

A BLANK CHEQUE AND THE PEOPLE WHO CASH IT
IN: THE STATE SECRETS PRIVILEGE

SOPHIE PU

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I. INTRODUCTION

“Plaintiff suffers this reversal not through any fault of his own, but because his personal interest in pursuing his civil claim is subordinated to the collective interest in national security.”¹

In 2007, the Fourth Circuit Court of Appeals asserted the above in a matter brought by Khaled El-Masri against Central Intelligence Agency (CIA) employees and the CIA’s contractor defendants for allegations of unlawful detention and interrogation in violation of his rights under the U.S. Constitution and international law.² The claim was ultimately dismissed on appeal after the Court ruled in favor of the government’s invocation of a state secrets privilege.³ Beyond an anodyne reprimand of the individuals involved,⁴ the government and CIA have done little to provide Mr. El-Masri any semblance of justice.

Mr. El-Masri’s story is not singular, neither in its cause nor in its resolution—or indeed, the lack thereof. In 2001, following the Bush

1. *El-Masri v. United States*, 479 F.3d 296, 313 (4th Cir. 2007).

2. *Id.*

3. *Id.*

4. *Promotions after Mistakes for CIA Agents*, CBS NEWS (Feb. 9, 2011), <https://www.cbsnews.com/news/promotions-after-mistakes-for-cia-agents/> (“[Former CIA Director Michael] Hayden decided that Elizabeth should be reprimanded, current and former officials said. Frances would be spared, he told colleagues, because he didn’t want to deter initiative within the ranks.”).

administration's declaration of a War on Terror, the use of the state secrets privilege burgeoned to astonishing degrees; President Bush's office raised the privilege in 25% more cases per year than prior administrations and sought dismissal in 90% more cases.⁵ Furthermore, although the state secrets privilege has been invoked in a wide array of cases since its inception as a doctrine, it has, in recent decades, been characterized by its use in government defenses against claims following "extraordinary rendition" practices, in challenges to anti-terrorism programs, and in cases against both the government directly and government contractors alike.⁶ The results of this judicial choreography are numerous civil claims left unresolved and an obfuscation of government abuse. In other words, an "affront to the constitutional separation of powers."⁷ Denying plaintiffs their day in court implicates not only their constitutional due process rights, but also denies them a more abstract, but nonetheless significant, right to truth.

This Annotation seeks to enumerate the impacts of the state secrets doctrine on cases brought by victims of CIA torture and demonstrate how, without firm curtailment or *in camera* review, the privilege is a violent and dangerous blank check for the government to cash in at will, in fundamental opposition to the principles of civil rights.

II. THE STATE SECRETS DOCTRINE

The state secrets privilege is a common law rule of evidence that, when formally invoked by the government during civil proceedings, allows the government to prevent the public disclosure of information in the interest of protecting national security.⁸ Although in the 1970s Congress considered introducing a provision in the Federal Rules of Evidence to make state secrets an official privilege, they ultimately decided against it and, as a result, the privilege was never codified.⁹

In 1876, the Supreme Court of the United States first recognized the state secrets privilege in *Totten v. United States*, where they dismissed

5. S. Rept. 110-442 - STATE SECRETS PROTECTION ACT, S.Rept.110-442, 110th Cong. at 8 (2022), <https://www.congress.gov/congressional-report/110th-congress/senate-report/442/1>.

6. Todd Garvey & Edward C. Liu, Cong. Rsch. Serv., R41741, *The State Secrets Privilege: Preventing the Disclosure of Sensitive National Security Information During Civil Litigation* (2011).

7. *Unraveling Justice*, N.Y. TIMES (Feb. 4, 2009), <https://www.nytimes.com/2009/02/05/opinion/05thu1.html>.

