

The State Secrets Privilege: From Evidentiary Privilege to Executive Immunity in the United States

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In recent years, a number of controversial programs initiated by the United States administration under the auspices of its post-9/11 “war on terrorism” have come to light. These include the program to transfer detainees taken into custody by American forces to third countries, where the detainees were exposed to brutal and invasive forms of interrogation.¹ Attempts to question the legality of such executive steps in the courts have encountered several hurdles, which in practice have prevented further legal proceedings and adjudication. One of the more prominent of these hurdles is the state secrets privilege recognized in the United States legal system.

Originally, the privilege was designed to enable the administration not to disclose certain evidence during civil legal procedures if the disclosure was likely to harm national security. Even under the privilege’s original formulation by the Supreme Court in the 1950s, almost complete deference was given to the interests of the government. Moreover, federal courts have interpreted the privilege very broadly in recent years, determining that the government is not required to invoke the privilege with regard to any particular piece of evidence. Instead, in several cases the courts have accepted the government’s request to dismiss lawsuits at the outset without

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any substantive adjudication because of the risk that, should the court allow the proceedings to continue, secret evidence might be revealed.

The application of the state secrets privilege in such a broad manner raises serious questions relating to fundamental principles of the American legal tradition. In practice, this barrier to the adjudication of legal disputes, which is seemingly procedural in nature, provides the government with immunity from judicial review of the administration's policy on security matters. As a result, not only are the interests of individual plaintiffs harmed, but the ability to determine in the courts whether or not the actions of the administration conform to its legal obligations is undermined. This essay contends that a narrower application of the state secrets privilege is called for, one that allows for the balancing of the privilege against other interests, including justice and the search for the truth. In this context, the experience of the State of Israel – another state facing difficult legal challenges with respect to national security – may be instructive, and could perhaps assist in tailoring a more balanced mechanism in the United States for the protection of state secrets.

The State Secrets Privilege

The state secrets privilege is an evidentiary, judge-made doctrine (i.e., developed by the federal courts rather than set in legislation) most commonly attributed to the 1953 Supreme Court ruling in *United States v. Reynolds*.² In that case, the widows of three civilians working for an Air Force contractor sued the federal government for the deaths of their spouses in the crash of a military aircraft. During the discovery stage, the Air Force refused to reveal various materials pertaining to the investigation of the event, claiming that this was necessary to safeguard national security and military secrets. The case ultimately reached the Supreme Court, which determined that the government's claim should be recognized and that non-disclosure of certain information is to be allowed if disclosure is likely to harm national security.³

Under *Reynolds*, when a court examines the government's claim to privilege, the court must also weigh the plaintiff's need for information. The more significant the plaintiff's need, the more thoroughly the court must investigate the claim to privilege. Nevertheless, in the event that the court accepts the government's claim, the privilege is absolute.⁴ The state secrets doctrine applies to civil proceedings, i.e., both in non-criminal lawsuits against the state (including constitutional and administrative matters) and

in suits involving two private parties, where the government sees fit to intervene and raise the state secrets privilege claim.⁵

Thus, Supreme Court precedent recognizes the possibility that the government can be exempt from disclosing particular information, should its exposure harm national security, and in *Reynolds* the exposure of certain materials (the investigative report of the plane crash and affidavits submitted by crew members who survived the crash) was indeed prevented. By contrast, in legal proceedings that have taken place in recent years in the United States, the government has sought dismissal of lawsuits – some against private parties rather than against the government itself – on the basis of the claim that hearing the suit at all is impossible given the concern that sensitive information might be revealed. The federal courts' willingness to accept this claim, as was the case in *Jeppesen* (discussed below), is too broad an expansion of the state secrets privilege that in practice protects the government from judicial review and exacts a heavy toll on those who have allegedly been harmed by the government.

Mohamed v. Jeppesen Dataplan, Inc.

