghanistan, he was held for another four months in a filthy cell. The CIA team abandoned him atop a hill in Albania when he was released (ACLU "El Masri," 2006).

In December 2005, El-Masri initiated a civil lawsuit for damages in the United States District Court for the Eastern District of Georgia. In 2006, the government employed the SSP in El-Masri's case against Tenet, some “John Doe defendants, and three corporations that El-Masri alleged served as ‘fronts’ for the operations” (Chesney, 2006). El-Masri accused Tenet of violating United States universal human rights laws because he allowed his agents to kidnap, beat, and drug El-Masri and move him to the CIA's secret jail ("Salt Pit" prison) in Afghanistan. His complaint presented three legal claims. First, he asserted a Bivens claim based on violations of the substantive and procedural parts of the Fifth Amendment Due Process clause. He stated that the conduct he had experienced was so extreme that it “shocks the conscience,” and he was robbed of his freedom without appropriate due process. Next, El-Masri called upon the “Alien Tort Statute" (ATS) as a basis to claim a violation of the international law principle against “prolonged arbitrary detention.” Finally, El-Masri also used the ATS to support his claim, claiming a violation of the international law principle that prohibits torture and other cruel treatment (Chesney, 2006).

Furthermore, El-Masri alleged that the CIA held him for some time even while knowing he was innocent. El Masri's counsel submitted proof that Press Secretary Scott Mclellan, Secretary of State Condoleeza Rice, and CIA Directors Tenet, and Porter Goss publicly admitted that the United States was involved in Extraordinary Rendition (Frost, 2009). Despite these serious allegations, in May of 2006, a judge discarded the case after government intervention, stating that the case would threaten state secrets even though people from all around the globe had already heard about El-Masri's story. The American Civil Liberties Union (ACLU) appealed the

dismissal of the case in November 2006. The United States Court of Appeals for the Fourth Circuit still upheld the court's decision to dismiss the case and did not allow El-Masri to have a hearing in the United States. A year later, in October 2007, the Supreme Court refused to review the case. The El-Masri court famously stated, "El-Masri's private interests must give way to the national interest in preserving state secrets" (Simpson, 2008).

The Bush Administration faced heavy criticism for using the SSP to dismiss lawsuits entirely. Critics accused them of using it to "evade accountability for torture" and "silence national security whistleblowers." A recent study found that in the Bush Administration's first six years, they employed the SSP twenty times, 28 percent more per year than in the previous decade. Similarly, the data found in the study showed that the Bush Administration had solicited dismissal from the courts 92 percent more per year than in the previous decade (Frost, 2009). The ACLU summarized the court's dismissal of the case in three words: "unjust, unnecessary, and improper," stating that the States Secret Privilege was a "once rare tool," now abused to conceal the nation's "illegal actions" and avert embarrassment.

El-Masri's Statement

El-Masri explained his desire for the United States to take responsibility for his abuse, a reason for his kidnapping, and an apology. El-Masri expressed his confusion about using the State's Secret Privilege in his case because the details of his abuse were already "widely reported" in the United States and international media. He states that this is not a democracy but resembles more of a "dictatorial regime" where people are harmed and tortured without the chance to seek justice (ACLU "Statement…," 2005). His statements illustrate the deterioration of trust in the United States government due to the abuse of the SSP. The State's Secret Privilege severely impacted El Masri's rights, as the government subjected him to horrifying abuse without due process and a fair hearing. It prevented the thorough examination of the human rights violations committed by the CIA officials and allowed the government to evade accountability.

The statement made by the El-Masri court that prioritizes preserving state secrets over El-Masri's "private interests" illustrates a flaw in how the SSP is commonly perceived. The courts should view the SSP as balancing national security and individuals' public interests. It is not a simple trade-off between the two. Instead, the courts should closely evaluate the importance of national security in the case and the importance of ensuring a fair legal process. The balancing test should also consider the public interest in the separation of powers, ensuring no single branch dominates the others (Simpson, 2008).