8. S. Rept. 110-442, *supra* note 5, at 2.

9. *Id.*

a breach of contract claim brought by a former Union Civil War spy against the government because the underlying subject matter of the case was a state secret and thus, the Court lacked jurisdiction.¹⁰ The modern analytical framework was subsequently established in the seminal case, *United States v. Reynolds*, brought by the widows of three civilians who died in the crash of a military aircraft in Georgia.¹¹ In *Reynolds*, the Supreme Court articulated a two-part analysis to determine the procedural prerequisite for a government's claim of state secrets to stand. As a result, courts must grapple with a competing tension—a court should not abdicate “judicial control over the evidence in a case . . . to the caprice of executive officers,” but nor should they “jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence.”¹²

A claim of privilege must be brought by the government and can neither be waived nor claimed by a private party.¹³ This extends to cases not involving the government but that concern secret evidence threatening to national security.¹⁴ First, a formal claim of privilege must be lodged by the head of the department which has control over the matter.¹⁵ Second, a court must itself determine whether the “circumstances are appropriate for the claim of privilege” without forcing a disclosure of the information that the privilege is requesting protection for.¹⁶ In assessing this latter requirement, a court may use its judicial experience.¹⁷

The *Reynolds* court asserted that a court must rule in favor of the government if it is satisfied “from all the circumstances of the case, that there is a reasonable danger that compulsion of the evidence will expose military matters” which should not be exposed for the purposes of national security.¹⁸ Later case law elaborated on this standard; in *United States v. Nixon*, the Supreme Court established that a court is obliged to give the “utmost deference” to the Executive Branch's responsibilities in protecting national security.¹⁹ This is in part due to constitutional division of power—the state secrets privilege provides exceptionally strong protection because it concerns ‘areas of Art. II

10. *Totten v. United States*, 92 U.S. 105 (1876).

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

12. *Id.* at 9.

13. *Id.* at 7.

14. Garvey & Liu, *supra* note 6, at 3.

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

16. *Id.* at 8.

17. *Id.*

18. *Id.* at 10.

19. *United States v. Nixon*, 418 U.S. 683, 710 (1974).

duties [in which] the courts have traditionally shown the utmost deference to Presidential responsibilities”²⁰—and also to how poorly equipped courts are to review the secrecy of classifications.²¹

The burden of proof to meet the *Reynolds* reasonable-danger standard lies solely with the Executive.²² However, the Executive can meet this standard by providing an affidavit or personal declaration from the head of department that lodged the formal privilege claim—declarations like that of the CIA director or an affidavit from the Air Force Judge Advocate General.²³ *Reynolds* even went so far as to say a court can decide that an explanation by the Executive of why a question cannot be answered would in and of itself create an unacceptable danger.²⁴

Once a determination of privilege is made, that information is absolutely protected from disclosure, even for the purpose of an *in camera* examination by the court—it is removed from proceedings entirely.²⁵ A proceeding can, however, continue if it can be “fairly litigated without resort to the privileged information.”²⁶ The possibility of a limited proceeding has seen little application though, particularly with regard to the War on Terror, as will be discussed below. On the other hand, the Supreme Court has recognized that some matters are so thoroughly bound to state secrets that they are impossible to litigate after the state secrets privilege has been recognized; a dismissal of pleadings may be appropriate if the very subject matter of an action is a state secret,²⁷ or if the privileged secret is so central to the dispute that “in an attempt to make out a prima facie case . . . the plaintiff and its lawyers would have every incentive to probe as close to the core secrets as the trial judge would admit.”²⁸

20. *El-Masri v. United States*, 479 F.3d 296, 313 (4th Cir. 2007) (citing *United States v. Nixon*, 418 U.S. 683 (1974)).

21. *United States v. Marchetti*, 466 F.2d 1309, 1318 (4th Cir. 1972) (“The courts, of course, are illequipped [*sic*] to become sufficiently steeped in foreign intelligence matters to serve effectively in the review of secrecy classifications in that area.”).

22. *El-Masri*, 479 F.3d at 305.

23. *Sterling v. Tenet*, 416 F.3d 338 (4th Cir. 2005) (relying on declarations of the CIA director to determine a racial discrimination claim brought by a CIA covert agent); see *Reynolds*, 345 U.S. (relying on a Claim of Privilege by Secretary of Air Force and affidavit of Air Force Judge Advocate General).