In 2006, President Bush revealed that detainees taken into custody by the United States had been transferred to third countries for interrogation as part of the Extraordinary Rendition Program.⁶ Had these detainees been held in official United States detention facilities, such as Guantanamo Bay, Cuba, or on American soil, they would have been subject to various forms of legal protection, oversight by certain bodies, and access to federal court. By contrast, detention in secret facilities in countries such as Morocco, Afghanistan, and Egypt apparently facilitated the subjection of detention conditions and interrogation methods that do not meet international or American standards.⁷

The plaintiffs in *Jeppesen*,⁸ citizens of different countries, were apprehended in various locations around the world. According to the plaintiffs, they were moved to interrogation facilities outside the United States, where they were detained under harsh conditions, beaten, threatened with death, and subjected to various interrogation methods constituting physical and mental abuse, and even torture.⁹ Based on openly published information, the plaintiffs concluded that they were subject to the United States' Extraordinary Rendition Program. They sued Jeppesen Dataplan, Inc., a Boeing subsidiary that was alleged in the complaint to have carried out the flights aboard which the plaintiffs were

moved to those third countries. The plaintiffs claimed that the defendant knew or should have known that they would be subjected to torture, and therefore bore responsibility for what had happened to them. In order to establish their claim the plaintiffs submitted hundreds of public documents, including the findings of an investigation by the Council of Europe and the European Parliament, as well as foreign governments and agencies, from which it was possible to learn about various aspects of the program.

Following earlier rulings by the district and appellate courts,¹⁰ the case was eventually brought before an expanded panel of the appellate court. A majority opinion of five judges, joined by a judge issuing a separate concurring opinion, determined that even though the existence of the program in and of itself was not a state secret, the landmark *Reynolds* ruling compelled the court to dismiss the suit outright because there was no practical possibility of litigating the case and examining the liability of Jeppesen without creating an unjustified risk that state secrets might be exposed. The decision to dismiss the lawsuit was given despite the fact that the majority was ready to assume that neither the plaintiffs nor the defendant would need classified evidence to prove their case.¹¹

Had the court determined that the defendant could not present a proper defense without needing classified evidence, the dismissal of the lawsuit would have been understandable. Fundamental principles of justice require that people be given the opportunity to defend themselves against legal proceedings and use exculpatory evidence. But the majority in this case was willing to recognize that the parties apparently did not need classified information to establish their case. The concern was that sensitive information would inadvertently come to light in the course of the proceedings. According to the majority opinion, this concern justified the dismissal of the suit.

A minority opinion of five additional judges felt that it was inappropriate to invoke the state secrets privilege at the beginning of the proceedings as a reason for dismissal because the state secrets privilege is fundamentally evidentiary in nature and was designed to allow non-disclosure of specific evidence. The minority opinion reasoned that it was therefore improper to exempt the government (or any third party) entirely from presenting its defense since allowing this effectively renders the state secrets privilege a doctrine of immunity. The minority judges dug through the many documents submitted by the plaintiffs and pointed to the unclassified documents that seemingly supported the plaintiffs' claims, thereby attempting to show

that it was improper to dismiss the suit at this preliminary stage without allowing the plaintiffs to attempt to substantiate their case on unclassified information, especially in light of the serious implications for the plaintiffs of preventing their access to the courts.¹²

From an Evidentiary Privilege to Executive Immunity

From the discussion above it would appear that the main disagreement between the majority and minority opinions in *Jeppesen* was over *when* to invoke the state secrets privilege. While the majority felt it could be raised at the outset, as a reason to dismiss the suit and avoid having to present a defense, the minority felt that the defendant first had to present its defense and invoke the state secrets privilege only with regard to certain evidence that, according to the government, could not be revealed. However, all the judges on the *Jeppesen* panel were in agreement that the case involved state secrets that could not be revealed during the proceedings. If so, why is the *Jeppesen* ruling so troubling?

