KEEP IT SECRET, KEEP IT SAFE: AN EMPIRICAL ANALYSIS OF THE STATE SECRETS DOCTRINE

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The state secrets doctrine provides both an evidentiary privilege and a categorical bar against litigation that implicates national security concerns. The U.S. government has invoked the state secrets doctrine to insulate certain programs, including rendition and surveillance operations, from oversight by the courts. Despite a surge of interest in the state secrets doctrine after September 11, 2001, few scholars have used statistical analysis to evaluate courts' treatment of the issue. This Note employs a dataset containing over 300 state secrets cases—larger and more complete than in any previous statistical study—to explore state secrets jurisprudence. I find that the state secrets doctrine has been asserted much more frequently after September 11 than it was before. However, in cases to which the government is a party, courts tend to uphold and deny those assertions at roughly the same rate. In litigation between private parties, courts have mostly avoided ruling on state secrets issues since September 11, a dramatic change from the pre-September 11 era. I also identify and analyze two other important trends: First, courts appear to be more skeptical of state secrets claims in Fourth Amendment cases than in most other types of cases. Second, criminal defendants have particular difficulty in overcoming state secrets privilege claims, especially after September 11. Through case analysis, I conclude that the data alone reveal no obvious abuse of the state secrets doctrine by either the executive or the judiciary. Nonetheless, the frequency with which courts uphold the government's invocation of the state secrets privilege, and the circumstances under which they do so, suggest that the state secrets doctrine often conflicts with some of our most fundamental democratic principles.

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INTRODUCTION

Binyam Mohamed, an Ethiopian citizen and legal resident of the United Kingdom, was arrested in a Karachi airport in Pakistan in 2002.[1] Though originally arrested on immigration charges,[2] Mohamed was detained based on suspicions that he had trained and fought with al Qaeda or the Taliban.[3] He was transported, on planes allegedly operated by the CIA through a private contractor, to detention facilities in Morocco and Afghanistan.[4] There, he says, he was viciously tortured. He was beaten so severely that he suffered broken bones.[5] He was cut all over his body, including on his genitals, with a scalpel.[6] Hot, stinging liquid was poured into his wounds.[7] Then he was transferred to the American military prison at Guantanamo Bay, Cuba, where he was detained for years.[8] In October 2008, the U.S. government decided to drop all of the charges against him.[9] In February 2009, almost seven years after his arrest, Mohamed was released.[10] He was never tried for, let alone convicted of, any crime.[11]

Mohamed and several other former detainees who claimed to have suffered similar experiences sued Jeppesen Dataplan, an American company, in federal court.[12] They claimed that Jeppesen had provided flight planning and logistical services to the CIA, facilitating the CIA's efforts to render them to places where they were illegally detained and tortured.[13] The U.S. government inter-

1. Mohamed v. Jeppesen Dataplan, Inc., 614 F.3d 1070, 1074 (9th Cir. 2010) (en banc); *Profile: Binyam Mohamed*, BBC NEWS, http://news.bbc.co.uk/2/hi/7906381.stm (last updated Feb. 12, 2010, 2:59 PM GMT).

2. *Mohamed*, 614 F.3d at 1074.

3. *Profile: Binyam Mohamed*, *supra* note 1.

4. *Mohamed*, 614 F.3d at 1073-74; Mohamed v. Jeppesen Dataplan, Inc., 539 F. Supp. 2d 1128, 1130 (N.D. Cal. 2008), *aff'd on reh'g en banc*, 614 F.3d 1070; *Profile: Binyam Mohamed*, *supra* note 1.

5. *Mohamed*, 614 F.3d at 1074.

6. *Id*.

7. *Id*.

8. *Id*.

9. *Profile: Binyam Mohamed*, *supra* note 1.

10. *Id*.

11. *See id*.

12. Mohamed v. Jeppesen Dataplan, Inc., 539 F. Supp. 2d 1128, 1129-32 (N.D. Cal. 2008), *aff'd on reh'g en banc*, 614 F.3d 1070.

13. *Mohamed*, 614 F.3d at 1075.

vened in the case on Jeppesen's behalf, claiming that any information about the scope or operation of the CIA's detention and interrogation programs, and any information that might "reveal intelligence activities, sources, or methods," was too sensitive to reveal in court.[14] Courts have procedures for dealing with classified evidence, but the government argued that this information was so important to military and intelligence operations that even those procedures would be inadequate.[15] Therefore, the government claimed, the case should be dismissed pursuant to a rarely used legal doctrine known as the state secrets privilege.[16] According to the government, the risk of revealing sensitive information was so great that dismissal was warranted even though the plaintiffs intended to prove their case only with publicly available information.[17]

A judge in the Northern District of California agreed and dismissed the case.[18] A unanimous three-judge panel of the Ninth Circuit Court of Appeals reversed,[19] but the Ninth Circuit then agreed to hear the case en banc.[20] The en banc panel determined that there was "no feasible way to litigate Jeppesen's alleged liability without creating an unjustifiable risk of divulging state secrets,"[21] despite the plaintiffs' intention to rely only upon public information. The en banc panel vacated the reversal and upheld the district court's decision, though it concluded "reluctantly" that Mohamed's case was one of the rare situations in which state secrets preclude justiciability.[22] The Supreme Court declined to hear the case.[23]

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14. *Id*. at 1076-77, 1086 (quoting Redacted, Unclassified Brief for United States on Rehearing *En Banc* at 8, *Mohamed*, 614 F.3d 1070 (No. 08-15693), 2009 WL 6635974) (internal quotation mark omitted).

15. *See id*. at 1076.

16. *See id*.

17. *See id*. at 1075-76.

18. Mohamed v. Jeppesen Dataplan, Inc., 539 F. Supp. 2d 1128, 1136 (N.D. Cal. 2008), *aff'd on reh'g en banc*, 614 F.3d 1070.

19. Mohamed v. Jeppesen Dataplan, Inc., 563 F.3d 992, 996-97 (9th Cir. 2009).

20. *Mohamed*, 614 F.3d at 1077.

21. *Id*. at 1087.

22. *Id*. at 1073.

23. Mohamed v. Jeppesen Dataplan, Inc., 131 S. Ct. 2442 (2011). For a defense of the application of the state secrets doctrine in *Mohamed*, see Robert E. Barnsby, *So Long, and Thanks for All the Secrets: A Response to Professor Telman*, 63 ALA. L. REV. 667, 668-69 (2012). Courts in the United Kingdom, by contrast, refused the British government's request to try civil suits regarding rendition in a "closed material procedure," which would permit the government to rely on sensitive evidence without disclosing it to other parties. *See* Al Rawi v. Sec. Servs., [2011] UKSC 34, [2012] 1 A.C. 531, [1], [69], [92] (appeal taken from Eng.) (explaining that the use of a closed procedure "would be, at a stroke, the deliberate forfeiture of a fundamental right which . . . has been established for more than three centuries"). In fact, British courts even revealed information about the government's involvement in Mohamed's treatment over the Foreign Secretary's objections. *See* Mohamed v. Sec'y of State for Foreign & Commonwealth Affairs, [2010] EWCA (Civ) 65, [2011] Q.B. 218, [2], [57] (Eng.) (holding that it was wrong to conceal the facts supporting the conclusion that government officials were "involved in or facilitated wrongdoing in the context of the abhorrent practice of torture" but noting that no "genuinely secret material" that might "damage

The executive branch has also used the state secrets privilege to insulate the National Security Agency's (NSA's) interception of Americans' phone calls and digital communications from judicial oversight.[24] Despite the Department of Justice's promises during the beginning of President Obama's first term that the administration would limit use of the state secrets privilege,[25] the administration continued a trend (that began during the Bush Administration) of invoking the privilege to prevent judicial review of NSA surveillance.[26] Litigation regarding NSA surveillance is ongoing, and the courts have made it clear that the state secrets privilege will play an important role.[27] The effect of the state secrets privilege in the NSA surveillance litigation is discussed in more detail in Part IV.C.

The idea that the government can shield its activities, including the alleged torture and detention of innocent people, from any judicial oversight is inherently problematic in a society that values democracy, transparency, and the rule of law.[28] Unlike other reasons for dismissal, the state secrets bar against certain

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the national interest" was at risk). That ruling garnered its own share of criticism. *See, e.g.*, Con Coughlin, *When the Next Bomb Goes Off in London, Blame the Judges*, TELEGRAPH (Feb. 10, 2010), http://blogs.telegraph.co.uk/news/concoughlin/100025663/when-the-next-bomb-goes-off-in-london-blame-the-judges. The British government ultimately compensated Mohamed through a civil settlement. *See Government to Compensate Ex-Guantanamo Bay Detainees*, BBC NEWS (Nov. 16, 2010), http://www.bbc.com/news/uk-11762636.

24. *See, e.g.*, Ellen Nakashima, *U.S. Reasserts Need to Keep Domestic Surveillance Secret*, WASH. POST (Dec. 21, 2013), http://wapo.st/1e11xLE; *cf.* Cyrus Farivar, *Judge Throws Out "State Secrets" Defense in Light of NSA Leaks*, ARS TECHNICA (July 9, 2013, 12:35 PM PDT), http://arstechnica.com/tech-policy/2013/07/judge-throws-out-state-secrets-defense-in-light-of-nsa-leaks (describing a federal judge's rejection of a government attempt to invoke the state secrets doctrine).

25. *See* Charlie Savage, *Justice Dept. to Limit Use of State Secrets Privilege*, N.Y. TIMES (Sept. 22, 2009), http://www.nytimes.com/2009/09/23/us/politics/23secrets.html.