The application of the SSP was unwarranted in *El-Masri vs. Tenet* due to a lack of genuine concern about national security, government accountability, and human rights. The subject matter of this case, Extraordinary Rendition, and El Masri's torture does not inherently include classified information that could harm national security. Furthermore, information regarding Extraordinary Rendition has been documented in investigations, media reports, and other legal proceedings. Therefore, the government's use of the privilege raises questions about whether they used it to protect national security or avoid accountability and the exposure of more information regarding illegal activities. Finally, denying El Masri specific information about his torture by using this privilege did not allow him to seek justice for his misery.

Moreover, El Masri was not the only person who fell victim to an unjust case of Extraordinary Rendition. Another man named Maher Arar also stated that he was incorrectly identified as a terrorist and that the United States knowingly sent him to other countries where he was brutally tortured. Arar is a Syrian-born Canadian citizen. While on vacation in September

2002, authorities held him at the New York City J.E.K International Airport while attempting to catch a flight. He was detained for 13 days and then transported to Amman, Jordan, where he was handed over to Jordanian officials. In turn, he was transported to Syria. There, Arar was imprisoned in a small cell for a year, enduring abuse and torture by Syrian officials. Arar claimed that the Syrian officials collaborated with the United States, stating that the U.S. officials supplied the Syrian interrogators with questions and information and received information from them regarding his responses. After a year of imprisonment, Arar was finally released on October 5, 2003. Arar also filed a federal lawsuit, but his case was dismissed based on the SSP. Again, just like in *El-Masri vs. Tenet*, the court stated that the subject of Arar's case was a state secret and that Arar could not push for justice because national security was at stake (Frost, 2009). Later, in October 2007, before the House Foreign Affairs Committee, Condoleezza Rice conceded that Arar's case was not handled appropriately (Reuters, 2007).

V. Mohamed vs. Jeppesen

In a war crime case titled *Mohamed vs. Jeppesen* (2010), the court applied the SSP in a similar fashion to the *El-Masri vs. Tenet* case. This case also pertains to Bush's highly controversial War on Terror procedure, "Extraordinary Rendition." In this case, five individuals, including a man named Binyam Mohamed, filed a lawsuit against Jeppesen Data, a company that provides navigational aid, including charts and maps for pilots. The five men asserted that the United States government subjected them to rendition and torture during the United States War on Terror. They also claimed that Jeppesen had given support, such as transportation aid, to the CIA to conduct the rendition flights ("torture flights"). President Bush and the United States government again turned to the SSP, attempting to dismiss the case due to national security concerns and classified information. In 2010, when the case reached the Ninth Circuit Court, the court backed the United States government and dismissed the case.

A former employee of Jeppesen told *New York Magazine* that he had heard a senior official working for Jeppesen say, "We do all of the Extraordinary Rendition flights – you know, the torture flights. Let's face it, some of these flights end up that way." This blatant display of callousness illustrates the normalization of the abuse and torture and that Jeppesen was aware of the consequences of their actions (ACLU, "Mohamed"...2011). Ben Wizner of the ACLU National Security Project argued this case before the appeals court and stated that by choosing to dismiss the case, the court "refused once again to give justice to torture victims and to restore our nation's reputation as a guardian of human rights and the rule of law." Steven R. Shapiro, a legal director with the ACLU, asserted that the government utilizes this privilege to "avoid judicial scrutiny for illegal actions carried out in the name of fighting terrorism." Furthermore, Steven Watt, an attorney with the ACLU, explains that the assertion of this privilege to avoid accountability for torture harms the "separation of powers." He adds that it is "disappointing that no court has fulfilled" its vital constitutional role of deciding the "legality of the Bush Administration's torture" procedures (ACLU, "Mohamed".. 2011). Even now, not a single victim of Bush's torture procedures has gotten the chance to seek justice in court.