One might argue that the approach of the majority is the more efficient one. If the plaintiffs are expected to inevitably hit a brick wall at a later stage of the proceedings – e.g., at a point when they will need classified evidence that they will be unable to attain – why waste time and resources on holding the proceedings to begin with? Isn't it preferable to dismiss the suit outright? The simple answer is no, for several crucial reasons.

First, it is impossible to know with certainty that the plaintiffs would need classified information to establish their claims (and similarly, that the defendant would need classified information to establish its defense). It may very well be that the case could have been heard without resorting to any classified evidence; indeed, this was the starting point of the majority opinion. The decision to dismiss the suit outright was designed to preempt the unintentional disclosure of classified information during the legal proceedings, which can be complex and involve a plethora of information. This is a conservative approach, which to a large degree questions the government's and the court's ability to conduct themselves responsibly and professionally when handling sensitive information. As a result, the plaintiffs' right to have their dispute heard by the courts is dealt a fatal blow. The plaintiffs themselves – not the government – are forced to pay the price of protecting state secrets.

Beyond the harm to the individual plaintiffs' interests, which one might argue is justified when balanced against the harm to the government should

it fail to maintain its secrets, the judiciary's ability to examine the legality of the Executive's actions is also severely impaired. Revealing details about the Extraordinary Rendition Program, as used by the Bush administration, would most likely have had political and diplomatic ramifications. At the same time, however, there are important legal questions at the very core of the program as well, such as: was the United States entitled to transfer people it had detained to foreign countries for interrogation, and if so, under what conditions? Did the interrogation methods to which the detainees were subjected amount to improper treatment or even torture? If so, was it the United States' active obligation to ensure that such methods would not be used before it rendered the detainees to these foreign countries? To the extent that the government promotes a policy that is not in keeping with the country's legal obligations and profoundly harms individuals' basic rights and liberty, there is tremendous importance to bringing the practice to a halt and to a judicial declaration that such a practice cannot continue in a democratic society.¹³

There are other advantages inherent in allowing judicial proceedings to proceed, to the extent possible, instead of a clumsy and unduly broad application of the state secrets privilege. By their nature, legal proceedings air other important details about the government's practices, contributing to lively public debate and a reexamination of policy by government bodies, which could lead to improvements and reforms. Furthermore, holding proceedings could create opportunities for reaching a settlement between the parties. Aside from the advantages outlined above, there is a glaring disadvantage to the approach that allows the outright dismissal of a case on the basis of a general claim that it is impossible to hold a hearing without endangering state secrets: namely, that the government does not assume any risk under such a legal approach. Essentially, there is no cost to advancing the argument as a threshold claim because the government always retains the right to invoke its privilege later on in the proceedings with regard to particular pieces of evidence. Therefore, the approach fails to provide any incentive to the government to limit the use of the doctrine as much as possible; in fact, it does just the opposite.

Despite the considerations justifying a narrower approach to the state secrets privilege – one that allows the state to invoke the privilege only vis-à-vis specific evidence rather than a threshold claim for dismissal of the legal proceeding as a whole – one must recognize that there may still

be many cases in which legal challenges will fail because of the inability to reveal information that includes or touches upon state secrets. This is partly as a direct result of the *Reynolds* ruling that holds that when the court is convinced that certain items of evidence do indeed involve state secrets, absolute privilege is extended even if such items of evidence are crucial to one of the parties. Therefore, it is not enough to adopt a narrower approach to the state secrets privilege than the one advocated by the government (and affirmed by the *Jeppesen* majority), although adopting such a stance is desirable given the current state of affairs. In addition, what is needed is a reexamination of the *Reynolds* ruling itself and a reconsideration of the balance that perhaps ought to be struck in American courts between the protection extended to state secrets and other important interests.

