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## THE PHILIP D. REED LECTURE SERIES: The State Secrets Privilege and Access to Justice: What Is the Proper Balance?

The Honorable Robert D. Sack

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**THE PHILIP D. REED LECTURE SERIES**

**PANEL DISCUSSION**

**THE STATE SECRETS PRIVILEGE  
AND ACCESS TO JUSTICE:  
WHAT IS THE PROPER BALANCE?\***

MODERATOR

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PANELISTS

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Hon. John D. Bates

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PROF. CAPRA: Thanks for coming tonight. My name is Dan Capra. I am the Philip Reed Chair at Fordham Law School. What you are attending tonight is a Reed Panel presentation, a yearly presentation on issues that are of interest to the federal courts.

The Reed Chair was established in 1996 to promote discussion about issues facing the federal judiciary, and I have been the Chair since it was instituted. Last year's program was about private information in court filings and how to protect private identifier information from internet access, which is a very large program here.

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\* This Panel Discussion was held on March 23, 2011, at Fordham University School of Law. The text of the Panel Discussion transcript has been lightly edited.

Philip Reed, Jr., who was responsible for establishing the Chair, passed away. I want to take this opportunity to express my sadness at his passing and to say how important and valued his support has been to me and to the Chair here at Fordham.

The proceedings of the yearly Reed Program are transcribed and published in the *Fordham Law Review*. This year's *Law Review* members have provided outstanding assistance and have been absolutely fantastic to work with—not only on the Reed Program, but on everything I do around here. I would particularly like to thank this year's Editor-in-Chief, Alyssa Beaver, and the Symposia Editor, Mari Byrne, for their outstanding work and their outstanding assistance. Thank you.

On the topic tonight, I am just going to provide a few introductory remarks and then I am going to provide introductions to the panelists and then I am going to let it go. The state secrets privilege is what we are going to be talking about tonight. Under the state secrets doctrine, the United States may prevent the disclosure of information in a judicial proceeding if there is a reasonable danger to national security.

The fountainhead case on the privilege is *United States v. Reynolds*,<sup>1</sup> in which an Air Force B-29 bomber had crashed during testing of secret electronic equipment and civilian observers were killed. Their widows sued the United States and they sought discovery of certain Air Force documents related to the crash, and the Air Force refused to disclose the documents and filed a claim of privilege, contending that the plane had been on a highly secret mission of the Air Force and disclosure of the materials would seriously hamper national security.<sup>2</sup>

That got to the Supreme Court. The Court sustained the Air Force's refusal to disclose the documents, noting that the privilege that was invoked was well established in common law all the way back to the Aaron Burr treason trial.<sup>3</sup> The *Reynolds* Court reviewed a long line of the decisions, including a case which may come up in the discussion tonight, *Totten v. United States*,<sup>4</sup> where the Supreme Court affirmed the dismissal of an action for breach of a secret espionage contract. So it was a breach of contract action saying, "You did not pay me for my espionage," which obviously raises some state secrets issues. The Court in the *Totten* case held that prosecuting that matter would inevitably lead to the disclosure of matters which the law regards as confidential.

So it is fair to state that the state secrets privilege was rarely invoked in the period between *Reynolds* and 9/11, but since 9/11 it has been invoked much more frequently. Civil cases involving state secrets, for example, go to contentions about illegal rendition, claims for torture, illegal surveillance. All have been court decisions involving the state secrets privilege, and I assume that our panelists will be talking about them tonight.

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1. 345 U.S. 1 (1953).

2. *Id.* at 3–4.

3. *Id.* at 7 & n.18, 9 & n.24.

4. 92 U.S. 105 (1875).

A court faced with a state secrets privilege question is required to use a three-part analysis. I will just go quickly through those parts. The court must find that the procedural requirements for invoking the state secrets privilege have been satisfied, and there are significant procedural requirements. The court must decide whether the information sought to be protected qualifies as privileged under the state secrets doctrine. If that finding is made, it means that the information cannot be used. There is no balance of interests. It is not a qualified privilege; it is an absolute privilege. A court's determination that a piece of evidence is a privileged state secret removes it from the proceedings entirely.

And then, to me, the most interesting question: What happens then? Can the case proceed? There are difficult issues of determining whether a case can proceed after an invocation of the state secrets doctrine. The question is: can the case be prosecuted without that state secret or is there a problem of litigating the case that comes so close to the state secrets that even without the state secrets information there is a threat to national security based on the prosecution of the matter?

One of the problems of administering the state secrets privilege is that arguments must be made about it and about the sensitivity of information and the risk of disclosure and the like, without access to the information itself. So there are difficult questions that need to be answered about how a court goes about evaluating a claim of state secrets.

It is not inevitable that the court would use—in fact, it is not always permitted to use—an *in camera* proceeding. *In camera* proceedings have to have some kind of finding before they can be held. But then, when there is an *in camera* proceeding, both parties—especially the party that seeks the information—are under a difficulty in terms of trying to argue that there is no problem with the information when in fact they do not know what the information is.

So those are the conundrums that we are going to be talking about tonight. To discuss these important and timely issues we have, I have to say, one of the best panels that we have ever put together here, with extensive experience in thinking and writing about these matters. Their complete bios are found in the materials, but I am going to summarize them here in the order of their speaking.

First, Judge Robert Sack, who has been a judge on the Second Circuit Court of Appeals since 1998. He took senior status in August of 2009. He has had some pretty good clerks, specifically my colleagues Jeanne Fromer and Richard Squire. Judge Sack graduated from the University of Rochester and Columbia Law School. He clerked for Judge Arthur Lane of the United States District Court for the District of New Jersey. He practiced with Patterson Belknap and later Gibson Dunn. During 1974, he served as Associate Special Counsel and Senior Associate Special Counsel for the House of Representatives' impeachment inquiry staff. If you think back in your history, you can figure out which impeachment that was.

Judge Sack is an expert in national and international press law and is the author of *Sack on Defamation*<sup>5</sup> and co-author of *Advertising and Commercial Speech: A First Amendment Guide*.<sup>6</sup> He has authored a number of opinions for the Second Circuit on the state secrets privilege, and he is a member of the Board of Visitors of Columbia Law School and a Lecturer in Law at the School.

Judge John Bates was appointed to the District Court for the District of Columbia in 2001. He graduated from Wesleyan University and the University of Maryland School of Law. He served in the Army, including a tour in Vietnam. Judge Bates clerked for Judge Roszel C. Thomsen of the United States District Court for the District of Maryland, practiced at Steptoe & Johnson, served as an Assistant United States Attorney for the District of Columbia, and as Chief of the Civil Division of the U.S. Attorney's Office from 1987 to 1997, and practiced thereafter at the Washington, D.C. law firm of Miller & Chevalier. Judge Bates serves as a member of the Judicial Conference Committee on Court Administration and Case Management. In 2006, he was appointed by the Chief Justice to serve as a judge of the United States Foreign Intelligence Surveillance Court—the FISA Court—and he has been the presiding Judge of that court since May 2009.

Ben Wizner is the Litigation Director of the ACLU's National Security Project. He is a graduate of Harvard College and New York University School of Law. Mr. Wizner was a law clerk to the Honorable Stephen Reinhardt of the U.S. Court of Appeals for the Ninth Circuit. He has litigated several post-9/11 civil liberties cases in which the government has invoked the state secrets privilege, including *El-Masri v. United States*,<sup>7</sup> which was a challenge to the abduction and detention of a German citizen; *Mohamed v. Jeppesen Dataplan, Inc.*,<sup>8</sup> which ended up in an en banc opinion in the Ninth Circuit, a suit against a private aviation services company for facilitating the CIA's rendition; *Edmonds v. Department of Justice*,<sup>9</sup> which was a whistleblower retaliation suit on behalf of an FBI translator; and *Al-Aulaqi v. Obama*,<sup>10</sup> a suit challenging the government's authority to use lethal force against a U.S. citizen. He has written widely on issues relating to detention, military commissions, and accountability for torture. He also appeared regularly in the media, before Congress, and traveled several times to Guantanamo to monitor the military commission trials.

Doug Letter is the Terrorism Litigation Counsel for the Civil Division of the Department of Justice, a graduate of Columbia University and the

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5. ROBERT D. SACK, *SACK ON DEFAMATION: LIBEL, SLANDER, AND RELATED PROBLEMS* (4th ed. 2010).

6. P. CAMERON DEVORE & ROBERT D. SACK, *ADVERTISING AND COMMERCIAL SPEECH: A FIRST AMENDMENT GUIDE* (1999).

7. 479 F.3d 296 (4th Cir. 2007).

8. 614 F.3d 1070 (9th Cir. 2010) (en banc), *cert. denied*, 131 S. Ct. 2442 (2011).