24. *Id.* at 9.

25. *El-Masri*, 479 F.3d at 306; *Reynolds*, 345 U.S. at 11.

26. *El-Masri*, 479 F.3d at 306.

27. See *United States v. Reynolds*, 345 U.S. 1, 11 (1953) (discussing *Totten v. United States*, 92 U.S. 105 (1876)).

28. *Farnsworth Cannon v. Grimes* 635 F.2d 268, 281 (4th Cir. 1980).

The doctrine as it stands today is one which is heavily weighted in favor of privilege, and which relies significantly on the judgment of courts, with a seemingly low evidentiary burden placed on the government. This has, in turn, had catastrophic effects on civil cases brought by victims of the government's War on Terror.

III. THE STATE SECRETS PRIVILEGE AND THE WAR ON TERROR

A. *Backdrop: The War on Terror*

On September 20, 2001, following the attacks on 9/11, President Bush declared in an address to a joint session of Congress and the American people the "War on Terror."²⁹ What followed was an almost decade-long program of extraordinary rendition, torture, and interrogation sanctioned in part by the U.S. government and carried out by the CIA in partnership with contractors and other nation states around the world.³⁰ Although the details of the CIA's Rendition, Detention and Interrogation (RDI) program may seem tangential to the focus of this essay, they are in fact the fulcrum of the argument against the state secrets doctrine.

Between 2001 and 2009, the CIA committed heinous violences against its detainees, 119 of whom were identified in the Senate Select Committee on Intelligence's 2014 report of the CIA's Detention and Interrogation Program (henceforth "Senate Torture Report").³¹ Among its findings, the Senate Torture Report concluded that the CIA's use of enhanced interrogation, a euphemism for techniques like waterboarding which were later acknowledged by President Obama as torture,³² was not an effective means of acquiring intelligence or gaining cooperation. Indeed, the Committee discovered that many CIA officers themselves regularly questioned their methods.³³ It also found that the CIA made inaccurate claims to policymakers and the

29. Pres. George W. Bush, Address to a Joint Session of Congress and the American People (Sept. 20, 2001) (transcript available on <https://georgewbush-whitehouse.archives.gov/ws/releases/2001/09/20010920-8.html>).

30. S. Rep. No. 113-288, at 2, 12 (2014); Sam Raphael, Crofton Black & Ruth Blakely, CIA Torture Unredacted, at 38, 124 (The Rendition Project, 2019) [hereinafter CIA Torture Unredacted], <https://www.therenditionproject.org.uk/documents/RDI/190710-TRP-TBIJ-CIA-Torture-Unredacted-Full.pdf> (citing the CIA's partnership with other nation states, including Romania and Morocco).

31. S. Rep. No. 113-288, at 10 (2014).

32. Ewen MacAskill, *Obama: 'I believe waterboarding was torture, and it was a mistake'*, THE GUARDIAN (Apr. 29, 2009), <https://www.theguardian.com/world/2009/apr/30/obama-waterboarding-mistake>.

33. S. Rep. No. 113-288, at xi (2014).

Department of Justice; they attributed information to the result of enhanced interrogation when in fact, the intelligence was gained through other sources or was acquired prior to the use of enhanced interrogation.³⁴

Adding to the CIA's abuse of trust, its interrogations were found to be "brutal and far worse than the CIA represented to policymakers:" interrogation techniques included sleep deprivation that kept detainees standing and awake for 180 hours with their hands shackled above their heads, waterboarding detainees until they convulsed and became unresponsive, "rectal rehydration," and other similar abuses.³⁵ There has been international condemnation of the RDI program,³⁶ and in the 2021 trial of Majid Khan, a former detainee and victim of the RDI program, seven of the eight-member military jury delivered a handwritten note rebuking the U.S. government and calling Khan's treatment a "stain on the moral fiber of America."³⁷ It is against this backdrop of prolonged violence and subjugation that the government's use of the state secrets doctrine is set in sharp relief.