An Alternative Model to the State Secrets Privilege: A Glance at the Israeli Experience

In practice, the *Jeppesen* ruling forces the plaintiffs themselves to bear the cost of protecting national security in the sense that it prefers to block the possibility of holding legal proceedings at all rather than run the theoretical risk that sensitive information might be revealed during the proceeding. But there is another difficulty in the application of the state secrets privilege in the United States as formulated in the *Reynolds* ruling, which concluded that when the court is convinced that certain information amounts to state secrets, the protection extended to that information is absolute and the court does not have discretion over whether to allow its disclosure. The courts' discretion is thus limited only to determining whether certain materials should enjoy the state secrets privilege. Once the courts are convinced that the doctrine applies, the information cannot be disclosed. Thus, the Supreme Court of the United States grants an obvious advantage to the government's interests.

This all-or-nothing model, providing absolute protection to the government's interest in not revealing the information, is not the only model possible or even the only model in existence. In Israeli legislation a different model was adopted that enables a balance between the interests of the state and considerations of justice. In the Israeli context, the legal framework that enables the protection of state secrets is found in the Evidence Ordinance [New Version] 1971, which regulates, *inter alia*, the handling of classified evidence.¹⁴

Section 44 of the Evidence Ordinance states that the Prime Minister and Minister of Defense or Minister of Foreign Affairs may issue a “certificate of privilege” with respect to evidence whose disclosure is likely to impair national security or Israel’s foreign relations. In such a case, that evidence cannot be used in legal proceedings. Section 45 creates a similar arrangement for evidence whose disclosure has been determined likely to damage an important public interest by any other government minister. Nonetheless, these sections also state that the courts may order that the secret evidence be disclosed if it is convinced that “the need to disclose it for the purpose of doing justice outweighs the interest of non-disclosure.”¹⁵ To make sure that no sensitive information is revealed during the hearing of the request to remove the privilege, section 46 of the Evidence Ordinance states that the hearing of such a petition can be held behind closed doors and that the court is permitted to hear the state’s explanations *ex parte*. These paragraphs of the Evidence Ordinance apply to both civil and criminal proceedings. In Israel, as in the United States, a private party may request that the state issue a certificate of privilege in proceedings involving two private parties.¹⁶

Thus, the Evidence Ordinance establishes a mechanism that allows the courts to balance the need to prevent the disclosure of material whose exposure could harm state interests and the need of a plaintiff, a defendant – or the accused in the case of a criminal proceeding – for information in order to establish their claims. One may well ask how the court can compel the exposure of evidence when doing so would damage a critical national interest; does this not represent an unreasonable risk to national security, foreign relations, and other interests? This question may be answered in several ways.

First, the courts are routinely required to balance national interests, including those affecting national security, against other interests, such as the right to liberty, the right to privacy, freedom of expression, and so forth.¹⁷ This is not unique to courts in Israel. American courts, which generally tend to take a more conservative approach when it comes to judicial review of matters seen as political in nature,¹⁸ are also often required to balance national security needs with other individual rights.¹⁹ There is therefore no justification that in the evidentiary field in particular absolute preference will be given to the interests of the state over other interests.

Second, the Israeli courts use various tools to reduce the possible harm to state interests when sensitive materials are involved. At times, for example,

with the consent of the opposing side, sensitive information is presented to the court *ex parte*.²⁰ While the party that cannot see or hear the evidence firsthand is still disadvantaged, if that party believes that the evidence can support its case, one may assume that it will prefer to allow the court access to that information, even if in an *ex parte* setting, rather than have the evidence excluded from the proceedings altogether. Other examples of means designed to prevent the inadvertent disclosure of sensitive materials include: keeping the evidence in a secured environment at the courthouse;²¹ submitting rulings to the state before their publication;²² releasing a summary or acquiring the state's consent that only the plaintiffs and their representatives with appropriate security clearance be able to review the sensitive information.²³ It should be noted that special arrangements for the handling of sensitive information in federal criminal proceedings also exist in the American context.²⁴

Third, the state always has the option to prevent the harm likely to be caused as a result of the disclosure of the information. In civil proceedings, this could mean reaching a settlement, whether in the form of awarding damages or by stopping the harmful practice.²⁵ Such steps essentially represent the internalization by the state, and not (just) the individual, of the inability to disclose state secrets. Furthermore, the state is required to take such steps only if the court finds that considerations of justice compel the disclosure of privileged evidence. The courts still have the discretion to determine that, despite its critical nature, certain evidence will remain secret, even when in practice this decision means that the proceeding will have to end.