9. 161 F. App'x 6 (D.C. Cir.), *aff'g* 323 F. Supp. 2d 65 (D.D.C. 2004), *cert. denied*, 546 U.S. 1031 (2005).

10. 727 F. Supp. 2d 1 (D.D.C. 2010).

University of California Law School—one year behind me, actually, and we have never met to this day. At the DOJ, Doug has presented oral argument at the Supreme Court and in more than 200 cases in the federal courts of appeals. His areas of expertise include antiterrorism, separation of powers and presidential authority, national security, foreign affairs, and ethical rules for Justice Department attorneys. He successfully represented the United States in many cases involving these kinds of issues. For the past six years he has taught a course on national security at George Washington University Law School. He has been a lecturer at various schools, including Yale, Michigan, and American Law Schools, and the United States Naval Academy. Doug serves as the Department of Justice member on the Judicial Conference Advisory Committee on Appellate Rules.

Our protocol tonight is to have the speakers speak in that order and make a presentation on some aspect. I imposed no rules, as far as I can tell, on what they were going to talk about. We are going to have them all talk, make statements, and then we will have a general discussion, and we will leave some time for questions and comments from the audience.

I would like to call on Judge Sack. Thank you very much, Judge, for coming.

JUDGE SACK: I am very glad to see my law clerks here, Jeanne Fromer and Richard Squire. As you are well aware, I am a great admirer indeed of both of you.

I am reminded at this moment of the elementary school student who was given a history test that went something like this: “Tell everything you know about the Japanese attack on Pearl Harbor.” He answered, “I know nothing about it,” and he got an A, because after all, his answer was entirely correct.

I am not an expert on state secrets. Few Court of Appeals judges are. As best as I can recall, I have written on three state secrets cases. Two of them were incarnations of the same case actually, in which, both times, I dissented because the district court did not, wrongly I thought, even reach the state secrets question. And there was one in which our panel agreed that under the circumstances the plaintiff’s lawyer was not entitled to examine allegedly secret documents in order to help him establish that they were not state secrets.

So I am not engaging in mock self-deprecation. Judges should be experts in judging. But as a general matter we are not, and are not expected to be, experts on the subject matter of the civil cases that come before us, at least not before those cases are in fact heard. In many instances, we have little previous knowledge about a subject because it has not been relevant to what we have been tasked to do.

To choose one of any number of examples, our court hears a vast number of immigration cases. Many involve asylum seekers from Fujian Province in China. I would be willing to wager that most of my colleagues have no idea where Fujian Province is or why the large flow of immigrants comes

from there. They will be informed by counsel when, if ever, those facts are thought by counsel to make a difference in a particular case.

I have read dozens of transcripts of asylum hearings where the alien is testifying in translation. I have no deep understanding of how that fact affects the immigration judge's ability to make reliable credibility assessments that affect, often determine, the outcome of the hearing. If the issue becomes material in the course of an appeal, the lawyers will try to explain it to me.

And so I think it is with state secrets, even district court judges who first hear the state secrets question. My knowledge, like theirs, is limited.

So I thought I would use these few minutes to talk, not about my slim judicial experience handling state secrets questions, but about a case that predates my judgeship by more than twenty-five years and that, strictly speaking, was not a state secrets case at all. It may nonetheless contain a message or two for us for this evening.

We are about to mark the fortieth anniversary of the *Pentagon Papers* case.<sup>11</sup> The issue was prior restraint whereas the subject tonight is judicial interaction with state secrets. But it seems to me that there is a striking similarity between the challenges facing Judge Gurfein in deciding forty years ago whether to continue an injunction against the *New York Times's* publication of the Papers and a judge in 2011 deciding whether documents are covered by the state secrets doctrine so as to disallow their use in civil litigation.

I must give a nod at the outset to Professor David Rudenstine of Cardozo Law School, whose 1994 book on the *Pentagon Papers* case, *The Day the Presses Stopped*, is the classic account.<sup>12</sup> He was kind enough recently, and entirely coincidentally, to send me a copy of the once-sealed transcript of the June 21st in camera hearing before the *Pentagon Papers* district court that I will discuss in a moment. Now, I say it was once sealed, but I say that hopefully, because if it is still sealed, Professor Rudenstine and I are in a heap of trouble.

Surely, even these many years afterwards, I need not rehearse for you much about the facts of the legendary case: the leaking to the *Times* and the *Washington Post* by Daniel Ellsberg of all but four volumes of a forty-seven volume Defense Department history of American involvement in Vietnam; the *New York Times's* resolution to publish excerpts despite opposition within and without the paper and warnings that publication might violate the Espionage Act; the government's success in obtaining a temporary restraining order from the Southern District of New York against such publication, but only after three installments had already been published by the *Times*.

Several days later, after the third installment appeared, the district court turned to the issue of whether to preliminarily enjoin the *Times* from their

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11. *N.Y. Times Co. v. United States (Pentagon Papers)*, 403 U.S. 713 (1971).

12. DAVID RUDENSTINE, *THE DAY THE PRESSES STOPPED: A HISTORY OF THE PENTAGON PAPERS CASE* (1996).

further publication of the papers. There was a temporary order in place containing the restriction, but the question was injunction.

The protagonists for present purposes were the U.S. Attorney for the Southern District of New York, Whitney North Seymour, for the government; Yale Law Professor Alexander Bickel for the *Times*; and Judge Murray Gurfein, a moderately conservative New York Republican before whom the request for an injunction had been made. Legend at least has it that this was the first case Judge Gurfein heard upon taking the federal bench and the first appearance of the seasoned and celebrated academic Professor Bickel as an advocate in a federal court anywhere. The substantive portion of the hearings was held behind closed doors for the obvious purpose of protecting any sensitive material that might be perused and discussed during the course of those hearings.

The pivotal question as Judge Gurfein saw it was simple if not easy: would publication of one or more of the Pentagon Papers be likely seriously to harm the national security of the United States?

The government's principal overall position, as I understand it, was that it did not have to answer that question. Once the Executive Branch had by executive order branded documents secret, the documents were secret as a matter of law. They could therefore not be published without, in effect, permission of the Executive Branch, and the courts were obligated to enforce the secrecy by injunction—prior restraint—on publication if necessary.

Incidentally, to prove that there is indeed nothing new under the sun, Judge Gurfein in the early course of trying to elicit explicit testimony as to the harm that might befall the United States from publication, said:

Every day on television I can find out almost the entire order of battle of the United States Army and Marines, isn't that true? "I am here with the First Division at so and so and we are doing this[.]"

Warfare today is different from what it was in the days when there was real security. Everybody and his brother knows what everybody is doing today.<sup>13</sup>

This was 1971. He was referring to television. But if you substitute the word "blogs" for "television," a Southern District judge might have made a similar observation just this morning.

In any event, up until the hearing began, Judge Gurfein seemed to be very much inclined to grant the injunction. All he appeared to be looking for to support its issuance was evidence that further public disclosure would do serious damage to legitimate American security interests. But the government witnesses did not provide any such evidence. Professor Bickel was there to tell the court not that prior restraints were necessarily unconstitutional, but that in light of the First Amendment interests at stake, a strong showing of serious harm to the national interest was required.

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13. Transcript of In Camera Proceedings at 1, *United States v. N.Y. Times Co.*, 328 F. Supp. 324 (S.D.N.Y. 1971) (No. 71 Civ. 2662).

Crucially, no such showing had been made. After several hours of testimony and argument, Judge Gurfein came to agree. He ruled that a further injunction was, under the circumstances, unwarranted.

Just nine days later—nine days after the district court opinion—the Supreme Court of the United States famously agreed, issuing nine separate opinions, three of them dissents.

But oft forgotten is the tenth opinion, a brief per curiam for the majority. It did not state new or bold constitutional doctrine. It did not contain original mellifluous prose. The Court said just this: “Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity,”<sup>14</sup> citing a 1963 case<sup>15</sup> and a 1931 case, *Near v. Minnesota*.<sup>16</sup> The government “thus carries a heavy burden of showing justification for the imposition of such a restraint,”<sup>17</sup> quoting a 1976 opinion.<sup>18</sup>

The Supreme Court concluded: “The District Court for the Southern District of New York in the *New York Times* case . . . held that the Government had not met that burden. We agree.”<sup>19</sup> That was it.

The *Pentagon Papers* case was profoundly important for many reasons. But the holding of the Supreme Court, I think, was simply that the United States did not prove as a fact before the district court that the Papers contained genuine “state secrets” (or whatever they were referred to by the Court at the time), and that therefore no injunction was constitutionally permissible.

I draw from the *Pentagon Papers* experience several possible lessons for the handling of state secrets in federal courts today—at least in civil cases, which of course the *Pentagon Papers* case was.

First, and perhaps most important, it is the constitutionally ordained role of judges, amateurs though we may be, to decide in a variety of circumstances whether executive claims of the need for secrecy to protect national security are justified.