B. *El-Masri v. United States: The Government's Use of State Secrets to Obfuscate and Evade Responsibility*

El-Masri v. United States is a paradigmatic case of the government's weaponization of the state secrets privilege to avoid responsibility for their actions in the course of the CIA's RDI program. The facts are particularly damning—in addition to the violent nature of Mr. Khaled El-Masri's rendition, it was clear to the CIA from early on in his detention that there was insufficient evidence to continue to hold him.³⁸ Although many victims of the U.S.'s War on Terror were never

34. *Id.* at xii.

35. *Id.* at xii–xiii.

36. Juan E. Méndez (UN Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment) et al., Open letter to the Government of the United States of America on the occasion of the 14th anniversary of the opening of the Guantánamo Bay detention facility (Jan. 11, 2016) ("Everyone implicated, including at the highest level of authority, must be held accountable for ordering or executing extraordinary renditions, secret detention, arbitrary arrest of civilians and so-called 'enhanced interrogation techniques' in the name of combatting terrorism.").

37. Carol Rosenberg, *U.S. Military Jury Condemns Terrorist's Torture and Urges Clemency*, N.Y. TIMES (Oct. 31, 2021), <https://www.nytimes.com/2021/10/31/us/politics/guantanamo-torture-letter.html>.

38. Central Intelligence Agency Inspector General, Report of Investigation on the Rendition and Detention of German Citizen Khalid Al-Masri 3 (2007) [hereinafter Report on the Rendition of Al-Masri],

charged or put on trial,³⁹ Mr. El-Masri's case is particularly egregious because of the CIA's explicit abuse of power, and is demonstrative of the grim consequences of the state secrets privilege.

In December 2003, Mr. El-Masri, a German citizen of Lebanese descent, boarded a bus from Germany to Macedonia on holiday.⁴⁰ When the bus crossed the border, Macedonian officials confiscated his passport and detained him until he was eventually transferred to a hotel where he was held for twenty-three days under guard.⁴¹ He was not allowed to contact anyone and was interrogated repeatedly until January, when he was handed over to the "exclusive authority and control" of CIA agents who beat him, sexually assaulted him, and stripped him.⁴² Finally, Mr. El-Masri was transferred to Afghanistan where he was held incommunicado for more than four months, all the while suffering inhumane treatment, interrogations, and forced feedings.⁴³ Throughout his interrogations, he answered truthfully that he had no connection to or idea of any terrorist activity.⁴⁴ When Mr. El-Masri was finally released onto a hilltop in Albania in the dead of the night, it was on the condition that he would keep his time in detention a secret.⁴⁵

In 2015, following a Freedom of Information Act suit brought by the ACLU against the CIA, the CIA released a 2007 report it conducted into the rendition of Mr. El-Masri.⁴⁶ The report noted that the entire rendition operation of Mr. El-Masri was "characterized by a number of missteps" and that by January 2004, hardly a month into his

https://www.thetorturedatabase.org/files/foia_subsite/pdfs/cia_production_c06541725_report_of_investigation_the_rendition_and_detention_of_khalid_al-masri.pdf.

39. Hina Shamsi, *20 Years Later, Guantánamo Remains a Disgraceful Stain on Our Nation. It Needs to End*, ACLU (Jan. 11, 2022), <https://www.aclu.org/news/human-rights/20-years-later-guantanamo-remains-a-disgraceful-stain-on-our-nation-it-needs-to-end>.

40. Khaled El-Masri, *Statement: Khaled El-Masri*, ACLU, <https://www.aclu.org/other/statement-khaled-el-masri> (last visited Nov. 26, 2022).

41. *Id.*

42. Petition Alleging Violations of the Human Rights of Khaled El-Masri by the United States of America with a Request for an Investigation and Hearing on the Merits, P-419-08, Inter-Am. Comm'n H.R. at 2 (2008) [hereinafter *Petition*], <https://www.aclu.org/legal-document/el-masri-petition-iachr>.