Thus, it is hard to argue that the Israeli arrangement and its application by the courts deal Israel's national security a fatal blow. Rather, they allow for a balance between the state's interests and considerations of justice in a manner that is missing from the American practice of recent years. Further support for this position may be found in the fact that since the enactment of sections 44-46 of the Evidence Ordinance, this Israeli legislative arrangement has not been altered.

Looking Ahead

Since the Obama administration entered the White House in 2009, and contrary to certain expectations,²⁶ the administration has continued to make relatively aggressive and extensive use of the state secrets privilege.²⁷ Specifically, the government continues to claim that attempts to challenge the administration's national security policy should be dismissed outright on the basis of this

doctrine.²⁸ In 2009, the Attorney General issued a memorandum designed to ensure that the doctrine be used judiciously,²⁹ though neither the memo nor its application have relieved critics' concerns.³⁰

In this context, the initiative to regulate via legislation use of the state secrets privilege, first proposed in Congress in 2008, bears mentioning.³¹ The bill is designed to set in place a "safe, fair and responsible" mechanism for the invocation of the state secrets privilege,³² and seeks to confront most of the difficulties arising from the privilege's current use.³³ However, it has failed to make it past congressional committee since its proposal. In the meantime, the state secrets privilege, as well as a number of other procedural barriers developed by the courts, prevents the possibility of debating and clarifying essential legal issues relating to national security matters.³⁴ These issues will often have a significant impact on the fundamental rights of American citizens and others who come under American jurisdiction or control.

The United States is not the only country in the world facing challenges pertaining to the protection of sensitive information while conducting legal proceedings.³⁵ As discussed in detail above, Israel has a mechanism, established through legislation, that the courts use with some frequency. While the legal systems in Israel and the United States are not identical and it is not necessarily appropriate for the United States to import the Israeli approach, Israel's experience shows that even when confronting serious security challenges, the possibility for the state to deal with secret evidence differently exists. Consequently, Israel's experience may well be helpful in formulating a more balanced mechanism for invoking the state secrets privilege in the United States.

Notes

- 1 Another central issue was that of the Bush administration's warrantless wiretap program; see James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, THE NEW YORK TIMES, December 16th, 2005, <http://www.nytimes.com/2005/12/16/politics/16program.html?pagewanted=all>. In June 2013, an extensive Obama administration program to collect records of phone calls made in the United States was also exposed; see Glenn Greenwald, *NSA collecting phone records of millions of Verizon customers daily*, THE GUARDIAN, June 6th, 2013, <http://www.guardian.co.uk/world/2013/jun/06/nsa-phone-records-verizon-court-order>. See also Barton Gellman and Laura Poitres, *British intelligence mining data from nine U.S. Internet companies in broad secret program*, THE WASHINGTON POST, June 7th, 2013, <http://www.washingtonpost.com/investigations/us-intelligence-mining-data-from-nine-us-internet-companies-in-broad-secret-program/2013/06/06/3a0c0da8-cebf->

11e2-8845-d970ccb04497_story.html. The program has given rise to public furor and extensive debate in the media and among commentators.