The *Pentagon Papers* is one example. But fast-forward—to use a term from the age of tape recordings—just three years. In July 1974, Chief Justice Burger observed for a unanimous Supreme Court that the Nixon White House tapes were

sought by one official of the Executive Branch within the scope of his express authority; [they were] resisted by the Chief Executive on the ground of its duty to preserve the confidentiality of the communications of

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14. *Pentagon Papers*, 403 U.S. at 714 (per curiam) (quoting *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963) (citing *Near v. Minnesota*, 283 U.S. 697 (1931)).

15. *Bantam Books, Inc.*, 372 U.S. 58.

16. 283 U.S. 697 (1931).

17. *Pentagon Papers*, 403 U.S. at 714 (quoting *Org. for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971)).

18. *Neb. Press Ass’n v. Stuart*, 427 U.S. 539, 558, 592 (1976).

19. *Pentagon Papers*, 403 U.S. at 714.

the President. Whatever the correct answer on the merits, these issues are “of a type which are traditionally justiciable.”<sup>20</sup>

In other words, whether the tapes were required to remain confidential in the interest of national security, the Supreme Court concluded, was a question for the courts, not the Executive Branch of government. The Supreme Court then decided that question in the negative. As a result, the so-called “smoking gun” tape became public and the President was forced from office less than three weeks later.

The second lesson I draw is that smart judges, which Judge Gurfein was, can be pretty good at deciding these issues despite their lack of preexisting expertise. There is broad consensus that under uniquely difficult circumstances, Judge Gurfein got the national security issue right. Publication of the papers did no serious lasting damage to the United States. Erwin Griswold, then Solicitor General, argued the case for the government. He commented eighteen years later, “I have never seen any trace of a threat to the national security from the publication [of the Papers]. Indeed, I have never seen it even suggested that there was such an actual threat.”<sup>21</sup>

Third, perhaps ironically, it seems to me notable that the judiciary is, for reasons that we can discuss at another time, one of the more leak-resistant of government institutions. In that regard it is well qualified to review secrets. It is said that during the *Pentagon Papers* proceedings the Papers themselves were spread out on a table night and day for the entirety of the proceedings in Judge Gurfein’s chambers. There were no extraordinary security procedures taken to safeguard them. And yet it was, after all, Daniel Ellsberg, a government contractor, who provided the Papers to the *New York Times* and the *Washington Post*. It was not Judge Gurfein and it was not his law clerk or another member of his or the court’s staff.

Fourth, and penultimately, it seems to me that making the papers available to Judge Gurfein for his review was absolutely necessary for him to address and answer the question at hand. Since the Supreme Court’s 1953 *Reynolds* opinion, to which you were referred by Professor Capra in his introduction,<sup>22</sup> and as I understand it still to be enforced, such review by the district court in a state secrets context is contingent, not guaranteed.

The *Reynolds* Court declined to “go so far as to say that the [district] court may automatically require a complete disclosure to the judge before the claim of privilege will be accepted in any case.”<sup>23</sup> I think the *Pentagon Papers* experience suggests that in that respect the *Reynolds* Court had it wrong; Third Circuit Judge Maris, his court, and the Supreme Court dissenters had it right. The judicial role can rarely be properly exercised without a judicial review of the allegedly privileged material.

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20. *United States v. Nixon*, 418 U.S. 683, 697 (1974) (citing *United States v. ICC*, 337 U.S. 426, 430 (1949)).

21. Erwin N. Griswold, *Secrets Not Worth Keeping: The Courts and Classified Information*, WASH. POST, Feb. 15, 1989, at A25.

22. *See supra* note 1 and accompanying text.

23. *United States v. Reynolds*, 345 U.S. 1, 10 (1953).

Fifth and last, much was gained in the *Pentagon Papers* proceedings by the preservation of the adversary system in the otherwise closed hearings before the judge. The *Times* was represented and fully participated. It is arguable that the *Pentagon Papers* proceedings, without advocates for both sides present in the court, would have foundered. To be sure, the *Pentagon Papers* proceedings were rather peculiar in this context, because the persons arguing against secrecy already had the secrets; they already had the Pentagon Papers. They were seeking not access but the ability to publish them. I think, though, that *Pentagon Papers* teaches more broadly that we should not be quick to abandon the adversary system in state secrets judicial proceedings. The amateur judge needs it.

Perhaps there are reasons why the lawyer for the non-government party cannot participate—the danger that such participation alone will itself endanger the secrets. But there are presumably other people—non-party lawyers acting as amici, experts with relevant expertise fully cleared for access to the documents in question—who can participate in aid of the court, someone available with sufficient knowledge to question the government's assertions if necessary.

Put it this way. If I was a district court judge and was told that the continued secrecy of a complex drawing was an enormously sensitive state secret, I would very much like to have someone not aligned with the government available to participate in that hearing before me. Not because I doubt the need for the government to keep secrets—of course it sometimes may. And I do not doubt—at least I have not been given any reason to doubt—the good faith of the government in declaring material to contain a state secret.

But my expert in this hypothetical case before me as a district court judge might point out some things that I just would not know—for example, that a version of the diagram in question often appeared in first-year college physics texts, or that the name “Goldberg,” the illustrator's signature beneath the illustration in question, referred not to the late Stanley Goldberg, an expert on nuclear physics, but to the late Rube Goldberg, who I suspect had no such experience.

In any event, I thought I would raise these matters for your consideration.

PROF. CAPRA: Thank you, Judge Sack. Judge Bates.

JUDGE BATES: Perhaps it will be no surprise that my remarks as a district judge will be a little more practically oriented and focused on how to handle a case, which is something that I have some experience with but remain, in Judge Sack's words, an amateur.

It is an understatement to say that the state secrets privilege is the subject of continuing academic and political debate. One area of controversy is the historic origin of the privilege. Is it a common law evidentiary privilege, or has it evolved from constitutional roots? It may be a bit of both. The Supreme Court's seminal decision, referred to by Judge Sack, is the *United*

*States v. Nixon* case<sup>24</sup> on executive privilege, which certainly points in the direction of some constitutional origin for the privilege.<sup>25</sup>

That examination, of course, draws one into separation of powers issues regarding the respective roles of the Executive Branch, the Legislative Branch, and the Judicial Branch in identifying the precise contours of the state secrets privilege and then applying it.

There are always pending efforts in the Congress to promulgate statutes or rules governing the assertion of state secrets privilege. There are today, and there were as far back as the 1970s with the consideration of proposed Federal Rule of Evidence 509, which would have defined and set guidelines for application of the privilege. Those efforts often spring from a congressional assessment that state secrets is an evidentiary privilege of common law origin.

The Executive Branch, of course, tends to stress the constitutional underpinnings of the privilege, deriving from the President's Article II powers, and would generally reserve to itself a greater role in claiming and applying the state secrets privilege.

Another current debate is whether the privilege has been invoked more frequently recently or by one administration as compared to other administrations. Given the post-9/11 efforts by the United States against terrorism and threats of terrorism, it is not surprising that we would see more frequent assertions of state secrets over the past decade. Certainly, settings such as extraordinary rendition or warrantless surveillance, or even the alleged targeted killing of U.S. citizens abroad, have given rise to several recent and controversial assertions of the state secrets privilege.

Today I am going to try to stay clear of such issues and instead focus for a few minutes on equally difficult issues related to adjudicating cases involving state secrets claims. That said, my comments may well touch on the current dispute over whether the state secrets privilege is properly asserted early in a case—often to achieve dismissal of the case—or instead should just be an evidentiary privilege with its consequences for the case determined only after a plaintiff has been allowed to present all non-privileged evidence.

Let me begin with a few preliminary observations. First, this is still largely uncharted territory, and the cases actually resolving state secrets claims remain relatively few. Indeed, the Supreme Court has had very little to say on this subject. The 1953 decision in *United States v. Reynolds*<sup>26</sup> is the only Supreme Court case to fully explore a state secrets claim other than the cases derived from the 1875 decision in *Totten v. United States*,<sup>27</sup> where the very subject matter of the case is a state secret, and those are generally espionage cases involving secret contracts.

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24. 418 U.S. 683 (1974); *see also supra* note 20 and accompanying text.

25. *See Nixon*, 418 U.S. at 705–06.

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

27. 92 U.S. 105 (1875).