43. *Id.*; El-Masri, *supra* note 40.

44. El-Masri, *supra* note 40.

45. *Id.*

46. Jamil Dakwar, *New CIA Torture Documents Confirm Chilling Details of Khaled El-Masri's 'Kafka-esque' Ordeal*, ACLU (Jun. 17, 2016), <https://www.aclu.org/news/national-security/new-cia-torture-documents-confirm-chilling-details-khaled-el-masri>; see Report on the Rendition of Al-Masri, *supra* note 38.

detention, the CIA agents holding him had “concluded that he was not a terrorist.”⁴⁷ Nonetheless, the report noted, the two agents primarily involved in his detention “justified their commitment to his continued detention . . . by insisting that they knew he was ‘bad.’”⁴⁸ The CIA acknowledged that their grounds for capturing and detaining Mr. El-Masri did not meet the standard specified in the 2001 Presidential Memorandum of Notification requiring that an individual pose a “continuing, serious threat of violence or death to U.S. persons and interests” or be “planning terrorist activities.”⁴⁹ Finally, although concerns were raised in February 2004 that Mr. El-Masri should be released for lack of compelling information to continue to detain him, it took one extra month for the CIA’s Counterterrorism Center to determine that the grounds for detention were insufficient and another two months to return him to Germany because of bureaucratic differences and reputational concerns.⁵⁰

In spite of these damning facts, in 2006, after the ACLU had brought a case on behalf of Mr. El-Masri against former CIA Director George Tenet, the court nonetheless ruled in favor of the government’s state secrets invocation.⁵¹ On appeal to the Fourth Circuit, the court affirmed the ruling, and in October 2007, the Supreme Court denied certiorari.⁵²

Mr. El-Masri presented to the two lower courts that, although he acknowledged the framework and importance of the state secrets doctrine, the facts of his case had already become public knowledge through statements by U.S. officials and the media, and thus were so widely discussed that litigation could not threaten national security.⁵³ Nonetheless, the Fourth Circuit asserted that he misunderstood the nature of judicial assessment; the controlling inquiry was not whether the “general subject matter . . . can be described without resort to state secrets . . . [but] whether an action can be *litigated* without threatening the disclosure of such state secrets.”⁵⁴ Based on the *Reynolds* standard that security should not be jeopardized by an “examination of the evidence, even by the judge alone, in chambers,” Mr. El-Masri’s

47. *Id.* at 3.

48. *Id.*

49. *Id.*

50. *Id.* at 4.

51. *El-Masri v. United States*, 479 F.3d 296, 299 (4th Cir. 2007).

52. Linda Greenhouse, *Supreme Court Refuses to Hear Torture Appeal*, N.Y. TIMES (Oct. 9, 2007), <https://www.nytimes.com/2007/10/09/washington/09cnd-scotus.html>.

53. *El-Masri*, 479 F.3d at 301.

54. *Id.* at 308.

suggestion that the court could receive state secrets into evidence and conduct a trial *in camera*, with his counsel provided information under a non-disclosure agreement, the Fourth Circuit nonetheless said his case was expressly foreclosed.⁵⁵

It is vital to note here how deeply antithetical the rule generally denying *in camera* review in sensitive cases and its application in Mr. El-Masri's case is to the notion of separation of powers. Disallowing *in camera* review on the basis that a secret may be so central to national security that even an individual judge may not be privy to it in their evaluation of whether an individual's right to due process ought to be cut off at the knees runs blatantly afoul of the Constitution's vision.⁵⁶ According to *Reynolds*, a court must be satisfied that there is a "reasonable danger" present in compelling certain evidence, but this decision can be made solely based on the declaration of the very government official whose dignity, reputation, and career hangs in the balance.⁵⁷ The dissenting Supreme Court justices in *United States v. Zubaydah* did not envision an incompatibility between the protection of evidence created by *Reynolds* and the necessity of *in camera* review—a court's responsibility to assess reasonable danger is made possible by *in camera* review.⁵⁸

The Supreme Court also rebutted Mr. El-Masri's assertion that to allow the state secrets privilege to stand would enable the government to avoid judicial scrutiny through invocation; this, he suggested, would lead to dire constitutional and policy consequences.⁵⁹ The Court, however, stated that the executive must persuade the court that state secrets are so central to an action that the case cannot be litigated without threat of exposure. The government did so with its Classified Declaration—a document that Mr. El-Masri was never privy to.⁶⁰ This,

55. *Id.* at 311.