26. *See, e.g.*, Jewel v. NSA, 673 F.3d 902, 906 (9th Cir. 2011) ("The government sought summary judgment . . . 'because information necessary to litigate plaintiffs' claims is properly subject to and excluded from use in the case by the state secrets privilege . . . .'"); Al-Haramain Islamic Found., Inc. v. Bush, 507 F.3d 1190, 1193 (9th Cir. 2007) ("The government countered that the suit is foreclosed by the state secrets privilege . . . .").

27. *See* Jewel v. NSA, 965 F. Supp. 2d 1090, 1103 (N.D. Cal. 2013) (finding that "significant evidence . . . would be properly excluded" by the state secrets privilege).

28. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803) ("The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. . . . The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right."). In *Marbury*, the Supreme Court reserved for itself the role of evaluating the acts of the other branches of government for their constitutionality. *Id.* at 177-78. Since then, the role of the courts as final arbiters of constitutionality has become ingrained in American jurisprudence. *See, e.g.*, Cooper v. Aaron, 358 U.S. 1, 18 (1958) ("[T]he basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution . . . has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system."). Preventing the judiciary from playing that role by asserting state secrets disregards that "permanent and indispensable feature of our constitutional system." *Id.*; *see also* Mohamed v. Jeppesen Dataplan, Inc., 614 F.3d 1070, 1073 (9th Cir. 2010) (en

cases is "'designed not merely to defeat the asserted claims, but to preclude judicial inquiry' entirely."[29] At the same time, our nation's security depends on the secrecy of certain operations.[30] As a result, the state secrets doctrine seeks to strike a "difficult balance . . . between fundamental principles of our liberty, including justice, transparency, accountability and national security."[31] Sometimes, though, "exceptional circumstances create an irreconcilable conflict between them."[32] The legal rules that resolve these conflicting values—and the courts that implement them—play a crucial role in the functioning of our government.[33] But it is difficult or impossible to evaluate how well these rules are working, and how faithfully courts are applying them, when the information involved is secret. This Note seeks to assess application of the state secrets privilege through a combination of data analysis and examination of court documents.

In Part I, I review the history of the state secrets doctrine, starting with its common law roots in the early years of the Republic and continuing through its evolution during the last decade. In Part II, I describe the dataset I use to explore the state secrets doctrine. Part III identifies four important trends in the data. First, there has been a major increase in use of the state secrets doctrine since September 11, 2001, but in cases to which the government is a party, courts have nonetheless tended to uphold state secrets claims at about the same rate as before September 11. Second, after September 11, courts have usually not ruled on state secrets assertions if the government is not a party to the case. Third, assertions of state secrets are almost always upheld in full in criminal

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banc) (recognizing the difficulty of balancing "fundamental principles of our liberty, including justice, transparency, accountability and national security," but ultimately holding "reluctantly" that Mohamed's lawsuit must be dismissed).

29. *Mohamed*, 614 F.3d at 1078 (quoting Tenet v. Doe, 544 U.S. 1, 7 n.4 (2005)).

30. In 1954, President Eisenhower tasked General James Doolittle with conducting a study of the covert activities of the recently created Central Intelligence Agency. *See* JAMES H. DOOLITTLE ET AL., REPORT ON THE COVERT ACTIVITIES OF THE CENTRAL INTELLIGENCE AGENCY (1954). Doolittle and his colleagues argued that "[w]e must develop effective espionage and counterespionage services and must learn to subvert, sabotage and destroy our enemies by more clever, more sophisticated and more effective methods than those used against us." *Id.* at 3. But even those soldiers arguing for greater reliance on sophisticated covert operations recognized that they espoused a "fundamentally repugnant philosophy." *Id.*

31. *Mohamed*, 614 F.3d at 1073.

32. *Id.*

33. Some secrecy may be necessary for security, but public information is necessary for a democracy. As James Madison wrote, "A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives." Letter from James Madison to W.T. Barry (Aug. 4, 1822), *in* 9 THE WRITINGS OF JAMES MADISON 103, 103 (Gaillard Hunt ed., 1910). The en banc panel of Ninth Circuit judges who rendered the final decision on the *Mohamed* case recognized that this conflict cannot always be resolved satisfactorily. *See* 614 F.3d at 1073 (acknowledging that "there are times when exceptional circumstances create an irreconcilable conflict between" the principles of "justice, transparency, accountability and national security").

cases. Fourth, state secrets claims are relatively more likely to be denied, at least in part, in Fourth Amendment cases than in most other types of cases. Following this analysis of the numerical data, I examine several cases in depth to explore the reasons behind these trends.

Part IV explores the last three trends in more detail. I argue that the dramatic increase in assertions of the state secrets doctrine since September 11 is due to an increase in litigation against the government, more frequent invocation by the executive branch, and more lawsuits against defense contractors who claim the privilege in an aggressive approach to preserve affirmative defenses. The cases against defense contractors frequently settle or are dismissed on other grounds, obviating the need for the court to decide the state secrets issue. The rest of the increase is likely due to the large number of lawsuits regarding the detention, interrogation, and surveillance programs aimed at fighting terrorism. Most importantly, any significant differences in the distribution of courts' resolutions of state secrets assertions since September 11 are limited almost entirely to private litigation.

I also argue that criminal defendants' general inability to overcome the privilege is troubling given their constitutional rights and compelling interests. Even so, the small number of criminal cases in which the privilege is asserted suggests that prosecutorial discretion might also be a factor.[34] I hypothesize that the lower success rate for state secrets claims in Fourth Amendment cases is an indication that courts make at least a nominal effort to protect individual constitutional rights when feasible, but they are nonetheless failing to do so effectively. Ultimately, the data are far from conclusive. They do not indicate any obvious abuse of the state secrets privilege, but the trend in criminal cases and the substance of some Fourth Amendment cases suggest that the doctrine may not strike the proper balance between national security and protection of our rights and liberties.

I. THE STATE SECRETS DOCTRINE

American courts recognized the necessity for a judicial doctrine protective of sensitive national security information in the early nineteenth century. During the treason trial of Aaron Burr, Burr subpoenaed orders from the President to army and navy officers to apprehend Burr, a letter from a general to the President concerning Burr, and the President's response.[35] The prosecution opposed the subpoena for several reasons, including that the documents "might contain state secrets, which could not be divulged without endangering the national

34. *See infra* Part IV.B.

35. *See* United States v. Burr, 25 F. Cas. 30, 32 (C.C.D. Va. 1807) (No. 14,692). For a more detailed overview of the history of the state secrets doctrine, see Jason A. Crook, *From the Civil War to the War on Terror: The Evolution and Application of the State Secrets Privilege*, 72 ALB. L. REV. 57 (2009).

safety."[36] Chief Justice John Marshall expressed serious concerns about the possibility of the prosecution denying a criminal defendant evidence essential to his defense, especially in a capital case:

> That there may be matter, the production of which the court would not require, is certain; but, in a capital case, that the accused ought, in some form, to have the benefit of it, if it were really essential to his defence, is a position which the court would very reluctantly deny. It ought not to be believed that the department which superintends prosecutions in criminal cases, would be inclined to withhold it. What ought to be done under such circumstances presents a delicate question, the discussion of which, it is hoped, will never be rendered necessary in this country.[37]

Indeed, Chief Justice Marshall found it unnecessary to resolve that "delicate question." The court held that "[t]here is certainly nothing before the court which shows that the letter in question contains any matter the disclosure of which would endanger the public safety," but indicated that it would be proper to suppress "any matter which it would be imprudent to disclose."[38] Chief Justice Marshall's opinion was prescient.

Though the next sixty years of American history passed without necessitating further development of a state secrets doctrine, a landmark case decided shortly after the Civil War established state secrets protections in American jurisprudence. In *Totten v. United States*, the Supreme Court recognized that certain claims may not be litigated in court at all because they risk revealing secrets critical to national security.[39] Almost a century later, in *United States v. Reynolds*, the Court held that the state secrets doctrine may be applied as an evidentiary privilege rather than a categorical bar to litigation.[40] In modern jurisprudence, the state secrets privilege takes two forms, known respectively as the *Totten* bar and the *Reynolds* privilege.

A. *The* Totten *Bar*

The Supreme Court first announced the state secrets doctrine in *Totten* in 1876.[41] *Totten* was a lawsuit brought by the estate of William A. Lloyd, a spy hired by President Lincoln during the Civil War to conduct espionage in the South.[42] Lloyd's estate claimed that he had not been compensated in full for his

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36. *Burr*, 25 F. Cas. at 31.

37. *Id.* at 37.

38. *Id.*

39. 92 U.S. 105, 106-07 (1876).

40. 345 U.S. 1, 6-10 (1953).

41. *See Totten*, 92 U.S. at 106-07; *see also* Michael Q. Cannon, Note, Mohamed v. Jeppesen Dataplan, Inc.*: The Ninth Circuit Sends the* Totten *Bar Flying Away on the* Jeppesen *Airplane*, 2012 B.Y.U. L. REV. 407, 412 ("[T]he first application of the state secrets doctrine in the United States came in the post-Civil War case of *Totten v. United States*.").