That could change soon, if the Supreme Court reaches in any broad way the state secrets privilege issues in the pending *General Dynamics* and *Boeing* cases,<sup>28</sup> or if it grants certiorari, as perhaps at least one of my fellow panel members hopes, in the *Jeppesen Dataplan* case.<sup>29</sup>

Second, the scope of any state secrets privilege is broader in civil cases than in criminal cases. The government will usually not be able to proceed with a criminal prosecution if it is also invoking the state secrets privilege as to relevant evidence or discovery. Moreover, criminal cases these days generally address issues relating to classified information—including any state secrets claim—through the process required under the Classified Information Procedures Act.<sup>30</sup>

Third, the law is fairly clear that courts should avoid reaching state secrets claims whenever possible—*Reynolds* says as much.<sup>31</sup> The privilege should be invoked by the government, then, only where truly necessary. The 2009 Attorney General Policy confirms that the state secrets privilege will only be invoked in limited circumstances where a significant risk to national security is presented and after detailed procedures—including the Attorney General's personal approval—have been followed.<sup>32</sup> And if a court has any other basis for resolving a case without reaching a state secrets claim, it usually should do so.

Well, what if a district court cannot avoid reaching a state secrets claim? What is then the district court's obligation in addressing and resolving this unique privilege claim? Generally, I think all would agree, a robust, careful examination is required in order to make an independent judicial determination that the information or matter at issue is—in fact and under the law—privileged. The court must employ a careful yet skeptical eye, particularly where the government is accused of engaging in unconstitutional misconduct in serious violation of individual rights. That examination entails, it seems to me, close judicial scrutiny at four places.

First, there are certain procedural requirements that must be met. The court must demand compliance by the government with three procedural requirements for invocation of the state secrets privilege that were originally set out in *Reynolds*. There must be a formal claim of privilege by an appropriate agency or department head after personal consideration. To these I would add today that there should be compliance with the Attorney

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28. The Supreme Court did not do so. *See Gen. Dynamics Corp. v. United States*, 131 S. Ct. 1900 (2011) (holding that when a court dismisses an affirmative defense to the government's allegations of breach of contract because of state secrets, the possession of funds and property of the parties ought to be left as it was the day they filed suit).

29. *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070 (9th Cir. 2010) (en banc), *cert. denied*, 131 S. Ct. 2442 (2011).

30. Pub. L. No. 96-456, 94 Stat. 2025 (1980) (codified at 18 U.S.C. app. 3 §§ 1–16 (2006)).

31. *See Reynolds*, 345 U.S. at 10.

32. Memorandum from Eric Holder, Attorney Gen. to the Heads of Exec. Dep'ts and Agencies and Heads of Dep't Components (Sept. 23, 2009), *available at* <http://www.justice.gov/opa/documents/state-secret-privileges.pdf>.

General's Policy. These issues are straightforward, usually resting on clear affidavits, and need no further discussion here.

Second, the district court must ask whether the specific materials or subject matters at issue actually contain or involve the sensitive state secrets information that the government contends. This is the initial phase of the robust judicial role. For cases in which the assertion of state secrets is truly an evidentiary privilege, as in *Reynolds*, this should involve careful ex parte, in camera review of the actual documents at issue. Indeed, the *Reynolds* case illustrates why such careful examination is so important. There, the courts did not review the actual document involved, which was a single report. Many years later, when that document was declassified and released, it became clear that it simply did not contain sensitive state secrets information as the government had claimed.

The standard articulated in *Reynolds*, moreover, included reliance on a "reasonable danger" that the document would reference state secrets.<sup>33</sup> That standard, I think, may be misdirected, since Executive Branch officials can claim no particular superiority over a federal judge when reviewing a document to ascertain whether that document actually contains the type of information it is claimed to contain. This aspect of *Reynolds* has not really been applied much by later courts, although there has not been a subsequent Supreme Court case that has modified it. But where specific documents have been identified, it seems to me that the best course always should include actual judicial review of the documents.

But there are cases in the category recognized by the Ninth Circuit in *Jeppesen Dataplan* and the Fourth Circuit in *El-Masri*, where the *Reynolds* evidentiary privilege and the *Totten* subject matter bar converge and a state secrets privilege assertion may require dismissal because it is apparent either that the case cannot proceed without the privileged evidence or that continuing to litigate presents an unacceptable risk of disclosing state secrets. Then this careful judicial review and assessment may have to be based on affidavits from government officials outlining the types of information the government says cannot be disclosed and why. Judges must be sensitive here to the obligation to perform a careful, probing analysis, even when encountering some resistance from the government, which may wish to limit the detail provided even to the judge. The problems are heightened when the government asserts the state secrets privilege at an early point in the litigation, before discovery has begun or specific sensitive materials are identified and, hence, before the option of examining the underlying documents themselves can even be considered by the district court. Some courts have stressed that it is the rare case where dismissal under *Reynolds* is appropriate at the outset. But many of the present-day settings in which the state secrets privilege is invoked will probably continue to give rise to early state secrets claims by the government. This is a primary point of disagreement regarding the Ninth

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33. *Reynolds*, 345 U.S. at 10.

Circuit's *Jeppesen Dataplan* decision, as you will no doubt hear shortly from the panelist to my left.

Third, the next aspect of the judicial assessment of whether the state secrets privilege has been properly invoked asks whether the information in the documents, or as outlined by the government in its classified affidavits, is sufficiently sensitive to warrant protection—in other words, is it state secrets as claimed? Here, considerable deference to the expertise of the executive branch officials is warranted—particularly in military, intelligence, and foreign affairs arenas. While the judicial role is still important and must include careful assessment, appropriate deference to the experts asserting the state secrets claims must be afforded. They will know much more than the judge can be expected to know or will ever know. But just how much deference could be impacted by the need for the material. And classification of the material is not enough by itself. As the Ninth Circuit acknowledged in *Jeppesen Dataplan*, the Supreme Court has plainly instructed in *Reynolds* that the judicial role “cannot be abdicated to the caprice of executive officers.”<sup>34</sup>

Fourth and finally, if the resolution of all these inquiries supports the government's state secrets privilege claim, the court must decide how the litigation will proceed, if at all. Some cases will simply require the exclusion of discrete pieces of evidence and the case can proceed to trial. But frequently it will be difficult to separate the state secrets information from other non-sensitive information, and occasionally it may be that the case cannot proceed and dismissal will be required. This assessment calls for close examination of both the plaintiff's claims and the defendant's defenses to ascertain whether the case can proceed fairly without the disputed documents, or even without any inquiry into the area properly determined to be subject to the state secrets claim. It is not enough to say that the general subject matter is publicly known. A careful review of the facts needed to support the specific claims and defenses is necessary to determine whether further litigation would unjustifiably risk the disclosure of state secrets, as both the Fourth Circuit in *El-Masri* and the Ninth Circuit in *Jeppesen Dataplan* have noted. For those courts, the case cannot proceed if litigation of the claims or defenses would, in the words of the Ninth Circuit, be “so infused with state secrets that the risk of disclosing them is both apparent and inevitable.”<sup>35</sup> But dismissal without permitting a plaintiff to present non-sensitive evidence in support of its case is an extreme and highly controversial outcome. While the government's assessment certainly should receive some weight here, ultimately once again this demands a careful, independent review by the district judge.

None of this is easy. And of course, the non-governmental party, as has been mentioned, is often handicapped by less than full participation in the process. Neither the precise role of the courts nor the applicable standards are as yet fully developed.

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34. *Jeppesen Dataplan*, 614 F.3d at 1082 (quoting *Reynolds*, 345 U.S. at 9–10).

35. *Id.* at 1089.

State secrets claims often occur at the nub of the tension between protecting national security and preserving individual rights, particularly where serious government misconduct is alleged. Therefore, they tend to be difficult and often controversial.

For now, pending further guidance from higher courts, I would agree with the en banc majority of the Ninth Circuit in *Jeppesen Dataplan* to this extent—that is, that “it is the district court’s role to use its fact-finding and other tools to full advantage before it concludes that the rare step of dismissal is justified.”<sup>36</sup>

PROF. CAPRA: Thank you, Judge. Ben Wizner.

MR. WIZNER: Thanks, Dan. It is a real honor to be included in this illustrious panel—that does include you too, Doug.

Unlike Judge Sack, regrettably, I am an expert on the state secrets privilege. I never intended to be, did not set out to be, and would rather be an expert on the issues that we are trying to litigate in these cases, but, because of Doug and his cronies, we have had to litigate the state secrets question again and again.

I think I will not get into a lot of detail about the cases and will save some time for our panel discussion. I do not agree with everything that was just said. I do agree that I am to your left. I am going to make three broad points that I hope can frame the discussion that we have afterwards, rather than getting into too much detail about the cases.