The government's use of privilege undermines accountability and truth based on the apparent lack of concern regarding national security and publicly known information. Like *El-Masri vs. Tenet*, the subject matter, Extraordinary Rendition, does not intrinsically involve confidential material. As mentioned previously, media and investigations had documented the existence of Bush's Extraordinary Rendition program. In this case, using this privilege hinders

the plaintiff's ability to seek redress and allows the government to evade accountability for human rights violations.

VI. FBI vs. Fazaga

The same year, the government invoked the SSP in a case known as *FBI vs. Fazaga.* Three Muslim men, Sheikh Yassir Fazaga, Ali Uddin Malik, and Yasser AbdelRahim, filed a lawsuit in a federal court claiming that the Federal Bureau of Investigations (FBI) utilized a secret informant to carry out at least a fourteen-month surveillance program. They alleged that the program aimed to gain information on the Irvine Islamic Center solely because they were Muslim. The FBI sent an informant, Craig Monteilh, to the most populated mosques in Orange County, California, pretending to be a follower of Islam. The informant secretly gathered names, phone numbers, and information about hundreds of Muslims' religious and political beliefs. Furthermore, he recorded numerous conversations with hidden microphones and videotaped personal locations (including businesses, homes, and mosques). In 2008, the FBI admitted to employing 15,000 people as informants, many of whom were allegedly tasked with surveilling Muslim-American individuals after September 11 (Dakich, *Northeastern*).

The United States Attorney General utilized the State Secret Privilege to dismiss the claims of discrimination by the men, and the court dismissed all the claims except one using the SSP (Congressional Research Service). The plaintiffs argued that the FISA (Foreign Intelligence Surveillance Act) provisions calling for a private review of the evidence should take priority over the traditional *United States vs. Reynolds* procedures. However, the court rejected the plaintiff's argument and applied *Reynold's* standard. The court did not directly review the evidence deemed a "national security risk." Because of this, most of the plaintiff's claims were dismissed (Congressional Research Service). Later, the United States Court of Appeals for the Ninth Circuit reversed, stating that the court needed to have reviewed the surveillance camera evidence to conclude whether the surveillance violated FISA. However, the upper court, the Appellate Court, rejected the petition to have all the judges reconsider the case (en banc). The courts ruled that Section 1806(f) of the Foreign Intelligence Surveillance Act (1978) "does not displace" the use of the State Secret Privilege --allowing the court to dismiss the case (ACLU, "FBI…" 2023).

Sheik Fazaga stated, "I promised my clients confidentiality. I don't say anything without their permission…But to know that the FBI was actually recording these sessions, that is illegal, it is unethical, it is not constitutional, and it puts a lot of people's lives in jeopardy and their well-being and their rights of privacy." Fazaga went on to add that he "invited the FBI to speak with the members of [his] Mosque" and they "looked [them] in the eyes and assured [them] unequivocally that they were not spying on [them]." He prayed that "... the Supreme Court will allow us to hold them [the FBI] accountable for treating people who practice Islam as second-class citizens." Attorney Ahilan Arulanatham, a primary attorney for this case, argued that "the government cannot hide behind state secrets to pretend everything is national security." Concerning FISA, he states that "an independent judge or entity should be able to sort through the evidence and decide whether this constitutes state secrets or not" --highlighting the need for judicial review (Rafei, 2023). By invoking the State's Secret Privilege, the government created mass mistrust among the Muslim community and validated perceptions of discrimination.

VII. Al Harmain vs. Bush

In December 2005, President Bush publicly acknowledged that the National Security Agency (NSA) existed immediately following the publication of a *New York Times* article about the operation. Bush authorized the program to intercept communications under particular circumstances, such as if the contact was outside the United States or the U.S. had reason to believe the communication was from someone associated with Al-Qaeda. Following Bush's acknowledgment of the NSA, people began alleging they had been unlawfully wiretapped (Frost, 2009).