42. *See Totten*, 92 U.S. at 105-06.

services.[43] The Court of Claims dismissed the case, and the Supreme Court affirmed, on the ground that entertaining employment claims by secret agents against the government risked exposing details of secret espionage programs "to the serious detriment of the public."[44] Those types of cases, the Court reasoned, simply may not be litigated at all.[45] Because *Totten* acts as a complete categorical bar against certain litigation, this doctrine is known, by both scholars and judges, as the *Totten* bar.[46]

Though *Totten* is now cited for this rather broad premise,[47] the language of the case could have been construed much more narrowly. The *Totten* Court's logic depended upon both the employee-employer relationship and the consensual contract that Lloyd had entered into with the government:

> Both employer and agent must have understood that the lips of the other were to be for ever sealed respecting the relation of either to the matter. This condition of the engagement was implied from the nature of the employment, and is implied in all secret employments of the government in time of war, or upon matters affecting our foreign relations, where a disclosure of the service might compromise or embarrass our government in its public duties . . . .[48]

The most limited interpretation of this language might have constrained the *Totten* bar to secret agent and diplomatic employment cases. Alternatively, courts might have held that *Totten* applies only in cases that risk exposing state secrets that the parties agreed to keep confidential. Unless the existence of such an agreement has some bearing on whether the state secrets doctrine applies, the Court probably would not have emphasized the mutually understood secrecy of the contract.[49] However, the modern Supreme Court has clarified that the *Totten* bar extends much further.

In *Tenet v. Doe*, the Ninth Circuit adopted a very limited interpretation of *Totten*. The court determined that the first holding in *Totten*, though "often mistaken for a blanket prohibition on suits arising out of acts of espionage," was "instead simply a holding concerning contract law."[50] That holding, the Ninth Circuit decided, meant only that revealing the contents of a secret contract,

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43. *See id*.

44. *Id*. at 106-07.

45. *See id*. at 107 ("It may be stated as a general principle, that public policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential, and respecting which it will not allow the confidence to be violated.").

46. *See* Mohamed v. Jeppesen Dataplan, Inc., 614 F.3d 1070, 1077 (9th Cir. 2010) (en banc); Barnsby, *supra* note 23, at 669.

47. *See, e.g.*, Tenet v. Doe, 544 U.S. 1, 8 (2005).

48. *Totten*, 92 U.S. at 106.

49. For a detailed argument that *Totten* applies only to secret agreements with the government, see D.A. Jeremy Telman, *Intolerable Abuses: Rendition for Torture and the State Secrets Privilege*, 63 ALA. L. REV. 429, 458-63 (2012) ("*Totten* simply has no application where the plaintiff does not seek court enforcement of a secret agreement with the government.").

50. Doe v. Tenet, 329 F.3d 1135, 1147 (9th Cir. 2003), *rev'd*, 544 U.S. 1.

even in a suit for enforcement, constituted a breach.[51] Consequently, *Totten* was "not applicable" because "unlike Totten, the Does do not seek only enforcement of a contract."[52] The second holding from *Totten*, according to the Ninth Circuit, was that a court case necessarily generates publicity "inconsistent with the implicit promise of secrecy."[53] However, the court found that modern procedures for "accommodating asserted national security interests" might completely obviate the publicity concerns present in *Totten*.[54]

The Supreme Court disagreed. It pointed to the broadest language from *Totten*: "In fact, *Totten* was not so limited: '[P]ublic policy forbids the maintenance of *any suit* in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential.'"[55] The Supreme Court's interpretation expanded *Totten* to cover any suit that depends upon sensitive state secrets.[56] *Totten* has been applied even in cases alleging torts and constitutional violations against victims who certainly had no contract with the government to keep anything secret.[57] Scholars disagree as to whether this expansion of the *Totten* bar has coincided with increased American counterterrorism operations since September 11. Some argue that the executive branch has pushed, and that courts have permitted, unprecedented use of the *Totten* bar since September 11; others say that the executive's use of the doctrine has not changed much since at least the 1970s.[58] Regardless of when it

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51. *See id*.

52. *Id*.

53. *Id*. at 1147-48.

54. *Id*. at 1148.

55. *Tenet*, 544 U.S. at 8 (alteration in original) (quoting Totten v. United States, 92 U.S. 105, 107 (1876)).

56. Note, however, that *Totten* is still read as a categorical bar on espionage contract suits. *See* EDWARD C. LIU, CONG. RESEARCH SERV., R40603, THE STATE SECRETS PRIVILEGE AND OTHER LIMITS ON LITIGATION INVOLVING CLASSIFIED INFORMATION 5-6 (2009).

57. *See, e.g*., El-Masri v. United States, 479 F.3d 296, 308 (4th Cir. 2007) ("[A] proceeding in which the state secrets privilege is successfully interposed must be dismissed if the circumstances make clear that privileged information will be so central to the litigation that any attempt to proceed will threaten that information's disclosure."). El-Masri was a German national of Lebanese descent detained by Macedonian authorities and turned over to the CIA. He alleged that his detention itself and the CIA's treatment of him during his detention and rendition violated the Constitution and international law. The district court dismissed the case on state secrets grounds, and the Fourth Circuit affirmed. *Id*. at 299-300. The Fourth Circuit observed:

> [W]e recognize the gravity of our conclusion that El-Masri must be denied a judicial forum for his Complaint, and reiterate our past observations that dismissal on state secrets grounds is appropriate only in a narrow category of disputes. Nonetheless, we think it plain that the matter before us falls squarely within that narrow class, and we are unable to find merit in El-Masri's assertion to the contrary.

Id. at 313 (citations omitted).

58. *Compare* Amanda Frost, *The State Secrets Privilege and Separation of Powers*, 75 FORDHAM L. REV. 1931, 1939 (2007) ("[T]he Bush Administration's recent assertion of the privilege differs from past practice in that it is seeking blanket dismissal of every case challenging the constitutionality of specific, ongoing government programs."), *with* Robert M. Chesney, *State Secrets and the Limits of National Security Litigation*, 75 GEO. WASH. L.

occurred, this expanded *Totten* bar is the first half of the modern state secrets doctrine.

B. *The* Reynolds *Privilege*

Most scholarship on the state secrets privilege dates the beginning of the modern era of the doctrine to the 1953 Supreme Court case *United States v. Reynolds*.[59] In 1948, a B-29 bomber on a flight to test secret electronic equipment crashed, killing six crew members and three civilian observers.[60] The civilians' widows sought to compel production of the Air Force's official accident investigation report, but the government refused to turn over the report on the ground that it was highly secret.[61] The Court noted that "the privilege against revealing military secrets . . . is well established in the law of evidence."[62] Recognizing the complex tensions involved in applying such a privilege, the Court pointed out that the state secrets doctrine presented a "similar sort of problem" as the privilege against self-incrimination: "Too much judicial inquiry into the claim of privilege would force disclosure of the thing the privilege was meant to protect, while a complete abandonment of judicial control would lead to intolerable abuses."[63]

To balance these competing interests, the *Reynolds* Court imposed three requirements for invocation and assessment of state secrets as an evidentiary privilege. First, the head of the government department or agency that has control over the allegedly secret matter must formally invoke the privilege.[64] Second, the court must determine whether the circumstances merit upholding the privilege.[65] This is a difficult determination to make, and it turns on whether there is a "reasonable danger" that allowing the evidence in court, even if precautions for the treatment of classified evidence are taken, will threaten national security.[66] Third, during its assessment of whether to uphold the privilege, the court must avoid, if possible, forcing the government to disclose the secret

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REV. 1249, 1308 (2007) ("[A]s a descriptive matter . . . the current pattern of implementation of the state secrets privilege does not depart significantly from its past usage.").

59. 345 U.S. 1 (1953); *see also* U.S. Steel Corp. v. United States, 6 Ct. Int'l Trade 182, 184 (1983) ("The modern case law on the subject stems from the case of *United States v. Reynolds* . . . ."); LIU, *supra* note 56, at 2 ("The Supreme Court first articulated the modern analytical framework of the state secrets privilege in 1953, when it decided *United States v. Reynolds*."). *But see* Laura K. Donohue, *The Shadow of State Secrets*, 159 U. PA. L. REV. 77, 82-83 (2010) ("[S]ince *Reynolds* was decided there has been little historical exposition of the privilege prior to 1953. This gap in scholarship has resulted in the proliferation of an Athena-like theory of state secrets: in 1953 it sprung from Zeus's forehead, with little or no previous articulation. . . . This claim is wrong." (footnote omitted)).

60. *Reynolds*, 345 U.S. at 2-3.

61. *Id.* at 3-5.

62. *Id.* at 6-7.

63. *Id.* at 8.

64. *Id.* at 7-8.

65. *Id.* at 8.

66. *See id.* at 8, 10.

information.[67] As a result, the court need not review the information the government seeks to keep secret, even in camera.[68] Frequently, affidavits or declarations from the department head invoking the privilege are sufficient to satisfy the court that the privilege is necessary.[69] The more important the allegedly secret evidence is to the adverse party's case, the more thorough the court's inquiry into the necessity of secrecy should be. But if the court ultimately decides that the privilege applies, "even the most compelling necessity cannot overcome [it]."[70]

Reynolds defines a legal privilege that applies only to certain evidence. Unlike the *Totten* bar, the *Reynolds* privilege does not necessarily require dismissal of the case. However, application of the *Reynolds* privilege may mandate dismissal in two instances: if removing the secret evidence from the case prevents the plaintiff from proving his case, or if the defendant cannot assert a valid defense without the secret evidence.[71] This second reason for dismissal means that a case may be dismissed on state secrets grounds even if the plaintiff can prove her case only with publicly available information.[72]

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67. *Id*. at 8-10.

68. *See* Sterling v. Tenet, 416 F.3d 338, 343-44 (4th Cir. 2005) ("*Reynolds* made clear that the process of 'satisfying' a district judge that the privilege has been properly invoked does not necessarily require in camera review of all the materials likely to contain state secrets . . . .").

69. *See* Marjorie A. Shields, Annotation, *Invocation and Effect of State Secrets Privilege*, 23 A.L.R.6TH 521, 532-33 (2007); *see also* Mohamed v. Jeppesen Dataplan, Inc., 539 F. Supp. 2d 1128, 1134 (N.D. Cal. 2008) (holding that a declaration from the head of the CIA was sufficient to establish that the state secrets privilege applied), *aff'd on reh'g en banc*, 614 F.3d 1070 (9th Cir. 2010).