In February of 2008, I was in federal court in San Jose in the *Jeppesen* case, which was just being discussed, arguing against one of Doug’s colleagues, who was asserting that the case needed to be dismissed at the pleading stage. The basis for that dismissal was an affidavit by former CIA Director Michael Hayden, saying that the allegations of this case were so secret that they could not be confirmed or denied. The affidavit stated that the interrogation techniques that were alleged, relations with other nations—really everything about the case, including stuff that we believed was known to the public—were too secret to be litigated in that court. Well, on exactly the same day across the country testifying before the Senate was Michael Hayden himself, where he was disclosing officially for the first time that the CIA had used the highly secret technique of waterboarding against three detainees in CIA custody.<sup>37</sup> Just two months before that testimony, General Hayden had written in a letter to CIA employees that the CIA had destroyed ninety-two interrogation tapes depicting so-called “enhanced” interrogation techniques because the CIA had determined that those tapes were not relevant to any ongoing congressional or judicial proceeding.

Let me give you one other introductory example along these lines. This comes from the *Al-Aulaqi* case that Professor Capra referred to.<sup>38</sup> This was

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36. *Id.* at 1092–93.

37. *Current and Projected Threats to the National Security: Hearing Before the S. Select Comm. on Intelligence*, 110th Cong. 71–72 (2008) (statement of Michael Hayden, Director, CIA).

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

a case that was attempting to set some limits on the authority of the Executive Branch to use lethal force against a U.S. citizen away from a battlefield and without due process. Now, how did we know that Anwar Al-Aulaqi was being targeted with lethal force? Well, we knew that because the Executive Branch, in an apparently coordinated media strategy, had decided to advise the nation's leading newspapers that Al-Aulaqi's death had been approved by the National Security Council and by the President. Why did they do that? Why did they leak that information? Well, who knows? Was it to demonstrate how tough they were after the failed Christmas Day attack over Detroit? Was it to promote some other political reason? Was there a national security reason? We do not know. But following that disclosure, we attempted to litigate the implications of that information, and the government turned around and said, "This cannot be litigated." In affidavits from the Secretary of Defense, they said: "[D]isclosure of whether or not lethal force has been authorized to combat a terrorist organization overseas, and, if so, the specific targets of such action . . . [would provide the nation's enemies with] critical information needed to evade hostile action"<sup>39</sup>—precisely the information that the Executive Branch had just, in a coordinated way, provided to leading newspapers.<sup>40</sup>

These really glaring juxtapositions between public disclosure in one forum and claims of secrecy in another forum in my view typify the government's much more malleable and expedient approach to secrecy and accountability than they would like us to believe. All too often, if information is needed to hold government officials accountable in a civil case, or if it might even be relevant to a criminal investigation of government officials, it is withheld, or in some cases even destroyed. If, however, that same information or evidence might be useful politically to the Executive Branch, or might have to be disclosed in order to pave the way for prosecutions, or even executions, of terrorism suspects, then the same evidence can be revealed and will be revealed without any harm to national security.

I think this is an important frame for the discussion because so much of the debate about the state secrets privilege revolves around the notion of "judicial competence"—about whether judges have the institutional expertise to protect national security and to determine the import of allegedly secret evidence. I think this is really the wrong answer to the wrong question. The wrong *answer* because I would stack the record of the federal judiciary on national security questions against the record of the CIA any day of the week, and I think the judges would come out on top. Every single day in Washington, there is a crime wave of leaks of classified information to newspapers, and none of it comes from judges; it comes from Executive Branch officials, and it comes from Congress. I think it is

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39. Opposition to Plaintiff's Motion for Preliminary Injunction and Memorandum in Support of Defendants' Motion to Dismiss at 50, *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1 (2010) (No. 10-cv-1469), 2010 WL 3863135.

40. See, e.g., Dana Priest, *U.S. Playing a Key Role in Yemen Attacks*, WASH. POST, Jan. 27, 2010, at A1.

the wrong *question* because what gets ignored in all of this discussion about who is more competent to make these determinations is what is a far more serious question, and that is the question of the structural conflict of interest when you have the Executive Branch—which is itself being accused of wrongdoing, and in some of our cases criminality—submitting affidavits demanding dismissal of cases on national security grounds. Under this doctrine—and it is the existing doctrine—a torture victim can be denied his day in court on the basis of an affidavit submitted by the architect of his abuse and torture.

What I am going to say next sometimes raises eyebrows, but maybe it does not anymore. That is that every single case since 9/11 that has sought to hold U.S. officials accountable for torture, every single one of those cases, has been dismissed at the pleading stage without any adjudication of either the facts or the law. These courts are not saying that the alleged conduct is lawful. These courts are not saying that the allegations in the complaint are not credible. Neither of those questions is being considered. Instead, because of a threshold issue—all too often an invocation of the state secrets privilege—the cases are being dismissed without any resolution of those issues at all. This, of course, is a tragedy for the victims but, I think, also a problem for our system in that we are deprived of having a final resolution by the branch of government that is most suited to make that.

Now why am I raising this point? This is really, I think, the second broad point that I want to make today. This is another canard that you often hear in the state secrets discussion. Maybe I should not call it a canard because maybe Doug is about to make this point. But it is certainly a trope of this debate. That is that, regrettably, we are so sorry this is the case, but there are times when the interest of individual litigants must be subordinated to the greater good, the greater public interest, and the national security. Well that formula might hold true in a standard tort case like *Reynolds* where there is no allegation of illegal government conduct. But I would submit that it is quite different in a torture case. There is a significant *public* interest in ensuring that executive actions comply with the law, with our Constitution. There is a significant *public* interest in preserving the role of an active judiciary as an arbiter of whether other branches have complied with the law. So you do not have a scenario where the public interest sits on one side and the private interests sit on the other. I would say that, at best, there are public interests on both sides of the equation, and that in the cases that I am discussing now the public interest is overwhelmingly on the side of the plaintiffs.

That brings me to the third point here. If I have not made this clear enough, I believe that the government often invokes the state secrets privilege not to protect national security, but to protect government officials from legal accountability. But even if we were to accept that the purported secrets at the heart of these cases are indeed legitimate secrets and should be withheld, why does it follow that the burden of the state secrets privilege should fall wholly on the plaintiff, on the victim? In a torture case, why

should the alleged perpetrator of torture be permitted, number one, to block disclosure of evidence and, number two, to pay nothing to the victim and to walk away? This is really a perverse incentive, where there is no cost whatsoever to the government in invoking the privilege and every reason to do so. Why not have a rule that in cases in which the government or its agent is a party and plaintiffs have raised serious allegations of grave executive misconduct—such as the kidnapping and torture claims that are at the heart of some of our cases—why not compel the government to bear some of the cost of its invocation of the state secrets privilege?

Now, the argument that you might hear in response to this proposal is that we have to prevent the graymailing of the government. If a plaintiff could recover against the CIA simply by suing and alleging torture and expecting that there would be a state secrets invocation and get money, why wouldn't everybody do that? But I actually think that that is a fear that is overblown and one that could be addressed. You could set up some kind of framework, along the lines of Title VII, where the plaintiff is required to make some kind of prima facie showing before shifting the burden to the government. But the system as it exists right now allows the government to engage in torture, to declare it a state secret, and, by virtue of that designation alone, to avoid any judicial accountability for conduct that even the government purports to assert is illegal in all circumstances.

Whatever you think of the state secrets privilege, the government should not have a privilege to violate our most fundamental rights and get away with it.

PROF. CAPRA: Thanks, Ben. Doug Letter.

MR. LETTER: Thank you. I will start out by saying what I am required to at all of these types of appearances. I am appearing here in my individual capacity. I am not speaking here as a representative of the United States or the Department of Justice. Everybody I hope took that note down.

A couple of things that I just need to start out with. First of all, this is going to be an interesting experiment that you are all participating in. Normally when I appear before Judge Bates and Judge Sack, by now they would have interrupted me and asked piercing sorts of questions. They might listen to the answers; they might not.

JUDGE SACK: Would you like us to provide a little reality for you?

MR. LETTER: And by the way, I do have to note Judge Sack was on a panel that ruled against me earlier this week.

Professor Capra said he was in the class ahead of me in law school but we had not met before. What he did not say is I actually knew of him. There is a shrine at Berkeley to one of the top students who ever graced the halls.

PROF. CAPRA: Thanks, Doug.

MR. LETTER: I used to worship in front of that.

Switching to a serious note for a moment, I have litigated a number of cases against Ben. He is one of the most superb advocates in the United States today for the clients that he represents. I hope that at least the law

students here can use him as a model of somebody to emulate, because it is truly an honor for me to litigate against him.

I have one overall point to make in response to the three presentations here, which is the Attorney General and the Justice Department welcome the full participation, skepticism, et cetera, of the Article III judiciary in the state secrets arena. We believe that it is an absolutely essential part of this mechanism—absolutely essential. The independent Article III judiciary is, as you all know, one of the key bulwarks of our democracy, and we very firmly believe that it has an essential role to play in the state secrets realm.