- 2 United States v. Reynolds, 345 U.S. 1 (1953).
- 3 It should be noted that some view the doctrine's source in an older decision, *Totten v. United States*, 92 U.S. 105 (1875). In *Totten*, which dealt with a damage suit resulting from espionage services supposedly given to the administration of President Abraham Lincoln, the Supreme Court determined that the lawsuit could not go forward, as it was based on a covert agreement between the plaintiff and government to provide confidential services. At times, courts present both rulings as the two sources of the same doctrine; see *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1077 (9th Cir. 2010) (en banc). Other commentators argue that the *Reynolds* ruling (*supra* note 2) alone is the source for the state secrets privilege, whereas *Totten* relates only to specific cases wherein the foundation for the lawsuit is a secret agreement with the government; see, e.g., Christina E. Wells, *State Secrets and Executive Accountability*, 26 CONSTITUTIONAL COMMENTARY 625, 639 (2010); Sudha Setty, *Litigating Secrets: Comparative Perspectives on the State Secrets Privilege*, 75 BROOKLYN LAW REVIEW 201, 233 (2009); Carrie Newton Lyons, *The State Secrets Privilege: Expanding Its Scope Through Government Misuse*, 11 LEWIS & CLARK LAW REVIEW 99, 120-121 (2007). However, this distinction is not essential for our purposes; under both approaches, *Reynolds* is a binding legal precedent and key to the doctrine.
- 4 See *Reynolds*, *supra* note 2, 11.
- 5 As for criminal proceedings, there is specific legislation that deals with the handling of sensitive evidence; see Classified Information Procedures Act (CIPA), 19 U.S.C. app. 3 §§ 1-16 (1980). CIPA creates procedural steps for disclosing classified information connected to national security and its use in criminal proceedings in federal courts. These steps include protective orders, specific rules on revealing documents, *ex parte* hearings, and more.
- 6 Lucien J. Dhooge, *The State Secrets Privilege and Corporate Complicity in Extraordinary Rendition*, 37 GEORGIA JOURNAL OF INTERNATIONAL & COMPARATIVE LAW 469, 474 (2009). The program preceded the Bush administration and referred to the transfer of suspects to third countries for arrest or trial, but after 9/11 its features and purpose were changed by the Bush administration in essential ways (*ibid.*, 472). Another similar move was transferring detainees to secret interrogation places called "black sites" belonging to the CIA outside of the United States; see OPEN SOCIETY JUSTICE INITIATIVE, GLOBALIZING TORTURE: CIA SECRET DETENTION AND EXTRAORDINARY RENDITION (2013), <http://media.tcm.ie/media/documents/o/openSocietyJusticeInitiativeGlobalizingTortureReport.pdf>. Many commentators writing on the topic fail to maintain the distinction between the two programs.
- 7 As an aside, it should be noted that a legal opinion prepared by the White House Office of Legal Counsel on transferring suspected terrorists to third countries for interrogation determined, for a host of reasons, that there was no legal hindrance to doing so. The legal rationale underlying the opinion has not yet been examined by the courts because the legality of the Extraordinary Rendition Program itself has yet to be examined by any American court; see Memorandum from Jay S. Bybee, Office of Legal Counsel, for William J. Haynes, II, Re: The President's power as

Commander in Chief to transfer captured terrorists to the control and custody of foreign nations (Mar. 13, 2002), <http://www.justice.gov/opa/documents/memorandumumpresidentpower03132002.pdf>.