In February 2006, the Al-Haramain Islamic Foundation, a Muslim charity organization, filed a lawsuit against the United States government specifically aimed at President Bush and other government officials. The Al-Haramain Islamic Foundation claimed that they had been unlawfully surveilled according to the Foreign Intelligence Surveillance Act (FISA), and their rights were violated. The case also questioned the validity of the NSA and its program following 9/11. Al Haramain claimed that the evidence to support its claim included a classified document. In response, President Bush and the government argued that exposing the "Sealed Document" contents would harm national security and invoke the State Secret Privilege. Due to the government secrecy surrounding the NSA, the court proceedings were secretive and complicated. Bush and the government refused to state whether the surveillance existed, and the plaintiffs faced considerable obstacles trying to gather evidence for their case. Later that year, a lower court noted that the U.S. Government's surveillance program was unlawful according to the Fourth Amendment (seizures and searches), ruling in the plaintiffs' favor. The government continued to push for the dismissal of the case. According to the district court, there would be no "reasonable danger" to national security if it is revealed whether the plaintiffs were surveilled or not (FindLaw).

While the district court also approved the government's request to stop Al-Haramain from accessing the "Sealed Document," the court allowed Al-Haramain witnesses to submit affidavits confidentially to describe the document's content. This decision by the court aimed to support Al Haramain's argument regarding the standing and the "prima facie case." In 2007, the Ninth Court of Appeals reversed the decision made by the district court, stating that the State Secret Privilege did not apply in this case. The court explained that the government had publicly disclosed the TSP (Terrorist Surveillance Program). The case ultimately did not reach a decision. In 2012, the Supreme Court refused to review the case (Brief of Amicus Curiae Public Citizen in Support of Respondents, 2021).

The use of the SSP has been debated in this case, as the government invoked the privilege over the subject of litigation when the topic at hand was not secret. While in 2007, the government stated that the "alleged surveillance program" was a state secret, the court rejected this statement due to the government's detailed public disclosures regarding the surveillance program. The surveillance program was discussed in "14 publicly-filed pleadings, televised arguments…and in the media" (Brief of Amicus Curiae Public Citizen in Support of Respondents, 2021). The court added that the government's many efforts to address citizens' concerns and fears of surveillance undermine its argument that the existence of the surveillance program, the subject matter, should be shielded by the State Secret Privilege. The privilege's validity weakened primarily because of the public disclosures. However, the SSP, in this case, also impedes government accountability and people's constitutional rights. Shielding the unwarranted surveillance with the privilege undermines checks and balances and the due process of law (Brief of Amicus Curiae Public Citizen in Support of Respondents, 2021).

The appropriate application of the SSP relies on an idealistic version of the world. A world in which the executive branch always respects its constitutional boundaries, that classified information is always classified for a good reason, and that the government's motives behind legal cases are always for the greater good. This perfect world, however, does not exist, nor did it exist when the SSP was created. Courts must begin to approach the use of the SSP more realistically and reduce the excessive trust given to the executive branch. Correctly balancing private interests and national security requires a more nuanced perspective of the SSP, the comparative standard. Courts need to assess if it is likely that the information will compromise national security if released rather than treating the SSP as absolute. Therefore, the courts will no longer accept the government's claims of privilege at face value. They will assess the competing interests – comparing the need to protect national security to the need for justice and due process (Simpson). There is room to reform the SSP, as the privilege has a "common law shell" that can be changed (Geaghan-Breiner, 2022).

VIII. 2008 Reforms

In 2008, Congress began addressing concerns about using the SSP for multiple reasons. Firstly, the disputed actions during Bush's "War on Terror," including the Extraordinary Rendition and wiretapping programs, required inspection. For instance, the evidence of El-Masri being a victim of unlawful rendition stunned the public. Furthermore, the Bush administration's extreme use of the SSP generated arguments that the government was not using the privilege truthfully. Additionally, critics of the SSP began seeing the privilege as a method for government overreach, permitting the executive branch to withhold information and covering potential wrongdoings (Sudha, 2009). The reforms aimed to address the issue of cases being dismissed in the pleading stage by the government's use of the SSP.