70. *Reynolds*, 345 U.S. at 11.

71. *See* Kasza v. Browner, 133 F.3d 1159, 1166 (9th Cir. 1998) ("If, after further proceedings, the plaintiff cannot prove the *prima facie* elements of her claim with nonprivileged evidence, then the court may dismiss her claim as it would with any plaintiff who cannot prove her case. Alternatively, 'if the privilege deprives the *defendant* of information that would otherwise give the defendant a valid defense to the claim, then the court may grant summary judgment to the defendant.'" (quoting Bareford v. Gen. Dynamics Corp., 973 F.2d 1138, 1141 (5th Cir. 1992), *vacated in part on denial of reh'g*, No. 91-2432, 1992 U.S. App. LEXIS 25805 (5th Cir. Oct. 14, 1992))); Al-Haramain Islamic Found., Inc. v. Bush, 451 F. Supp. 2d 1215, 1220 (D. Or. 2006) ("The state secrets privilege may require dismissal of a case for any of three reasons: (1) if specific evidence must be removed from the case as privileged, but plaintiff can no longer prove the *prima facie* elements of the claim without that evidence; (2) if the defendant is unable to assert a valid defense without evidence covered by the privilege; (3) even if the plaintiff is able to produce nonprivileged evidence, the 'very subject matter of the action' is a state secret." (quoting *Kasza*, 133 F.3d at 1166)), *rev'd on other grounds*, 507 F.3d 1190 (9th Cir. 2007).

72. *See, e.g.*, *Mohamed*, 614 F.3d at 1089-90 ("[W]e conclude that even assuming plaintiffs could establish their entire case *solely* through nonprivileged evidence—unlikely as that may be—any effort by Jeppesen to defend would unjustifiably risk disclosure of state secrets."); El-Masri v. United States, 479 F.3d 296, 309 (4th Cir. 2007) ("Furthermore, if El-Masri were somehow able to make out a prima facie case despite the unavailability of state secrets, the defendants could not properly defend themselves without using privileged evidence.").

C. *Analyzing the State Secrets Doctrine*

For 125 years after *Totten*, the state secrets doctrine was invoked infrequently. But since the terrorist attacks of September 11, 2001, use of the state secrets privilege has expanded dramatically.[73] So has legal scholarship on the issue: between 2001 and 2010, more than 120 law review articles were published on the topic.[74] The attention the issue has received is understandable, as the state secrets doctrine can create conflicts with fundamental principles of our democracy, including public accountability, transparency, constitutional review, and separation of powers. Those conflicts sometimes cannot be satisfactorily resolved.[75] The idea that the executive branch can shield its actions, and sometimes entire programs, from review by the courts for legality and constitutionality simply *because they are secret* seems repugnant in a society that values responsive government and the rule of law.[76] Secrecy is undoubtedly required in some instances to protect the people and methods that keep this country safe.[77] But that need for secrecy has defeated serious allegations of egregious human rights violations and challenges to the constitutionality of major government programs.[78]

The state secrets doctrine relies heavily on judicial discretion and judges' ability to assess whether information may properly be kept secret, often without even knowing what that information is.[79] That requirement creates tension with a separation of powers principle that depends upon the judiciary's ability to review the constitutionality of the other branches' actions. Judges must trust the

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73. *See infra* Part II.

74. *See* Donohue, *supra* note 59, at 78.

75. *See Mohamed*, 614 F.3d at 1073 (explaining that "there are times when exceptional circumstances create an irreconcilable conflict between" "fundamental principles of our liberty, including justice, transparency, accountability and national security").

76. *See* DOOLITTLE ET AL., *supra* note 30, at 3 (recognizing the necessity of "effective espionage" but also that covert operations are premised upon a "fundamentally repugnant philosophy").

77. *See, e.g.*, Barnsby, *supra* note 23, at 669 ("Serving as an active duty Army officer with a TOP SECRET-level clearance for well over fifteen years, I have experienced firsthand the urgency of preventing national security information from falling into the hands of existing or potential adversaries."). Barnsby argues that the state secrets privilege is crucial to protecting the means and methods of intelligence gathering, and that "the course of normal litigation" after the 1993 World Trade Center bombing revealed important information about America's counterterrorism efforts to al Qaeda. *Id.* at 684-85.

78. *See, e.g.*, *Mohamed*, 614 F.3d at 1073, 1084-88 (holding that the state secrets privilege precluded judicial review of interrogation and rendition programs); El-Masri v. United States, 479 F.3d 296, 299-300 (4th Cir. 2007) (same); Am. Civil Liberties Union v. NSA, 493 F.3d 644, 687 (6th Cir. 2007) (holding that the state secrets privilege precluded judicial review of the constitutionality of NSA surveillance of Americans' telephone calls).

79. *See* United States v. Reynolds, 345 U.S. 1, 10 (1953) (holding that when there is "a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged," the court should not "insist[] upon an examination of the evidence, even by the judge alone, in chambers").

executive branch's privilege assertions, sometimes even without seeing the underlying evidence.[80]

A democracy also depends upon the public to be the ultimate supervisor of the government, and the public can normally evaluate the judiciary by reviewing decisions and opinions for their logic and proper application of the law. That is impossible in state secrets cases because the secret information, and often even the declarations explaining why the information needs to be kept secret, are not publicly available.[81] Consequently, it is impossible to determine whether a judge made the correct decision in excluding evidence or blocking a suit.

An avalanche of legal scholarship on the state secrets doctrine in the wake of September 11 has produced little statistically rigorous analysis of state secrets cases. Many authors assert that use of the state secrets privilege has increased significantly since September 11, sometimes with little or no empirical support.[82] When scholars do search for empirical support, they disagree as to whether use of the state secrets doctrine has changed significantly.[83] Few have pointed out that the number of assertions of the state secrets privilege tells us little about its actual application, and none have attempted to determine whether or how courts' application of the state secrets privilege has changed since September 11. These articles tend to focus on the executive branch's decision to invoke the state secrets doctrine. But if courts always refused to grant the privilege, there would be no conflict with civil liberties or government transparency; by contrast, if courts always granted the privilege, there would be no threat to the secrecy of covert operations. This study asks what happens *after* the privilege is invoked, a topic that is mostly absent from the existing literature. Two questions are critical to understanding changes in the application of state secrets doctrine since September 11: First, has the number of assertions of state secrets increased? And second, are courts granting the privilege more or

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80. *See id*.

81. *See* Erin E. Bohannon, Note, *Breaking the Silence: A Challenge to Executive Use of the State Secrets Privilege to Dismiss Claims of CIA Torture in* Mohamed v. Jeppesen Dataplan, Inc., 65 U. MIAMI L. REV. 621, 623 (2011) (arguing that the government has used the state secrets doctrine to shield potentially unconstitutional programs from public review, thereby controlling public discourse on counterterrorism operations).

82. *See, e.g*., Timothy Bazzle, *Shutting the Courthouse Doors: Invoking the State Secrets Privilege to Thwart Judicial Review in the Age of Terror*, 23 GEO. MASON U. C.R. L.J. 29, 29 (2012) (citing Frost, *supra* note 58, at 1939-40); Frost, *supra* note 58, at 1938 & n.28, 1939 (arguing that use of the state secrets privilege has changed since September 11, but citing one study that did not analyze the number of state secrets cases in the post-September 11 era, William G. Weaver & Robert M. Pallitto, *State Secrets and Executive Power*, 120 POL. SCI. Q. 85, 101-02, 108-09 (2005), and another that found no significant difference in use of the doctrine between the Bush Administration and prior administrations, Chesney, *supra* note 58, at 1297-302); Beth George, Note, *An Administrative Law Approach to Reforming the State Secrets Privilege*, 84 N.Y.U. L. REV. 1691, 1692, 1696 & n.33 (2009) (citing the same Weaver and Pallitto and Chesney studies).

83. *See* Frost, *supra* note 58, at 1938 & n.28, 1939.

less often than before?[84] The answer to the first question is undeniably yes; the answer to the second is much more nuanced.

II. BUILDING A STATE SECRETS DATASET

The State Secrets Archives at the Georgetown University Law Center have created a database of cases in which the state secrets privilege was raised.[85] Spearheaded by Laura K. Donohue, the Archives seek to rectify gaps in our understanding of the state secrets doctrine. Donohue realized that literature on state secrets focuses almost exclusively on published judicial opinions, which severely limits our understanding of how the doctrine operates in practice.[86] The Archives cast a wide net, searching court documents of all kinds and at all levels for references to state secrets. A team of researchers scoured databases for information on state secrets cases, searched court records, and, where necessary, sent couriers to courthouses for paper copies of filings.[87] For each case, the Archives code several variables, including the date of the case, the outcome on the state secrets issue (upheld, denied, upheld in part and denied in part, or

84. Two studies have attempted to quantify the increase in use of the state secrets privilege. First, Robert Chesney in 2007 compiled a collection of eighty-nine state secrets cases decided since *Reynolds* was handed down in 1953. His primary goal was to determine whether the administration of George W. Bush used the doctrine differently than its predecessors. *See* Chesney, *supra* note 58, at 1251, 1315-32. Chesney concluded that frequency analysis is ill suited to answer this question because of the difficulty of assembling the data, problems with political attribution (such as cases initiated during one administration but decided during another), and the fact that the number of opportunities to invoke the privilege varies widely from year to year. *See id.* at 1299-302. None of those criticisms are directly applicable to the broader question this Note seeks to answer: whether the data shed any light on courts' ability to apply the state secrets doctrine to strike the proper balance between national security and civil rights. I rely on broad trends in courts' treatment of state secrets claims to provide context for certain cases. Used in that way, the data provide a powerful tool to augment understanding of the doctrine as it is applied more generally. I am also less concerned about the frequency and attribution problems Chesney highlights for two reasons. First, my data cover sixty-four years before September 11 and twelve years after it. These sample sizes, which are both longer than a four- or eight-year presidential administration, should help to smooth out some of the variation. Second, regarding the attribution problem, changing the date at which a case is considered pre- or post-September 11 from 2002 to 2003 or even 2004 (to account for the length of the litigation process) does not make any significant difference to my results. Additionally, some of the trends I examine include the entire dataset and are not vulnerable to either of these potential pitfalls. William Weaver and Robert Pallitto in 2005 authored the other effort to quantify changes in use of the state secrets doctrine. Weaver & Pallitto, *supra* note 82, at 101. They argued that increased use of the state secrets privilege began during the Carter Administration, but did not compile numbers for the post-September 11 era. *Id.*

85. GEO. L. ST. SECRETS ARCHIVES, http://apps.law.georgetown.edu/state-secrets-archive (last updated Mar. 26, 2015).

86. Donohue, *supra* note 59, at 79-88; *About the Archives*, GEO. L. ST. SECRETS ARCHIVES, http://apps.law.georgetown.edu/state-secrets-archive/about.cfm (last updated Mar. 26, 2015).