As Judge Bates knows from personal experience and I know from the various cases that I have litigated, unlike in the time of *Reynolds*—I am fairly sure I could say this accurately—in every state secrets case I have been involved in, and that is quite a few, we have presented to the independent Article III judge or judges a massive amount of material. We do not do this pursuant to some sort of court order; we do not do it grudgingly, trying to hide things, et cetera. We do this because we consider that it is a key part of this process. I think many of you would be astonished at the depth of material that we often provide to the judiciary.

And by the way, just so you know, Department of Justice Regulations provide that Article III judges do not need any security clearance. If the material is relevant for the case so the judge has a need to know, we provide it automatically—and I am talking about material that is extremely highly classified. For instance, in the *Jeppesen* case, no law clerks were cleared, no court personnel were cleared. The judges were. And this is material that, because it was so highly classified, had to be handled by couriers, et cetera, who provided it to the judges for their use and their use alone.

I fear that much of the public—and I fear actually much of the judiciary and much of the bar—has an enormous misconception about how this system works. There seems to be this notion that the government walks into court and says, “State secrets, case over,” and everybody just says, “Oh gosh, we are done.” It does not work that way at all. We provide, as I said, an immense amount of detail—very, very lengthy declarations.

Now obviously, from Ben’s perspective, he sees the allegations in the complaint that he has either written or colleagues of his have done, and often that is all that he sees. This is regrettable, clearly.

MR. WIZNER: I agree.

MR. LETTER: And clearly it is regrettable, and clearly this should not be the norm, this should be the extremely rare case—and it is. The number of state secrets cases that we have is tiny. We do this only when it is absolutely necessary. Otherwise, the Attorney General fully and firmly believes in an adversarial system. So you have to keep this all in perspective, what a small number of cases this is and how far we go in trying to educate the judiciary.

Another point that I want to make clear—as Ben well knows, when he and I argued the *Jeppesen* cases in the Ninth Circuit en banc—at a certain point the judges went into a secure area and I alone went with them. Ben was not allowed to participate in that because it was about an hour-long

discussion of the actual material. The judges were pressing me for about an hour about the specific material. This is not something where we just say, as I said before, “State secrets, judge, make the case go away.” That is not the way it works. The judges probe.

Ben mentioned the appearance he made in San Jose before Judge Ware. Our view was that Judge Ware was extremely skeptical of our claims. We had the impression that he was: “Whoa! You are asking me to do what? You are asking me to dismiss this case at the outset given these allegations?” We did not threaten Judge Ware. We did not bribe him. We presented him with a massive amount of material and he was convinced, as were the majority of judges on the Ninth Circuit, as were the judges in cases like *El-Masri*, *Al-Haramain*,<sup>41</sup> *Edmonds*, et cetera.

Now, one thing I do want to pick up on: as was mentioned here, Judge Bates ruled on the *Al-Aulaqi* case.<sup>42</sup> In *Al-Aulaqi* the government did assert the state secrets privilege. However, as Judge Bates indicated, right there in Attorney General Holder’s Policy is that the privilege will be asserted “only [when] necessary.”<sup>43</sup> The government there made a series of arguments why the case was not justiciable, wholly aside from the state secrets privilege. However, we had one motion to dismiss. We had only one shot at this. So we also asserted the privilege. We said very clearly to Judge Bates that we strongly urged him not to reach the state secrets issue unless he had to, meaning unless he denied our arguments on the other justiciability grounds.

Judge Bates—in our view very correctly—ruled in a lengthy opinion that the case was non-justiciable for various reasons, and he therefore declined to even get into the state secrets privilege. In our view, this is exactly right.

Again, we are not trying to come in and shut down cases on the state secrets privilege if it is not necessary, if there are other ways that the case can be resolved without causing problems for national security. This is why Judge Sack gave an extremely interesting recounting of the *Pentagon Papers* case. The cases that I have litigated—the state secrets cases—are so precisely different because, as I pointed out, in all of them we have made presentations to the judges and the judges themselves have said—unlike in the *Pentagon Papers* case, where they said, “Why can’t this be published?”—in every one of the cases I have litigated, the judges have said, “You are right. You have convinced me. This is regrettable.”

I strongly urge you to read Judge Fisher’s majority opinion for the en banc Ninth Circuit in *Jeppesen*.

MR. WIZNER: Should they read the dissent too?

MR. LETTER: Yes, you should also read the dissent. It is very clear that Judge Fisher, who was Associate Attorney General in the Clinton Administration before being named to the Ninth Circuit, is extremely uncomfortable with dismissing that case. And yet it is also clear—and he

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

42. 727 F. Supp. 2d 1.

43. Memorandum, *supra* note 32, at 1.

says this a number of times: “We pored over this material, we were skeptical, we looked at it in great depth, and this is how we came out.”

Now Ben made a very interesting suggestion about if the government claims privilege in a torture case that something should shift or maybe some money should be paid. That would be awful public policy. You definitely do not want that. Remember that the officials who work for the President that you have elected—this is a democratic system, if you do not like what the President has done with the state secrets privilege, you vote him out of office—the President has appointed officials who you expect to protect national security. You do not want the head of the CIA or the head of the FBI or the Secretary of State—let us take the Secretary of State as an example—to say to herself: “I ought to assert the state secrets privilege. I should, national security demands it, but it will cost us a lot of money under Ben’s proposal. The budget is extremely tight. I am not going to do it.” You do not want the Secretary of State making that kind of balance. What you want the Secretary of State doing is saying: “The privilege is demanded here to protect national security, and my lawyers will prove that to independent Article III judges.” If that happens, why do you want your government to pay money?

Now—and this is where Judge Fisher’s opinion is terrific—one of the things, if you look at it you will see, and something that, as Ben knows—he actually asked me twice about it during the oral argument—are there other remedies? And as Judge Fisher points out, yes, there are. If Congress wishes to pay money through an appropriation, Congress can do that. So if Congress wishes to override the executive and the judiciary and say, “Nevertheless, we want to pay money,” Congress can do that. So this is just a question of—as Judge Fisher made clear—one remedy that is being removed, not all.

Judge Sack made an extremely interesting suggestion: could you have a neutral lawyer in there? This is something that is written about quite a bit and is discussed in considerable length in the academic debate on this. I am not sure if Judge Sack is aware; a British trial judge actually tried this in a case where the British government asserted privilege.<sup>44</sup> The trial judge said, “I am going to have a public advocate in who will be cleared.” In the British system, with barristers, it is easy, because a barrister may one day represent the government and the next day represent clients like Ben, so they play both sides of the street constantly. The trial judge said, “That is what I am going to do.” The British court of appeals overruled him, said he could not do that because—and obviously one can debate if this is the correct result or not—they said, “We will not allow secret litigation.”<sup>45</sup> Remember, the state secrets privilege removes the evidence from the case. If that means the case has to be dismissed, it is dismissed. But the British appellate court decided, “We do not want the case to proceed, to be litigated

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44. See *Al Rawi v. Sec. Serv.*, [2009] EWHC (QB) 2959, [4], [91]–[96] (Eng.), *rev’d*, [2010] EWCA (Civ) 482 (Eng.), *aff’d*, [2011] UKSC 34.

45. See *Al Rawi v. Sec. Serv.*, [2010] EWCA (Civ) 482, [11], [30] (Eng.), *aff’d*, [2011] UKSC 34.

in secret.” Again, you can debate whether that is the correct result or not, but I thought I would raise that because this very idea has been tried in Britain.

The one last point I want to make, because I really do want to get to the questions and the debate, is—I feel sort of rude doing this, but I have to, despite the fact that I am in the home of the Second Circuit and Judge Sack is here. One of the things that Professor Capra asked me to talk about is: is the Attorney General’s new policy working? It is very well—except the Second Circuit has caused a serious problem.

The Second Circuit in a case called *Aref*<sup>46</sup> has ruled that the state secrets privilege applies in criminal cases. We think that this is a very broad mistake, and we have told the Second Circuit this. When the opinion came down, we could not seek rehearing because we actually won; the criminal conviction was affirmed. But we filed a motion saying to the Second Circuit judges, “We believe you are incorrect and you ought to change this part of the opinion.”<sup>47</sup> The Second Circuit has held that the state secrets privilege applies in criminal cases under CIPA, the Classified Information Procedure Act. We have argued that cannot be correct because the Supreme Court said in *Reynolds* the state secrets privilege is absolute. That means there is no balancing. It does not matter if the other side said, “But I really, really need this information.” In that sense it is like the attorney-client privilege. You cannot say, “Well, this is a murder prosecution so we are going to call the attorney to the stand. This is really important.” You cannot do that. State secrets privilege—you cannot do that.

What the Second Circuit held in *Aref* is the state secrets privilege applies in a criminal case, but, they said, pursuant to the *Roviaro*<sup>48</sup> standard, which means you do a balancing.<sup>49</sup> In our view this does not make sense. This has caused actually very serious problems for the government, because we have a lot of criminal cases involving classified information—not state secrets information necessarily, classified information—and yet the Second Circuit has forced very high-level government officials to go through this procedure, which we think is incorrect. No other court is doing this.