56. *United States v. Zubaydah*, 142 S. Ct. 959, 991 (2022) (Gorsuch, N., dissenting) ("When the Executive seeks to withhold every man's evidence from a judicial proceeding thanks to the powers it enjoys under Article II, that claim must be carefully assessed against the competing powers Articles I and III have vested in Congress and the Judiciary. The original design of the Constitution and 'our historic commitment to the rule of law' demand no less.").

57. *United States v. Reynolds*, 345 U.S. 1, 9 (1953).

58. *Zubaydah*, 142 S. Ct. at 994–95 (Gorsuch, N., dissenting) (discussing the *Reynolds* holding that says "when assessing a state secrets claim courts may—and often should—review the evidence supporting the government's claim of privilege *in camera*...the Court *also* stressed that, before excluding evidence, a judge 'must be satisfied' that a reasonable danger of harm would flow from its production—and that this is a responsibility no court may 'abdicat[e].'").

59. *El-Masri v. United States*, 479 F.3d 296, 311 (4th Cir. 2007).

60. *Id.*

and the denial of *in camera* review, cuts to the heart of the danger of a doctrine as powerful as the state secrets privilege; with so indomitable a trump card in its hand, the government has insulated itself from any substantive review by courts, and indeed, review by the very individuals they subjected to extreme abuse in the name of national security.

Ultimately, Article III's limitations on the court's authority to decide cases and controversies led the Fourth Circuit to conclude: "[W]e would be guilty of excess in our own right if we were to disregard settled legal principles in order to reach the merits of an executive action that would not otherwise be before us – especially when the challenged action pertains to military or foreign policy."⁶¹ Although the court acknowledged that the state secrets privilege "imposes a heavy burden" on Mr. El-Masri and it is "no doubt frustrating" and through no fault of his own that the evidence is lost, it nonetheless concluded that it was for the greater good of national security that litigation not proceed.⁶²

IV. THE U.S.' OBLIGATIONS TO ITS VICTIMS: THE RIGHT TO TRUTH

In 2005, the U.N. Commission on Human Rights adopted Resolution 2005/66, which recognized the "importance of respecting and ensuring the right to the truth so as to contribute to ending impunity and to promote and protect human rights."⁶³ Although not explicit in the American Declaration on the Rights and Duties of Man or the American Convention on Human Rights, the Inter-American Commission on Human Rights has established the "substance of the right to truth . . . based on a comprehensive analysis of a series of rights recognized" in the aforementioned instruments.⁶⁴ This takes shape in the obligation of States to investigate and prosecute perpetrators of human rights violations to guarantee victims of such violations, their families, and society justice as well as access to the information.⁶⁵ States are obliged to gather all information in their possession to allow victims to "know the truth about past events, as well as the motives and

61. *Id.* at 312.

62. *Id.*

63. U.N. Comm. on Human Rights Res. 2005/66 (Apr. 20, 2005).

64. The Right to Truth in the Americas, Inter-Am. Comm'n H.R., OEA/Ser.L/V/II.152,

¶ 53 (Aug. 13, 2014) [hereinafter Right to Truth Report], <http://www.oas.org/en/iachr/reports/pdfs/right-to-truth-en.pdf>.