87. E-mail from Nadia Asancheyev, Exec. Dir., Georgetown Ctr. on Nat'l Sec. & the Law, to author (Aug. 5, 2014) (on file with author).

not ruled upon), the subject matter of the case, the government's role (plaintiff, defendant, prosecutor, intervenor, or nonparty), and how the opinion was disseminated (published opinion, unpublished opinion, or court order).[88] While the State Secrets Archives are a treasure trove for researchers, the data are ill suited for any sort of statistical analysis: for one, the Archives include several cases that mention the state secrets privilege as part of a longer discussion of governmental privileges, but in which the state secrets privilege was never actually claimed by a party.[89] These cases are useful for understanding state secrets jurisprudence, but they should be excluded from an analysis of courts' treatment of the privilege. The Archives also contain numerous duplicate cases and missing data points.

To make the data usable in a statistical analysis, I carefully combed through all 369 cases the Archives collected.[90] First, I eliminated cases in which the state secrets privilege was not raised. Second, I conducted additional research to replace missing data or correct errors. Next, I updated cases whose dispositions have changed since the Archives were last updated (which appears at the time of writing to have been sometime in 2012). I also added a number of cases filed after the last update or that the Archives appear to have missed.[91]

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88. *See* GEO. L. ST. SECRETS ARCHIVES, *supra* note 85.

89. See, for example, *Laws v. Thompson*, 554 A.2d 1264 (Md. Ct. Spec. App. 1989), which was a tort case in which the plaintiff sought to discover a memo regarding his arrest for crimes totally unrelated to national security or military operations. *Id.* at 1268, 1276. The court summarized all facets of the executive privilege. The discussion included a paragraph dedicated to the state secrets privilege, but the court noted that "[w]e are obviously not faced with such a situation in the instant case." *Id.* at 1277.

90. My analysis is based on the Archives as they appeared at the time of writing, which was late 2014. The Archives have since been updated and now include cases from as late as March 2015. However, the update added only five cases decided since 2011. By contrast, my dataset contains twenty-two cases decided from 2012 to 2014.

91. To find additional cases, I relied primarily on three Westlaw searches. First, I searched for the term "state secrets." That search returned thousands of results, most of which were not actually state secrets cases. However, beginning with such a broad search provided a valuable point of reference for subsequent searches. Next, I searched for any documents citing *Reynolds* or *Totten*. These searches were important because the state secrets doctrine was not always referred to by that name. I conducted the search for cases citing to *Totten* last, and that search turned up only one state secrets case that was not already in my dataset. The results of these searches make me confident that my dataset represents a fairly complete picture of the history of American state secrets jurisprudence. I also have a significantly larger dataset than either Chesney (89 cases) or Weaver and Pallitto (55 cases). *See* Chesney, *supra* note 58, at 1315-32; Weaver & Pallitto, *supra* note 82, at 101.

Additionally, I faced the fact that the Archives contain several cases from three multidistrict litigations (MDLs): the September 11 litigation, *In re* Terrorist Attacks on September 11, 2001, 295 F. Supp. 2d 1377 (J.P.M.L. 2003); the KBR/Burn Pit litigation, *In re* Battlefield Waste Disposal Litig., 655 F. Supp. 2d 1374 (J.P.M.L. 2009); and the NSA surveillance litigation, *In re* NSA Telecomms. Records Litig., 444 F. Supp. 2d 1332 (J.P.M.L. 2006). The MDLs present two main problems. The first is that the Archives do not include every case in each MDL. Second, there is no guarantee that every case in those MDLs involved state secrets. Third, the purpose of an MDL is to streamline resolution of common issues. So orders in these cases often apply to many of the cases in the MDL. Thus, even were I able to identify and classify every case from each MDL, those cases would be overrepresented in the da-

Once the data were curated in this way, the dataset contained 308 cases. Almost all are federal cases.[92] Most are cases to which the U.S. government is a party (and thus federal jurisdiction exists), but when the government is not a party, the state secrets privilege provides federal jurisdiction when asserted as an affirmative defense.[93] The dataset includes state appellate court, federal district court, federal appeals court, and Supreme Court opinions, orders, memoranda, and pleadings. Including pleadings is important because it means the dataset covers cases in which one party asserted a state secrets defense or privilege, but the court never ruled on it. Though the Archives often include multiple entries for the same case at different levels of the federal court system, I include in my dataset only one entry for each case that represents the final disposition (if any) on the state secrets issue. While lower court rulings that were reversed or vacated by a higher tribunal are useful in understanding the doctrine, they do not represent the final disposition on the issue. I therefore exclude lower court opinions from the dataset if a higher court reviewed a ruling on the state secrets assertion.

In general, when courts decide state secrets claims, they uphold the privilege 67% of the time, deny it 18% of the time, and uphold it in part 15% of the time. In 21% of cases in which the privilege is raised, courts never rule on the issue. The first striking trend in the data is that invocation of the state secrets privilege has become much more common since September 11. During the sixty-five years from 1937 to 2001,[94] the privilege was asserted in 159 cases, for an average of about 2.4 cases per year. In no year was the number of cases involving the privilege greater than twelve (1991). From 2002 to 2013, the privilege was asserted another 137 times, for an average of 11.4 cases per year. That is, the *average* number of state secrets assertions per year in the twelve years following September 11 was close to the *maximum* number of assertions in any

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taset because there would be multiple data points for the same court decision. My solution to this problem was to collapse the MDLs into groups of cases governed by the same state secrets ruling, so that each order or opinion dealing with a state secrets issue was represented once, even if that order applied to more than one case. Thus, classification remains consistent regardless of whether the case was consolidated in an MDL: every state secrets order or opinion is represented exactly once in the dataset. Moreover, classifying MDLs this way ensures that I do not overestimate the increase in use of the state secrets privilege since September 11.

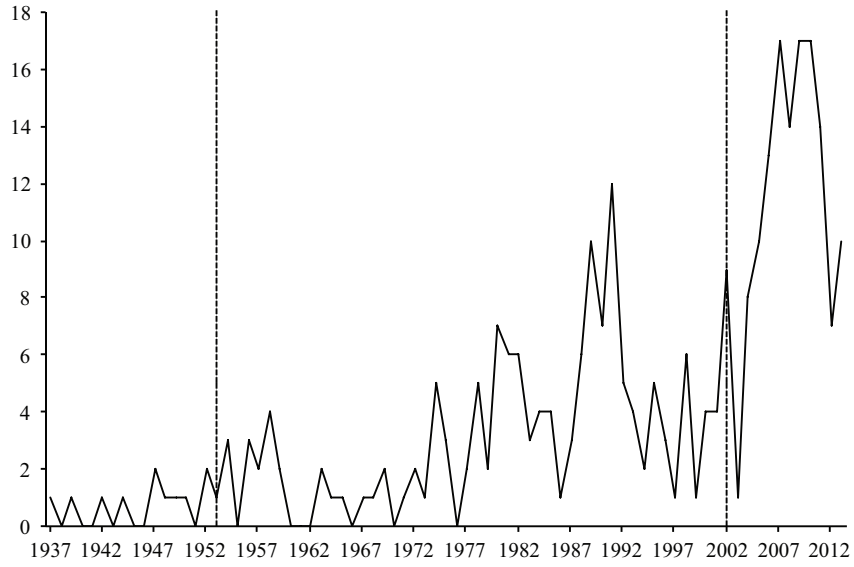
92. Three cases were not federal cases. *See* District of Columbia v. Bakersmith, 18 App. D.C. 574 (1901); State v. Andrews, 250 So. 2d 359 (La. 1971); Elson v. Bowen, 436 P.2d 12 (Nev. 1967).

93. *See* Donohue, *supra* note 59, at 99 ("Once it becomes an affirmative defense, for instance, the privilege provides a hook . . . to remove the case to federal court.").