JUDGE SACK: Would you like to name at least one Second Circuit judge who was not on the panel?

MR. LETTER: Judge Sack was not on the panel.

PROF. CAPRA: Judge Bates.

JUDGE BATES: In order to ensure a robust independent judicial role and review, I have always found it helpful to have law clerks cleared. I always have law clerks cleared for every level of matter, no matter how sensitive. I think that is something that judges need to keep in mind as well as the Department of Justice.

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46. *United States v. Aref*, 533 F.3d 72 (2d Cir. 2008).

47. See generally Memorandum of the U.S. in Support of Its Motion to Amend the Court’s July 2, 2008 Opinion, *Aref*, 533 F.3d 72 (No. 07-0981).

48. *Roviaro v. United States*, 353 U.S. 53 (1957).

49. *Aref*, 533 F.3d at 79–80.

MR. LETTER: Right, and we do often.

PROF. CAPRA: But if you can clear a law clerk, why can't you clear Ben? Why can't Ben be in that? I want to clear Ben. Judge Sack's point is that the adversarial argument in front of the judge in camera is important. So wouldn't you want to clear somebody who could be cleared, provided security clearance, who was arguing for the plaintiff in that case?

MR. WIZNER: If I had a former CIA general counsel on my team.

MR. LETTER: Right, and that is obviously the best argument, as Ben knows. A couple of problems with it. And by the way, I am going to be really stupid here for a minute and attack the entire federal judiciary. First, we have had, most sadly, leaks of classified information by judges. In fact, in one very difficult case we had to get the court of appeals to mandamus the judge to pull back the classified material. And we have litigators who have leaked information, unfortunately—I hope inadvertently—but it happens a lot.

JUDGE BATES: But it has never happened that anyone in the Department of Justice has leaked anything?

MR. LETTER: Never. But what Judge Bates said, I think, in part, makes my point. You want to keep as few as possible people who are cleared, because otherwise you increase the likelihood of problems. In addition, Professor Capra, an excellent question as some of the courts have noted. There is a very serious issue here if someone like Ben—or even worse, a criminal defense attorney, which happens plenty—is cleared, how do they deal with their client? The problems, I think, are immense.

PROF. CAPRA: Judge Sack?

JUDGE SACK: I want to say something that both Judge Bates and I mentioned before in terms of the dynamics of this sort of proceeding. I am a judge. Assume I have before me something that the government says must be kept secret. Assume it made the decision in good faith, has dotted the i's and crossed the t's, including getting the real signature of the Attorney General and not just a rubber-stamp facsimile.

MR. LETTER: No, no, the actual signature always.

JUDGE SACK: Assume all that. Then I get all this stuff, and I am the judge, and I am reading this, and I am thinking: "Well, all of these people have said that public disclosure would be a disaster, the whole nation is going to fall apart. As a judge, how do I know? Maybe I am giving away the secret of cold fusion to the Taliban. I do not want to be the one who did that! There is enormous pressure—inherent pressure—on the judge not to disclose what he or she is sternly warned must, in the national interest, be maintained in confidence. The government says, "We are the experts, and disclosure would be a terrible thing." It is very, very difficult for a judge to say, "Well, I will allow it to become public anyhow."

I am not saying the government is not always right. It may be. I am saying that if the judge is going to be wrong, he or she will almost always err on the government's side. That is precisely the reason—not the only reason, but one of the reasons—that I am concerned about the description that you give of government counsel disappearing into a "secure area" with

the entire en banc Ninth Circuit without anybody there with them to take the other side of the case. One of our problems is that we are under an inherent pressure to do what you tell us is so important for us to do.

MR. WIZNER: I just want to respond to a few points that Doug made. One gets the sense when listening to the government lawyers who in good faith invoke state secrets privilege that if only we knew what they knew, this would be very clear, and that we are all operating under this collective misconception about what is really at stake.

I would just point out that that en banc Ninth Circuit comprised of eleven judges divided six to five. Six agreed with Doug; five agreed with me. Now, those five also saw the documents and believed that—at least at this stage of the litigation—it was premature to make the determination that the case had to be thrown out. So it is not as cut and dried.

I was a little surprised by your response to my suggestion about burden sharing, and I think it actually takes a dim view of public officials. I could not imagine a Secretary of State, or any other Cabinet official, being lackadaisical about national security to save a little money that might go to a victim of government abuse.

MR. LETTER: I did not mean that.

MR. WIZNER: Well, I think so. You do not want a rule that might give any incentive to a government official to do anything other than take the most expansive view of state secrets. But I would say that you have to look at the other side of these issues. Assume, as you should, that a victim in this case—call him El-Masri—was an innocent citizen strolling down the street and in a case of mistaken identity was snatched up, chained to the floor of a plane, flown to a country he had never been to, held in a dungeon for five months, tortured, and dropped on a hilltop. The question is, should the government, even if there are legitimate secrets at play, be able to invoke an evidentiary privilege and then give this person nothing? Is there not another way?

I am saying protect the secret. If it is a real secret, protect the secret. But why do you also have to give this person nothing? I do not think it is an awful idea.

MR. LETTER: But, Ben, that is a public policy decision to be made by Congress, not judges.

MR. WIZNER: What if Congress has already made it by legislating a statute called the Alien Tort Statute,<sup>50</sup> that makes enforceable in federal court serious human rights violations? It is not as if Congress has not acted here. This was the very interesting question we had in the Ninth Circuit. Judge Fisher and others said, “Why don’t you go to Congress and get a private bill?” My colleague Jameel Jaffer, who was sitting next to me, whispered and said, “How about a public bill?” And there are public bills. There is the Torture Victim Protection Act.<sup>51</sup> There is the Alien Tort Statute. It is not as if this stuff does not exist.

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50. 28 U.S.C. § 1350 (2006).

51. Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350 note).

MR. LETTER: But, Ben, you are twisting it. You know neither of those statutes says, “Mr. El-Masri was done wrong and deserves money.” You are raising a broad point. As we know, if Congress wants to pay Mr. El-Masri money, it is free to do that.

MR. WIZNER: Okay, fair enough. Two more very short points in response. There is an interesting point that you make about how secret litigation is disfavored. But it seems like your proposed remedy for that is no litigation. No one here, at least on my side, is advocating secret litigation. We prefer it to no litigation if it means no remedy for the victims. This is something that Judge Sack’s colleague, Judge Jacobs, wrote in the *Arar* case,<sup>52</sup> another case on behalf of a torture victim, where Judge Jacobs said because some of these proceedings might have to happen in secret and because secret proceedings are disfavored, better for us just to not recognize a cause of action at all; it will make the judiciary look better. It is an extraordinary argument. I also share a suspicion of secret proceedings, but I think in cases like this, where the choice is some kind of closed proceeding with security clearances or nothing for a victim, I would choose secret proceedings.

I would also say, just finally, that the government has itself to blame for some of its credibility problems on these issues. I was sitting in a military commission court in Guantanamo during proceedings in the *Hamdan* trial.<sup>53</sup> Hamdan, remember, was Osama bin Laden’s driver. Hamdan’s lawyer said, “Look, there are people here in Guantanamo in a prison cell who could tell the court and the jury what Hamdan’s role was. You have the 9/11 plotters who are sitting over there. Why not give them written questions and let them answer what was Hamdan’s role, was he a bigwig or was he a small guy in al Qaeda?”

The government lawyer said, “This is the highest-level top-secret information in the government. We are talking about planes flying into buildings.” This is what was said in the court. “If you give any access to these people, it is going to be on you, judge.”

The Navy captain who was presiding said: “No. I think I will give the access. I will let them write questions to these people. I will look at the answers and I will provide them.” The government did not even appeal. And you wonder why people are skeptical of the kind of rhetoric the government uses.

MR. LETTER: Come on, Ben. Things are much more complicated than they seem on the surface often.

MR. WIZNER: On that?

JUDGE BATES: Just a couple of comments and I will pick on Doug some more, but not exclusively. I think Congress’s role should be not in the public bill approach but in setting some broader guidelines with respect to state secrets. There is room for legislation here. There is room for some

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52. *Arar v. Ashcroft*, 585 F.3d 559 (2d Cir. 2009) (en banc).

53. For the Supreme Court decision relating to these proceedings, see *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

tinkering with the doctrine as it exists, as developed by the courts. And certainly, it is not for the judges to do all of this.

Now, with respect to whether a lawyer like Ben could be cleared, I think if you look at the Guantanamo cases, you do have a model for that to some extent, where there is a problem in terms of communications with clients—and there it is a particularly difficult problem because the clients are down at Guantanamo and under very tight security and access is limited. But there are circumstances where the lawyers are cleared into certain information that cannot be shared with the clients, and that same approach could exist in cases beyond those habeas corpus proceedings dealing with Guantanamo detainees.