65. *Id.* ¶ 14.

circumstances in which aberrant crimes came to be committed, in order to prevent reoccurrence of such acts in the future.”⁶⁶

The United States, though a party to the Organization of American States—the international organization housing the IACHR and the two aforementioned human rights instruments—has not ratified the American Convention on Human Rights, and thus does not acknowledge the power of the Inter-American Commission or the Inter-American Court of Human Rights.⁶⁷ The salient point, however, is not that the United States has no legal obligation to provide victims of the RDI program the chance to have their day in court. Instead, it is that, precisely because the U.S. government has constructed legal mechanisms to avoid answering for their agents’ crimes, the pressure ought to come extrajudicially to fundamentally change the law of the state secrets privilege.

V. RECOMMENDATIONS AND CONCLUSION

Although at the time of writing this article, there were no statistics available for how often the state secrets privilege has worked in favor of the government, the “utmost deference” to the executive standard articulated in *United States v. Nixon* certainly leaves little room for doubt that it is a doctrine the United States courts are very much bound to.⁶⁸ Once invoked, it is difficult to imagine that a court might rule against the government; even in the case of Mr. El-Masri, in spite of reduced security consequences because of the public nature of his detention, the barbaric conditions of his rendition, and his acknowledged innocence, the Fourth Circuit nonetheless affirmed dismissal of his complaint. Thus, it is clear that for justice to be served to the victims of extraordinary abuses of CIA power, the government must be deterred from invoking the privilege to begin with, and the legal prerequisites for invocation must be raised.

This is a more explicit goal than simply asking the government to acknowledge that it has tortured its detainees. President Obama famously acknowledged that the United States “tortured some folks” and engaged in enhanced interrogation techniques that he and “any fair-minded person would believe were torture.”⁶⁹ In his 2008

66. *Id.* ¶ 71.

67. Organization of American States, American Convention on Human Rights “Pact of San Jose, Costa Rica” (B-32) Signatories and Ratifications, https://www.oas.org/dil/treaties_b-32_american_convention_on_human_rights_sign.htm.

68. *United States v. Nixon*, 418 U.S. 683, 710 (1974).

69. Josh Gerstein, *Obama: ‘We tortured some folks’*, POLITICO (Aug. 1, 2014), <https://www.politico.com/story/2014/08/john-brennan-torture-cia-109654>.

presidential campaign, too, President Obama criticized the Bush administration for invoking the state secrets privilege more than any previous administration.⁷⁰ And yet, in February 2009, when Mr. Binyam Mohamed and his fellow petitioners brought their case against a Boeing subsidiary for arranging flights for rendering them on the CIA's behalf,⁷¹ the government once again invoked the state secrets privilege to have the case dismissed.⁷²

In 2013, members of the House Judiciary proposed the State Secrets Protection Act.⁷³ Among other protective measures, *in camera* review and *ex parte* hearings included, the Bill proposes that a court cannot determine a claim of privilege is valid without reviewing the information the government seeks to protect.⁷⁴ This Bill is currently languishing in the catacombs of the Subcommittee on Crime, Terrorism, Homeland Security, and Investigations.⁷⁵ It must be revived by the legislative branch, or else the doctrine will only grow stouter still in the common law.

Furthermore, it is undeniably important that civil society continue to rally behind victims seeking redress, and that organizations like the Center for Constitutional Rights, Amnesty International, and the ACLU continue to file FOIA requests to discover precisely what went on behind closed doors throughout the RDI program.⁷⁶ These acts, forcing government exposure, bolster plaintiffs' cases by demonstrating to courts that they are not protecting secrets when they

70. Barack Obama, Ethics, OBAMA '08, <http://web.archive.org/web/20080731083937/http://www.barackobama.com/issues/ethics/> (last visited Dec. 14, 2022).

71. Among basic indignities and inhumane detention conditions, Petitioners were subject to violences including beatings so severe that their bones broke, sexual assault, forced feeding, sleep deprivation, and carvings with a scalpel to their genitals. Some of them were held for up to seven years. Report on Admissibility, Petition 1638-11, Inter-Am. Comm'n. H.R., Report No. 154/20, OEA/Ser.L/V/11., doc. 164 (2020), <http://www.oas.org/en/iachr/decisions/2020/usad1638-11en.pdf>.