- 8 See *Jeppesen*, *supra* note 3. The ruling is one of the most prominent ones handed down in recent years in the context of the state secrets privilege. Even though this was a ruling in a federal court of appeals, rather than the Supreme Court, it is a critical one for several reasons. It was a ruling of the 9th Circuit Court of Appeals, considered the most important of the appellate courts, partly because its local authority extends also to California. In addition, the *Jeppesen* ruling was given by an expanded panel of judges. Following the ruling, writ for certiorari (request for leave to appeal) was filed with the Supreme Court, and was rejected. Therefore, currently, the ruling is the leading source for the application of the doctrine. Other appellate courts have applied the state secrets privilege in a similar manner in cases relating to national security; *see, e.g.,* *El-Masri v. United States*, 479 F.3d 296 (4th Cir. 2007).
- 9 *See Jeppesen*, *supra* note 3, 1074-1075.
- 10 *Mohamed v. Jeppesen Dataplan, Inc.*, 539 F. Supp. 2d 1128 (N.D. Cal 2008); *Jeppesen*, *supra* note 3.
- 11 *Ibid.*, 1087, 1099.
- 12 *Ibid.*, 1098, 1101.
- 13 It should be noted that there are other ways of examining the legality of the government's actions besides judicial proceedings. For example, Congress can initiate an investigation or through legislation create a mechanism that would grant compensation to anyone harmed by government activity; in this context, *see Jeppesen*, *supra* note 3, 1091. One could also try to use international mechanisms, though their effectiveness vis-à-vis the United States is liable to be limited.
- 14 *See The Laws of the State of Israel*, New Version 18, p. 421.
- 15 Paragraphs 44 and 45 of the Evidence Ordinance.
- 16 Yaakov Kedmi, *On Evidence*, Part 2, 874 (2003).
- 17 *See, e.g.,* Israel High Court of Justice Case 2056/04, *Beit Surik et al v. State of Israel* (2004), which determined that the state had to reexamine the proposed route of the security fence despite the security interests it served, given the severe harm it was causing the area's Palestinian residents; Israel High Court of Justice Case 3239/02, *Mirab v. Commander of IDF in Judea and Samaria* (2003), which determined that the extension of detention of Palestinian detainees without being brought before a judge during intensive fighting did not meet binding legal standards and was therefore null and void; Israel High Court of Justice Case 680/88, *Shnitzer v. Chief Military Censor*, ruling 42(4)617, which determined that the decision of the Chief Military Censor to suppress the publication of an article about the Mossad was unreasonable.
- 18 In the United States, the political question doctrine formulated in the ruling of *Baker v. Carr*, 369 U.S. 186 (1962) is recognized. In accordance with the doctrine, courts avoid adjudicating cases when political questions come up and there are no judicial standards for reaching a decision; when it is impossible to decide issues the case arouses without making a policy determination; or when a ruling would involve an expression of disrespect towards one of the other branches of government; *ibid.*,

217. See, e.g., *El-Shifa Pharm. Indus. Co. v. U.S.*, 607 F.3d 836 (D.C. Cir. 2010); *Schneider v. Kissinger*, 412 F. 3d 190 (D.C. Cir. 2005); *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1 (D.D.C. 2010). In Israel, the application of the doctrine, manifested in the question of justiciability, is much narrower; see Aharon Barak, *Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARVARD LAW REVIEW 16, 98-106 (2002).
- 19 See, e.g., *Hamdi v. Rumsfeld*, 542 U.S. 507, 529-533 (2004), which determined that the mechanism for detaining those defined by the administration as illegal combatants does not meet the requirements of due process and that individuals detained under such circumstances were entitled to receive information about the factual basis for their detention and a fair opportunity to rebut the state's factual assertions before a neutral decision maker. The Supreme Court determined that the risk that under current conditions individuals would be detained without justification was unreasonably high and that the probability was low that the procedure the Court was demanding be implemented would have the severe ramifications claimed by the government; *ibid.*, 532-534.
- 20 See, e.g., Various Civil Requests 6763/06, *Hiyat v. Israel Airports Authority* (2006).
- 21 *Ibid.*
- 22 *Ibid.*
- 23 See, e.g., Civilian Appellate Authority, 7114/05, *State of Israel v. Hizi* (2007).
- 24 See *supra* note 5.
- 25 In the case of evidence needed for the defense in a criminal case, this could under certain circumstances mean the withdrawal of the indictment; see, e.g., Appellate Authority 2489/09 *Braude v. State of Israel* (2009). Although this is a relatively extreme outcome, the move is designed to serve a purpose no less worthy than enforcing the law – namely, ensuring due process and the defendant's rights, in particular the ability to prove one's innocence. Some commentators have suggested that if the American courts rule against the government should it refuse to disclose secret evidence, this would provide incentive for private bodies to initiated unjustified litigation against the government and exploit the government's inability to disclose relevant evidence to establish its defense; see, e.g., Robert M. Chesney, *State Secrets and the Limits of National Security Litigation*, 75 GEORGE WASHINGTON LAW REVIEW 1249, 1313 (2007). In practice, given the procedural obstacles facing potential plaintiffs, such as the standing requirement and the high costs of litigation, it is highly doubtful that this path would prove attractive to many potential plaintiffs. Moreover, it is possible to create mechanisms that would minimize this risk, such as one that would allow the courts to review sensitive evidence *ex parte* with both parties' consent so that it can determine whether the evidence supports the plaintiff's claims or not.
- 26 See, e.g., CENTER FOR CONSTITUTIONAL RIGHTS, 100 DAYS: END THE ABUSE OF STATE SECRETS PRIVILEGE, <http://ccrjustice.org/learn-more/faqs/100-days%3A-end-abuse-state-secrets-privilege>.
- 27 Setty, *supra* note 3, 257-258.
- 28 See, e.g., *Yassir Fazaga et al, v. Federal Bureau of Investigation*, 884 F. Supp. 2d 1022 (C.D. Cal. 2012), which dismissed a suit challenging the collection of