While President Obama seemed to favor the Bush-era broad use of the SSP during his presidency, Congress proposed more reforms in 2009. Despite introducing legislation and reforms, Obama created a new policy within the Department of Justice, requiring increased "rigorous internal review" before employing the SSP. Additionally, in 2008, senators initiated the States Secret Protection Act to pass "safe, fair, and responsible" methods and systems for addressing SSP claims. Representative Jerrold Nadler, a member of the group, and a chairman of the House Judiciary Subcommittee of the Constitution, Civil Rights, and Civil Liberties, highlighted the need for reform by explaining the consequences of the government abusing civil liberties: He brought up the point that if the government or an administration is committing immoral or unlawful acts, they are highly unlikely to hold themselves or their workers accountable. His statement holds true when examining cases of blatant lack of accountability, like *El Masri vs. Tenet* and the government's defense of George Tenet's alleged human rights violations. Nadler also stressed how, when the government employs the SSP to dismiss a lawsuit from the beginning, it undermines the entire legal process in which people can seek justice based on facts presented in court. The legal process aims to bring attention to events that have occurred and inhibit future occurrences of injustice. However, if the government dismisses cases under the guise of national security, this contradicts the U.S. ideals of protecting rights (Sudha, 2009).

The Senate and House Bills proposed in 2009 introduce specific guidelines that judges must follow when the government asserts the SSP in a case. These measures draw on the Classified Information Procedures Act from 1980. The 2009 legislation permits courts to have

hearings about the classified documents ex parte, in camera, or with legal experts or attorneys with special access to the information. In addition, the procedures mandate that the government provide the evidence deemed classified for in-camera review, as well as a signed affidavit from the head of the agency. The proposed Senate Bill requires the government to provide a non-confidential replacement for the evidence, like a summary version. The proposed reforms highly opposed the previous standard, in which the courts relied solely on government affidavits and stopped the courts from dismissing cases before discovery (Sudha, 2009). The reforms would also give the ability to appeal a decision made by the district court.

Opposition

The reforms introduced in 2008-2009 faced strong opposition from the Bush administration, who stated that courts lacked the expertise to evaluate SSP issues and that the executive branch should decide. Though the executive branch may better understand national security concerns, it is not logical that judges cannot play a role in applying the privilege. Furthermore, Bush strongly objected to the reforms that called for the Attorney General to share confidential information. They stated that the reforms would lead to the disclosure of state secrets, which would harm national security –yet they offered no supporting evidence (Sudha, 2009). The Bush Administration favored the “unitary executive” theory. The theory asserts that the president holds administrative powers due to the Constitution and that authority cannot be challenged (Simpson, 2008). Due to the Bush administration's disapproval, the United States never passed the reforms.

In 2009, the Obama administration instructed the Department of Justice to look for new ways to improve the process for asserting the SSP. Rather than measures to improve government accountability through increased judicial review, the Obama administration proposed additional Executive Branch internal oversight measures. Because they chose to keep the SSP process solely within the executive branch, they did not promote government transparency or address flaws in the system. Since then, this area has had no impactful presidential action (Geaghan-Breiner, 2022).

IX. Conclusion

While the SSP aimed to protect American interests and national security, it clearly falls short of being a flawless way of defense. Since its first formal recognition in *Reynolds,* it has been abused to harm individuals in cases of improper surveillance and national security. The lack of regulation surrounding the SSP makes it easy for the government to use it, which offers no redress for citizens wronged by the government. When the government invokes the SSP, there is no system of checks and balances between the government and the judicial branch to ensure its correct use. Using the SSP can also encourage illegal activity or government misconduct because it allows the concealment of lies. Every year the application of the SSP goes unchecked and unregulated, individual rights, checks and balances, and due process is further eroded (Dakich, Northeastern). A constructive bill must mandate judicial scrutiny of SSP claims and defend civil liberties. By introducing new legislation, Congress can set stricter guidelines for judicial review and encourage the courts to examine executive actions (Geaghan-Breiner, 2020).

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