Secret proceedings do not seem to me to be something that anyone should advocate for. The less of that, the better. But it is happening a lot. It did not only happen in *Jeppesen Dataplan*. It may have happened in *El-Masri*. I do not know.

MR. WIZNER: Yes.

JUDGE BATES: In virtually every Guantanamo habeas corpus case, there is some secret proceeding—usually involving the lawyers for the detainee, however, but secret from the public—that takes place both at the district court, because of the classified information and the level of the classified information involved—even secret information would not be public, obviously, but often it is a much higher level that is involved—and then at the court of appeals. In the D.C. Circuit there is often a two-stage proceeding, with a public argument and then everyone is excused from the courtroom and there is an additional argument that takes place. But again, there are lawyers for both sides at the proceeding. Whether that is a good idea in terms of even that degree of secrecy or not, I am not really going to opine on. But it certainly is something that is happening a lot.

PROF. CAPRA: Judge Sack, who would like a rebuttal of a particular point.

JUDGE SACK: No. What I want to do is toot my own horn.

PROF. CAPRA. Okay, fair enough—to toot his own horn on a particular point.

JUDGE SACK: In response to this opinion of Chief Judge Jacobs to which you made mention, I said, amongst many other things:

[T]he majority professes concern about “[t]he Court’s reliance on information that cannot be introduced into the public record,” which the Court says “is likely to be a common feature of any *Bivens* actions arising in the context of alleged extraordinary rendition.” The majority thinks that this concern “should provoke hesitation, given the strong preference in the Anglo-American legal tradition for open court proceedings.”

We applaud the majority’s recognition of the fundamental importance of the principle that courts are *presumed* to be open. It respects this Circuit’s history of meticulously guarding constitutional protection for “access to the courts” in the sense of the ability of a citizen to see and hear, and in that way to participate in, the workings of the justice system.

But it follows not at all, we think, from the presumption of openness however gauged that the open nature of the federal courts is properly weighed as a factor in the *Bivens* analysis. . . . We regularly hear, on the basis of partially or totally sealed records, not only cases implicating national security or diplomatic concerns, but those involving criminal defendants' cooperation with prosecutors, other criminal matters, probation department reports, upon which federal criminal sentences are to a significant extent typically based, child welfare, trade secrets, and any manner of other criminal and civil matters. Hardly a week goes by in our collective experience in which some document or fact is not considered by a panel of this Court out of the public eye.

We accommodate the public interest in proceedings before federal courts by rigorously adhering to the presumption of openness, but the presumption is often overcome. The majority's notion that because the presumption is likely to be overcome in a particular species of case we should therefore foreclose a remedy or otherwise limit our jurisdiction in order to accommodate the public suspicion of secrecy, is misconceived. Denying relief to an entire class of persons with presumably legitimate claims in part because some of their number may lose in proceedings that are held in secret or because secrets may cause some such claims to fail, makes little sense to us. It could work endless mischief were courts to turn their backs on such cases, their litigants, and the litigants' asserted rights.

We are not aware of any other area of our jurisprudence where the ability to overcome the presumption of openness has been relied upon to deny a remedy to a litigant.<sup>54</sup>

PROF. CAPRA: We are running late, but I promised to open it up to a couple of questions.

QUESTION: It seems in everyone's interest to have these issues litigated. Isn't there a way to either have a set of stipulated facts or have a framed issue hearing, or say, "Look, we are not going to say that this person was waterboarded, but we will admit that someone has been waterboarded and we want to know whether waterboarding is unconstitutional or not?" It seems to be in everyone's interest, including the government, to get those questions answered. You two seem incredibly bright, even though you are each obviously on opposite sides of this. But it seems like the two of you could come up with a way to get these issues litigated.

JUDGE BATES: What you are expressing to some extent sounds like a congressional hearing. That is a way to publicly, if you will, explore that kind of an issue.

QUESTION: But I am saying there needs to be a holding by a judge. The problem with a congressional hearing is you do not know if it is unconstitutional or not, and Ben is saying, "I need to know because my client either was deprived of his constitutional rights or not."

MR. LETTER: First of all, you are right, government attorneys have a responsibility to the public. I always, always serve the public interest as

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54. *Arar*, 585 F.3d at 609–10 (Sack, J., dissenting) (citations omitted).

determined by the Congress of the United States and the President of the United States, who are popularly elected. I am never freelancing, I am never hiding things to hide them, et cetera. Never, not once.

Second, where I started, remember: we do not come in and say, “State secrets, shut down the case.” We go to an independent Article III judge and we say, “We do not think this particular case can be litigated and here is why.” We somehow, crazy as it is, convince skeptical Article III independent judges—liberals, conservatives, all different stripes—that actually the case cannot be litigated.

All I can do is say there is your answer. All of these Article III judges, who are totally independent of the President, have agreed with us. Where we have said the case cannot be litigated, the majority in each panel has agreed.

PROF. CAPRA: I guess my experience is—I am a Special Master in a matter, so I will read a plaintiff’s brief on whatever motion. I will say, “Oh my God, how could I not rule in favor of the plaintiff?” Then I read the defendant’s brief and I say, “Oh my God, how could I not rule in favor of the defendant?”

I am sure you make excellent submissions. I guess the concern that has been expressed tonight is they are excellent, but the issue is, is there some way we can get the adversarial process in it? Maybe not. That is the question for tonight.

QUESTION: Would you support legislation that codifies what the Justice Department already apparently does, providing plentiful discovery to judges in camera where *Reynolds* does not actually require it? If that is good practice, should that be written into law so that we can have confidence that that is happening?

PROF. CAPRA: That is a good question. Anybody want to talk?

MR. LETTER: The Attorney General’s Policy so provides. The Justice Department has not at this point, I believe, commented one way or the other on proposed legislation. The Attorney General said, “We are doing it,” and it is Justice Department policy, and we always do it. Frankly, we always did it before, also. But as I say, the Justice Department has not taken a position.

MR. WIZNER: Well, they have actually. The House and Senate held hearings on state secrets legislation, asked for the Administration to send a witness to testify, and the Administration did not.

MR. LETTER: Right. But they did not take a position.

MR. WIZNER: There is a way in which you can say that is not taking a position and there is another, more accurate way in which you can say that that is killing a bill. So, yeah, they are not going to support it. In fact, the Attorney General’s new guidelines, which are laudable as far as they go, were really intended to take the wind out of the sails of the legislative momentum. Of course the Executive Branch would rather have voluntary self-policing guidelines instead of having Congress step in and say, “In every case the court has to look beyond the affidavit.”

JUDGE SACK: Please read the last part of the guidelines.

MR. WIZNER: “This policy statement is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity, by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.”<sup>55</sup>

PROF. CAPRA: So the question that is being discussed here is: is it actionable or not? That is a common point. Doug is right about that.

MR. WIZNER: But you are quite right, that legislation is necessary. It would be useful. The government would still win most of these cases, as Judge Sack pointed out, but it would prevent at least the fraud cases, and it would require the government to go through the exercise of presenting evidence and not just affidavits to judges in these cases, and I think that would be very helpful.

QUESTION: This is a question I have for the judges on the panel. Isn't it your responsibility in every case, in order to prevent the government from making wrongful claims of privilege, to examine the documents for which state secrets privilege is asserted? In other words, why would it ever be right for you to simply rely on a statement of a government official without making sure the documents justify the statement?

JUDGE SACK: I have an easy answer: it beats the hell out of me. It isn't right for us simply to rely on the statement of a government official. I do think the documents should be available to the court, they should be examined in every case, and I think that *Reynolds* is wrong in not saying that.

JUDGE BATES: I certainly agree that *Reynolds* was wrong in not saying that in the way it played out. The difficult case, and the one that these gentlemen are dealing with in many settings, is the case where the privilege is asserted early on; there are no specific documents that have been identified, the documents may in fact be hundreds of documents that deal with extraordinary rendition, or the military and political decision-making that went into deciding to target a U.S. citizen overseas, if that happened, with a drone attack. There are lots and lots of documents and information that could be gleaned from the officials involved through depositions.

So it is not always as simple as saying, “Yes, the judge should look at the documents.” It may be that, when the privilege is asserted early on, that is a very difficult thing to accomplish, and the government will fight very hard to say: “You cannot do that and you do not need to do that, because here is why, based on affidavits from the head of the CIA, the Director of National Intelligence, et cetera. All this information we can summarize for you and it is the sound basis for state secrets.” That is where it is a hard decision. If there are specific documents identified, I do not think it is a hard decision at all. The judge should look at the documents.

PROF. CAPRA: This was fun. Thank you very much for coming.

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55. Memorandum, *supra* note 32, at 4.