information about Muslim residents on the basis of their religious affiliation alone by using covert government agents.

- 29 Memorandum from Eric Holder, Attorney Gen., U.S., to Heads of Exec. Dep'ts & Agencies, U.S. (Sept. 23, 2009), <http://legaltimes.typepad.com/files/ag-memo-re-state-secrets-dated-09-22-09.pdf>.
- 30 See Sudha Setty, *Formalism and State Secrets* in *SECRECY, NATIONAL SECURITY AND THE VINDICATION OF CONSTITUTIONAL LAW*, (David Cole et al. eds., 2013) (forthcoming); Wells, *supra* note 3, 644-645.
- 31 State Secrets Protection Act, S. 2533, 110th Cong. (2008).
- 32 *Ibid.*
- 33 For example, it allows courts to use various means to protect sensitive information and sets forth how the court should examine state secrets claim, the burden of proof on the government, and more. As for when to invoke the privilege, the bill states that the claim of state secrets will be considered by the court only after the conclusion of discovery of non-sensitive evidence and an opportunity is granted to the sides to make their arguments. As a general rule, it would be impossible to invoke the state secrets privilege at the beginning of proceedings, as was done in *Jeppesen* (*supra* note 3). The bill also states that after the court has been persuaded that certain items of evidence are non-disclosable, it retains the discretion to "weigh the equities and take appropriate orders in the interest of justice."
- 34 See, e.g., *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1 (D.D.C. 2010), which dismissed a suit brought by a father to prevent the targeted killing of his son after the court determined that the father had not proven his legal standing or, in other words, had failed to show that he was an interested party from a legal perspective such that he would be able to bring suit. The targeted strike was carried out a few months later. See also *Clapper v. Amnesty International U.S.A.*, 133 S. Ct. 1138 (2013), in which the Supreme Court dismissed an attempt to challenge the legality of the government's wiretapping program also on the basis of the inability of the organization bringing suit to prove standing because it failed to show that it was itself placed under government electronic surveillance. In both cases, state secrets claims were invoked by the government as reasons for its refusal to disclose information relevant to the suits.
- 35 Also see Benjamin Wittes, *Hugo Rosemont on Secret Evidence and Civil Justice in Britain*, *LAWFARE BLOG*, April 5th, 2012, <http://www.lawfareblog.com/2012/04/hugo-rosemont-on-secret-evidence-and-civil-justice-in-britain>.