94. I begin the pre-September 11 era at 1937 because regular use of the state secrets privilege began around that time. Only four state secrets cases were decided before that year, and never more than two in a ten-year period. Only one state secrets case was decided during 2001 but after September 11. This was a case based on an investigation that began in 1999 into an illegal gambling and loan-sharking operation. *See* United States v. Scarfo, 180 F. Supp. 2d 572, 574 (D.N.J. 2001). Because the case (but not the decision) predates September 11, I consider all of 2001 a pre-September 11 year.

year during the previous two centuries. Of course, it does not necessarily follow that all of the post-September 11 state secrets claims dealt with counterterrorism issues, but the increased use of the state secrets privilege is both dramatic and undeniable. (See Figure 1.) That increase coincided with a marked shift in the executive branch's use and interpretation of the state secrets doctrine.[95]

FIGURE 1
State Secrets Cases Decided by Year



I used linear regression to test the statistical significance of the post-September 11 increase in state secrets cases. I coded two variables for each year: the number of state secrets decided in that year and a dummy variable indicating whether the year was before or after September 11. It is also important to recognize that the total number of cases decided by the federal courts in any given year varied significantly over the period of interest, from 76,314 in 1937

95. *See, e.g.*, Donohue, *supra* note 59, at 168 ("What appears to be different now . . . is that there are many visible cases alleging extreme and possibly criminal behavior, as well as constitutional violations, in which the government seeks to dismiss the case as part of its own defense. The claims are thus different from the more traditional state secrets cases—that is, those centered on tortious conduct or contractual disputes."); Steven D. Schwinn, *The State Secrets Privilege in the Post-9/11 Era*, 30 PACE L. REV. 778, 809 (2010) ("In the wake of the 9/11 attacks, the Government's position on the state secrets privilege builds upon the characteristics of the *Totten* cases and attempts to give the privilege expanded and very troubling dimensions."). *But see* Chesney, *supra* note 58, at 1308 (arguing that use of the state secrets doctrine has not changed in qualitative terms since 2001).

to 447,354 in 2010.[96] I thus added the total number of cases terminated in that year as a third variable in my regressions. Controlling for the size of the federal docket, the post-September 11 era is associated with an increase of 5.8 state secrets cases per year. That association is statistically significant, with $p < 0.001$ ($t = 5.46$). The r-squared value is 0.66, indicating that the total caseload and post-September 11 era together account for about two-thirds of the variation in the number of state secrets cases from year to year. The post-September 11 era alone accounts for 55% of the variation. Given that only 2.4 state secrets cases were decided per year before September 11, an increase of almost 6 cases per year is an enormous change. That so much of the variation is attributable solely to the post-September 11 era indicates that September 11 marked a sea change in the use of state secrets doctrine.

Figure 1 shows that the state secrets doctrine was rarely asserted during the first half of the twentieth century. It was not until after *Reynolds* was decided in 1953 that invocation of the privilege became a regular occurrence. To ensure that the statistical significance of the post-September 11 increase was not an artifact of the lack of use of the privilege before *Reynolds*, I conducted the same test (and again controlled for the size of the federal docket) but compared the period 1953-2001 with the period 2002-2013. The post-September 11 era is associated with an increase of 5.9 cases per year compared with the 1953-2001 period. This result, too, is statistically significant with $p < 0.001$ ($t = 4.9$) and an r-squared value of 0.61. These findings mean that the increase in the use of the state secrets privilege after September 11 almost certainly cannot be explained by chance alone, nor can it be explained by explicit recognition of the privilege in 1953.[97]

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96. I calculated caseloads using numbers compiled from the Federal Judiciary Center. The number for each year represents the total number of cases terminated in the United States courts of appeals, plus the number of criminal cases, private civil cases, and civil cases to which the United States was a party terminated in the district courts. *See U.S. Courts of Appeals*, FED. JUDICIARY CTR., http://www.fjc.gov/history/caseload.nsf/page/caseloads_courts_of_appeals (last visited Apr. 28, 2015); *Criminal Cases*, FED. JUDICIARY CTR., http://www.fjc.gov/history/caseload.nsf/page/caseloads_criminal (last visited Apr. 28, 2015); *Private Civil Cases*, FED. JUDICIARY CTR., http://www.fjc.gov/history/caseload.nsf/page/caseloads_private_civil (last visited Apr. 28, 2015); *Civil Cases to Which the U.S. Was a Party*, FED. JUDICIARY CTR., http://www.fjc.gov/history/caseload.nsf/page/caseloads_civil_US (last visited Apr. 28, 2015).

97. Both the Chesney and Weaver and Pallitto studies observed that an apparently large and enduring increase in the use of the state secrets privilege occurred in the mid-1970s. *See* Chesney, *supra* note 58, at 1291, 1297; Weaver & Pallitto, *supra* note 82, at 101 ("In the twenty-three years between the decision in *Reynolds* and the election of Jimmy Carter, in 1976, there were four reported cases in which the government invoked the privilege. Between 1977 and 2001, there were a total of fifty-one . . . ."). Accordingly, I also compared the period 1974-2001 with 2002-2013. Once again, the post-September 11 era is associated with an increase of 6.6 cases per year, and the increase remains statistically significant at the $p < .001$ level ($t = 4.2$), though the r-squared value drops to 0.48. As the start date of the analysis moves later, the effect of the size of the federal caseload on the number of state secrets cases per year decreases and loses both its statistical significance and explanatory power. When comparing the 1974-2001 period with 2002-2013 and controlling for the

Why, then, is assertion of the state secrets privilege so much more common since September 11? One possible explanation is that lawsuits challenging counterterrorism policies—such as detention, detainee treatment, and surveillance—created entirely new areas of litigation that consistently touch on sensitive security matters. However, there is an intriguing wrinkle in this general trend. The most dramatic change post-September 11 was an enormous increase in the number of assertions in cases to which the government was not a party. Between 1937 and 2001, the privilege was almost unheard of in private suits. It was raised in only 27 cases to which the government was not a party—less than one every two years. From 2002 to 2013, the privilege was invoked in 49 cases to which the government was not a party, for an average of 4.1 cases per year (about a 1000% increase). In cases to which the government was a party, the average number of state secrets cases per year increased from 2.0 to 7.7 (about a 385% increase). Both types of cases saw a major uptick in frequency after September 11, but private litigation has seen the most remarkable change. The increased use of state secrets when the government is not a party may be a result of more private lawsuits implicating national security issues concurrent with greater reliance upon private military contractors in the wars in Afghanistan and Iraq.[98] Regardless of the reason for it, this distinction has an important effect on the analysis of how courts treat state secrets privilege claims.

The fact that the privilege is being claimed much more frequently since September 11 raises a question as to whether courts are treating these cases similarly to those decided before September 11. Expansion of the doctrine to new types of claims and cases (particularly ones involving allegedly egregious violations of constitutional and human rights) makes it more important than ever for judges to assess privilege claims properly.[99] Breaking down the data will

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post-September 11 era, the size of the federal docket has no statistically significant effect on the number of state secrets cases per year ($p = 0.63$). This finding suggests that the size of the federal docket only has explanatory power over the number of state secrets cases because the federal caseload was very small and use of the state secrets privilege very rare before 1974. The federal docket has continued to grow since 1974, but its growth has slowed rather dramatically since the early 1980s: Between 1936 and 1986, the size of the federal docket (as calculated by the method described in note 96 above) more than quadrupled. From 1986 to its peak in 2010, the docket size increased only another 32%. Since 2010, the docket size has actually decreased, so that its size increased only 13% between 1986 and 2013. *See* sources cited *supra* note 96. Ultimately, the numbers indicate that the post-September 11 era is much more closely associated with the increase in use of the state secrets privilege than is the size of the federal docket.

98. *See* Molly Dunigan, Op-Ed., *A Lesson from Iraq War: How to Outsource War to Private Contractors*, CHRISTIAN SCI. MONITOR (Mar. 19, 2013), http://www.csmonitor.com/Commentary/Opinion/2013/0319/A-lesson-from-Iraq-war-How-to-outsource-war-to-private-contractors (referring to the Iraq War as "America's most privatized military engagement to date" and noting that contractors outnumbered troops in both Afghanistan and Iraq).

99. *See* Bazzle, *supra* note 82, at 70 ("When an individual makes a credible claim of harm, suffered through government wrongdoing—even secret government wrongdoing—the cost of not having the opportunity to seek judicial redress for that harm and to be made whole is substantial.").

fill in some of the gaps in our information about courts' treatment of state secrets claims, even if it is still impossible to evaluate the secret evidence itself.

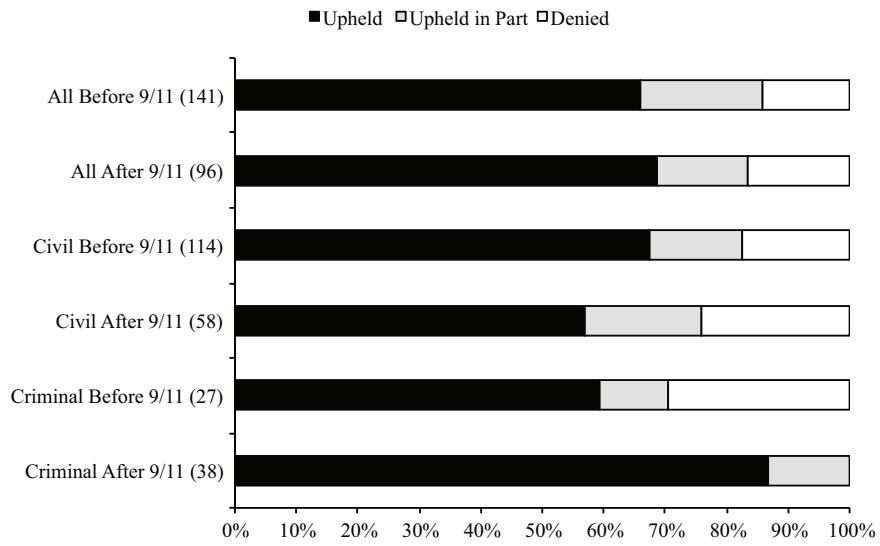
III. FINDING TRENDS IN THE DATA

This Part takes a closer look at the data and explores several trends that are not obvious from a higher-level view. After concluding that state secrets assertions have increased significantly since September 11, I ask whether courts have treated those assertions differently. I find that the distributions of rulings on state secrets assertions are similar before and after September 11, though there are important differences for criminal cases. Additionally, though parties are raising state secrets assertions more frequently in the post-September 11 era, courts are much less likely to rule on those assertions. I also identify two more important trends: assertions of state secrets in criminal cases are likely to be successful despite the special constitutional concerns and core liberty interests at stake in those cases, and courts have been particularly unwilling to uphold the privilege in full in Fourth Amendment cases.