72. John Schwartz, *Obama Backs Off a Reversal on Secrets*, N.Y. TIMES (Feb. 9, 2009), <https://www.nytimes.com/2009/02/10/us/10torture.html>.

73. State Secrets Protection Act, H.R.3332, 113th Cong. (2013).

74. *Id.* §6(b)(1)(A).

75. *See id.* (referring the bill to the Subcommittee on Crime, Terrorism, Homeland Security, and Investigations in January 2014).

76. *CLA Acknowledges It Has More than 7,000 Documents Relating to Secret Detention Program, Rendition, and Torture*, CENTER FOR CONSTITUTIONAL RIGHTS (Apr. 18, 2019), <https://ccrjustice.org/home/press-center/press-releases/cia-acknowledges-it-has-more-7000-documents-relating-secret>; *2015 Torture FOIA Complaint*, AMERICAN CIVIL LIBERTIES UNION (Nov. 25, 2015), <https://www.aclu.org/legal-document/2015-torture-foia-complaint>.

deny claims of privilege.⁷⁷ Indeed, in a different judicial climate, the volume of information exposed may suggest to a court that there is enough information to litigate a matter without revealing sensitive security information.

If the manifest abrogation of justice in *El-Masri* is insufficiently illustrative of the danger of the state secrets privilege, the final conclusion of the doctrine's progenitor is emblematic of its failings. Half a century after the *Reynolds* court developed the basis of the state secrets privilege we have today, the accident report in dispute—which had gone unreviewed for fear of danger to national security—was declassified.⁷⁸ The accident report detailing the plane crash that caused the loss of three lives contained no references to secret equipment, but instead “embarrassing information revealing Government negligence (that the plane lacked standard safeguards).”⁷⁹ Louis Fisher, a Specialist in Constitutional Law at the Library of Congress and an expert in the *Reynolds* case, concluded that “the court was misled by the executive branch and allowed itself to be misled.”⁸⁰

The fight for justice and due process is not one that has been resolved by changes in administration. At the IACHR, Mr. Mohamed's case against the Boeing subsidiary continues today, and yet the Biden administration nonetheless argues that the American Declaration of Human Rights is “non-binding” and that the IACHR can only issue recommendations that the United States is not obliged to follow.⁸¹ The United States must be discouraged from invoking the privilege, through exposure of the government's abuse and failures and through a drastically changed legal standard and procedure for invocation.

Anything short of sweeping change to this doctrine will entrench the cycles of violence that the United States feels emboldened and empowered to perpetuate, leaving collective civil rights to truth and

77. *United States v. Zubaydah*, 142 S. Ct. 959, 985 (2022) (Gorsuch, N., dissenting) (“Official reports have been published, books written, and movies made about them. Still, the government seeks to have this suit dismissed on the ground it implicates a state secret . . . Ending this suit may shield the government from some further modest measure of embarrassment. But respectfully, we should not pretend it will safeguard any secret.”).

78. See Louis Fisher, *In the Name of National Security: Unchecked Presidential Power and the Reynolds Case* (2006) (discussing the context and development of the *Reynolds* case after the Supreme Court ruling).

79. S. Rept. 110-442 *supra* note 5, at 5.

80. *Examining the State Secrets Privilege: Protecting National Security While Preserving Accountability*, Hearing before the S. Comm. on the Judiciary, 110th Cong. (Feb. 13, 2008) (prepared statement of Louis Fisher).

81. Report on Admissibility, Petition 1638-11, Inter-Am. Comm'n. H.R., Report No. 154/20, OEA/Ser.L./V/11., doc. 164 ¶ 18.

justice nothing but a chimeric dream. The government must be reminded: “The Constitution did not create a President in the King’s image but envisioned an executive regularly checked and balanced by other authorities.”⁸²

82. *United States v. Zubaydah*, 142 S. Ct. 959, 992 (2022) (Gorsuch, N., dissenting).