A. *How Have Courts Ruled on State Secrets Assertions?*

In exploring trends in courts' rulings on assertions of state secrets, I look first only at cases in which the court resolved the state secrets issue. The top two bars in Figure 2 illustrate the distribution of courts' dispositions before and after September 11. Not much has changed. Courts still uphold the privilege in a majority of cases, though the percentage of cases in which they uphold it has increased very slightly since September 11, from 66% to 69%. The percentage of cases in which courts deny the privilege has decreased from 20% to 14%, while the percentage of cases in which courts have upheld the privilege in part and denied it in part has increased from 14% to 17%. Because these numbers are so similar, they are not very useful in isolating a specific reason behind any post-September 11 changes. The middle two bars of Figure 2 represent the distribution of state secrets dispositions in civil cases before and after September 11. Here, the increase in denials of the privilege—and a corresponding decrease in full grants of the privilege—is somewhat more pronounced (though these changes are not statistically significant). The bottom two bars in Figure 2 show the distributions of state secrets dispositions in criminal cases before and after September 11. Here, the differences are stark: Before September 11, courts upheld assertions of state secrets in criminal cases about 59% of the time and denied those assertions about 30% of the time. Since September 11, courts have upheld assertions of the state secrets privilege more than 86% of the time and have never denied it completely. Returning to the discussion of all cases for the moment, the similarity in the distributions before and after September 11 is susceptible to contradictory explanations.

FIGURE 2
Distribution of Cases in Which the State Secrets Issue Was Decided, Before and After September 11, 2001



First, courts might be conducting careful and discerning review of privilege claims in the large number of cases and new areas of law in which the privilege is being invoked post-September 11. This explanation posits that courts applied the privilege fairly prior to September 11 and have continued to do so afterward. This interpretation of the data depends upon the assumption that the increase in privilege assertions after September 11 was due to a general increase in national security litigation, rather than an executive that has overzealously invoked state secrets. Alternatively, the government (or other parties) may be invoking the privilege in many more cases where it is unwarranted since September 11. Even though the percentage of cases in which the privilege was upheld has remained stable, the expansion in use of the doctrine might mean that courts have not adequately resisted more frequent application of the privilege.

Using the pre-September 11 distribution as a baseline, I calculated the expected number of post-September 11 state secrets dispositions (denied, upheld, upheld in part) if the distribution were to remain constant. A chi-squared test reveals that the differences are not statistically significant, with $p = 0.33$. I cannot reject the null hypothesis that courts' treatment of state secrets cases has not changed since September 11. This finding lends some support to the theory that courts may be evaluating state secrets assertions fairly; if we assume that courts decided these issues fairly before September 11, the lack of a statistically significant difference since September 11 suggests that they may be continuing to do so. However, some commentators have made convincing qualitative arguments that the dramatic increase in the overall number of state secrets cases af-

ter September 11 reflects overuse of the privilege.[100] If so, a similar distribution of state secrets decisions before and after September 11 might actually indicate that courts defer too much to an overreaching executive branch.

The similarities before and after September 11 depend heavily on whether the case is criminal or civil. Criminal defendants have been almost completely unsuccessful in challenging the state secrets privilege since September 11.[101] The differences between state secrets dispositions in civil cases before and after September 11 are not statistically significant ($p = 0.26$),[102] but the differences in criminal cases are ($p < 0.01$). These findings suggest that the post-September 11 era almost certainly had an impact on the distribution of state secrets decisions in criminal cases, but that there is a good chance that September 11 had no effect on the distribution of courts' decisions in civil cases.[103]

If the analysis includes all cases in which the state secrets privilege was asserted, and not just those in which courts have actually rendered a decision on it, the picture is also very different pre- and post-September 11. (See Figure 3.) Before September 11, courts did not render a decision on state secrets assertions in about 12% of cases. Courts disposed of those cases through dismissal, summary judgment, settlement, or other means without reaching the state secrets claim. Since September 11, the portion of state secrets cases in which the privilege is not ruled upon has almost tripled, to 32%. When these cases are considered, the difference in distributions across all cases before and after September 11 becomes statistically significant, with $p < 0.001$. These new data suggest that once courts actually reach the state secrets issue they are not necessarily treating it so differently since September 11, but the likelihood of the court reaching the issue at all has decreased significantly. This change is almost

100. *See* Frost, *supra* note 58, at 1940 (arguing that the Bush Administration's "invocation of the state secrets privilege as grounds for dismissal of all cases challenging the NSA's practice of warrantless wiretapping and the extraordinary rendition program raises new concerns for the courts"); Telman, *supra* note 49, at 436 (noting that use of the privilege to insulate rendition programs resulted in "precisely the sort of intolerable abuses of the privilege about which the Supreme Court expressed concern in *Reynolds*").

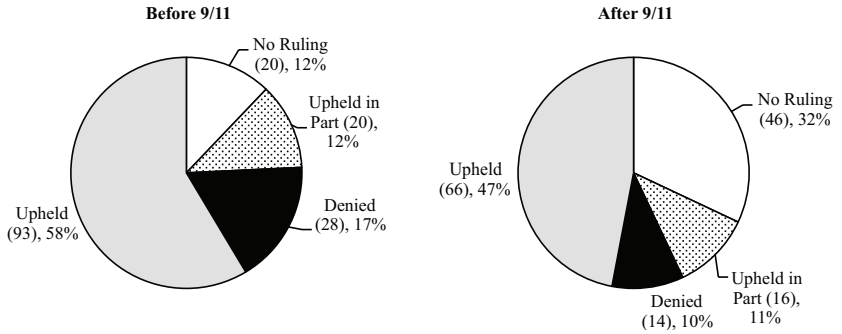
101. *See infra* Part IV.B.

102. The portion of cases in which the privilege was upheld wholesale decreased after September 11 from 67% to 57%; the portion upheld in part increased from 15% to 19%; and the portion denied increased from 18% to 24%. *See* FIGURE 2.

103. There are reasons to be skeptical of relying too much on these statistical findings. For one, the dataset treats every state secrets case equally, but not all cases have the same effect in practice. A landmark case in which the state secrets privilege precluded constitutional review of a major government program is represented exactly the same way as a (relatively) routine application of the state secrets privilege in an employment case. So long as we are aware of the limitations on this sort of statistical analysis, however, the numbers are invaluable in identifying broad trends. The next Subparts analyze individual cases to further explore those trends and to determine whether the numbers accurately reflect the importance of courts' behavior.

certainly not attributable to random variations in the data, meaning some other factor must be driving the post-September 11 changes.[104]

FIGURE 3
Distribution of State Secrets Dispositions, Before and After September 11, 2001, All Cases



One possible explanation for this trend is that the types of cases likely to touch on sensitive security issues since September 11 are unusually vulnerable to dismissal or summary judgment on other grounds. For example, these cases might be more likely to face standing or immunity obstacles.[105] While this

104. One potential explanation is that the post-September 11 era has coincided to some extent with the digitization of court records. Many of the post-September 11 cases in which the state secrets privilege was raised but never decided are cases in which a defendant discussed the possibility of a state secrets defense in a court filing. These filings are much easier to find if they are available electronically, so there is a possibility that similar documents filed before electronic filing was available escaped the Archives' (and my) searches. I am not seriously concerned with that possibility for a few reasons. First, electronic filing predates September 11 by over a decade; the Public Access to Court Electronic Records (PACER) scheme has existed since 1988. *See* Bobbie Johnson, *Recap: Cracking Open US Courtrooms*, GUARDIAN (Nov. 11, 2009, 5:45 PM EST), http://www.theguardian.com/technology/2009/nov/11/recap-us-courtrooms. Second, the data show that the distribution of state secrets decisions between 1988 and 2001 resembles the distribution of decisions across the entire pre-September 11 era. Third, the Archives have taken pains to track down paper records of state secrets cases. *See* E-mail from Nadia Asancheyev to author, *supra* note 87. Finally, I reran my analyses on a limited version of my dataset that included only cases in which the state secrets privilege was mentioned in a court order or opinion. Once more, the differences in dispositions among cases in which a decision was rendered are small and not statistically significant. Cases in which no ruling was made on the state secrets issue increased from 12% of cases before September 11 to 19% after, and that difference remains statistically significant ($p = 0.025$). For all these reasons, I am confident concluding that the increase in cases in which the state secrets privilege was raised but not ruled upon is not merely an artifact of data collection methods.

105. *See, e.g.*, Rasul v. Myers, 563 F.3d 527, 528, 532 (D.C. Cir. 2009) (per curiam) (dismissing Guantanamo Bay detainees' *Bivens* claims against military officers who allegedly tortured the detainees because the officers had qualified immunity); Am. Civil Liberties

explanation may have some merit, a more significant reason for this trend is the increased invocation of the state secrets privilege in cases to which the government is not a party.

B. *Do Rulings Differ if the Government Is a Party?*

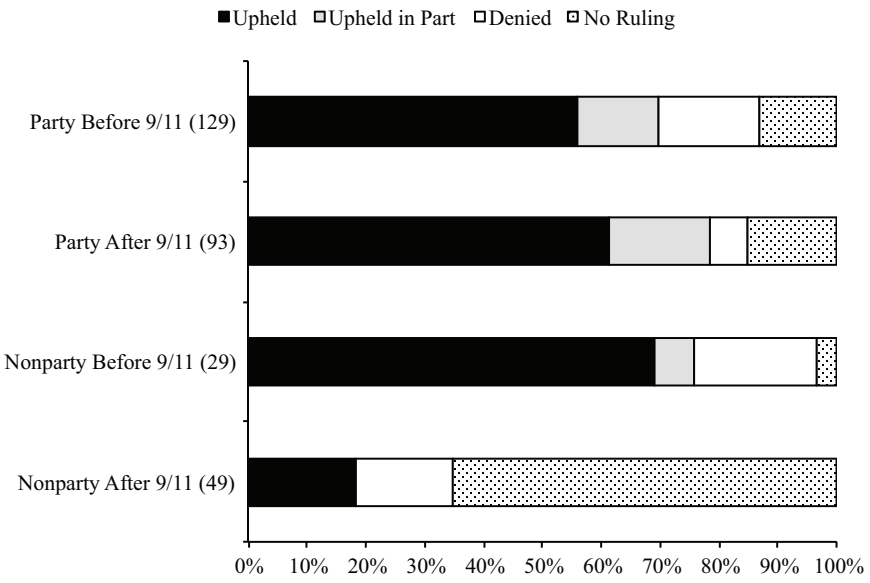
The role the government plays in the case may have an effect on courts' evaluations of state secrets assertions. Figure 4 breaks down the cases by the government's role, separating cases to which the government was a party (including intervenor) from those to which it was not, before and after September 11. When the government is a party, the distribution of state secrets dispositions has remained roughly the same. Courts have ruled on the issue a little less frequently, but when they do rule, the percentages of privilege claims upheld, denied, and upheld in part are fairly similar to those before September 11. The portion of privilege claims upheld increased 5.4%, the portion denied decreased 9.8%, and the portion upheld in part increased 3.3%. A chi-squared test reveals that these differences are not quite statistically significant, with $p = 0.08$. This finding suggests that the differences in the distributions of rulings on the state secrets privilege before and after September 11 are mostly attributable to the increased use of the privilege by private parties.

Before September 11, courts ruled on the privilege question about 97% of the time and upheld it 71% of the time when the government was not a party. After September 11, courts have reached the privilege issue only 35% of the time when the government was not a party, and they have upheld it in 53% of cases in which a ruling was made. These differences are statistically significant, with $p < 0.001$.[106]

Union v. NSA, 493 F.3d 644, 648-50, 687-88 (6th Cir. 2007) (dismissing a lawsuit challenging NSA surveillance for lack of standing).

106. By contrast, the differences in cases to which the government was a party approach, but do not quite achieve, statistical significance, with $p = 0.08$. But it is important to note that there are no criminal cases to which the government was not a party. So if we exclude criminal cases from the comparison, the differences in *civil* cases to which the government was a party become statistically significant ($p = 0.026$)—so long as cases with no ruling on the privilege issue are included. If only cases in which a disposition was reached are included, the differences are not statistically significant ($p = 0.27$). This finding suggests once more that the real difference in courts' treatment of civil cases post-September 11 is an increase in the portion of cases in which the privilege issue is never reached. That trend applies to all civil cases, regardless of whether the government was a party, but the effect is much stronger when the government was not a party.

FIGURE 4
State Secrets Dispositions by Government Role, Before and After September 11



Assuming for the moment that courts applied the state secrets privilege fairly before September 11, the lack of a statistically significant difference in how courts handle cases to which the government is a party after September 11 is comforting. Even if we accept that assumption, though, this similarity is hardly conclusive evidence that the privilege is not being misused. Those cases that present the most troubling constitutional challenges—those in which the privilege was used to insulate rendition and surveillance programs from judicial review—represent only a small handful of the cases used in this study. It is therefore entirely possible that the government has expanded use of the privilege to shield such programs from oversight in the post-September 11 era, but that the small number of such cases is hidden in the large-*n* statistical analysis. In other words, lack of *statistical* significance does not necessarily imply lack of *practical* significance.[107]

In cases to which the government is not a party, courts have been much less likely to rule on, and have much less frequently upheld, state secrets assertions since September 11. Two possible explanations seem most obvious. First, it seems possible that defense contractors are increasingly trying to use the privilege as a liability shield in the post-September 11 era, and courts have re-

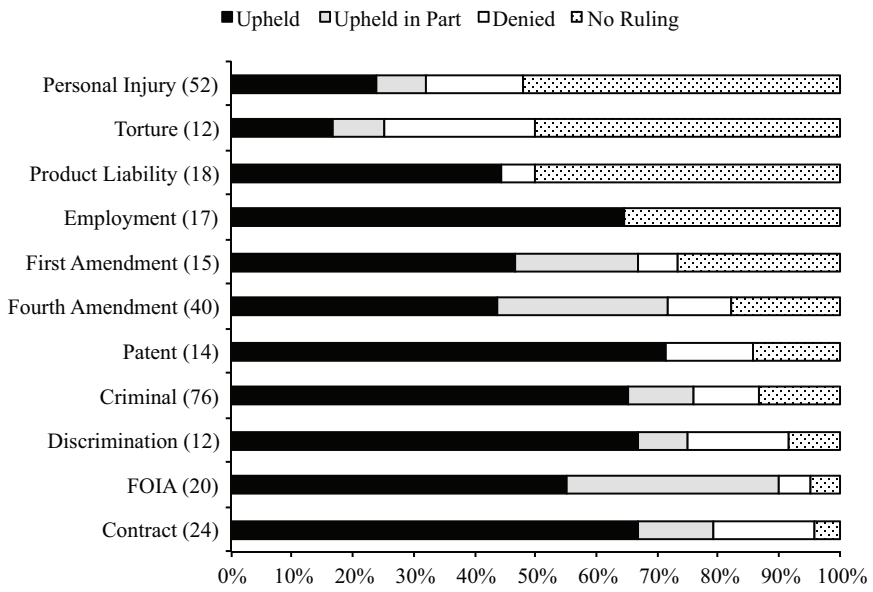
107. *See* Frost, *supra* note 58, at 1939-40 (arguing that, despite Chesney's findings, the Bush Administration's use of the state secrets doctrine to shield NSA surveillance programs from judicial review differed qualitatively from previous invocation of state secrets).

sisted this effort.[108] Second, it is possible that private parties have begun citing state secrets to preserve it as an affirmative defense without any real intention to rely upon it.[109] Those parties might be claiming the privilege simply to preserve it for possible use later in the litigation if the opportunity arises. This explanation suggests that courts are not intentionally avoiding these state secrets claims, but that the privilege claims are only marginally relevant in most of these cases.

C. *Do Rulings Differ Depending on the Issues in the Case?*

Another important question is whether courts treat the state secrets privilege differently depending on the issues in the case. As an example, do courts rule differently when the privilege is asserted in a criminal case than when it is asserted in a personal injury case or a patent case? The Archives code several different types of cases, and each case can have multiple case types—so, for example, a case might be both a criminal case and a Fourth Amendment case. Figure 5 illustrates how courts treat state secrets assertions by the type of case. Because cases might involve several issues, a single case can appear in the chart multiple times; if a case has more than one type listed, I include each case in the analysis for all issues that apply.

FIGURE 5
Disposition in State Secrets Cases by Case Type



108. *See infra* Part IV.A.
109. *See infra* Part IV.A.

In almost every type of case, courts are more likely to uphold the privilege in full than to uphold it in part or deny it, usually by a fairly comfortable margin. (In employment cases, 100% of assertions are upheld; in patent cases, 83%; in contract cases, 70%; in criminal cases, 75%; in discrimination cases, 73%; in First Amendment cases, 64%.) However, in personal injury and wrongful death cases, courts deny the privilege, in full or in part, at the same rate as they uphold it in full. In Fourth Amendment cases, courts only grant the privilege slightly more often (53% of the time) than they deny it in full or in part (47%). Assertions of the privilege in torture cases, too, are more likely to be denied in full or in part than to be granted in full, but the sample size is much smaller (only six decided cases). Second, the portion of cases in which courts do not reach the privilege issue at all varies significantly by the type of case. In product liability and torture and rendition cases, courts rule on assertions of the state secrets privilege less than half the time, while in discrimination, contract, and Freedom of Information Act (FOIA) cases, courts rule on assertions of the privilege over 90% of the time. It is possible that these differences reflect the difficulty of getting to the merits in these types of cases more generally; perhaps it is simply easier to avoid summary judgment or dismissal in discrimination, contract, and FOIA cases than it is in a personal injury or torture and rendition case. Certainly in the torture cases (all of which took place after September 11), the plaintiffs tended to rely on novel legal theories.[110]

The most optimistic interpretation of these patterns is that they reflect courts' effective balancing of fundamental constitutional rights against national security concerns. This interpretation claims that courts are skeptical of the state secrets privilege in Fourth Amendment cases because the government has allegedly violated a fundamental constitutional right. Fourth Amendment cases also tend to involve domestic surveillance that more closely resembles traditional law enforcement than military or espionage activities.[111] So both sides of the security/liberty balance favor denial of the privilege: the individual interest is strong, and the government's interest is distanced from traditional national security spheres. As a result, courts find reasons to deny assertions of the privilege, at least in part, more frequently than they do in other cases. Personal injury and wrongful death cases are a mix: they involve a very concrete, physical injury. But the injuries are usually not willfully inflicted by the government, and these cases often concern highly classified defense technology or opera-

110. *See, e.g.*, Mohamed v. Jeppesen Dataplan, Inc., 614 F.3d 1070, 1073, 1075 (9th Cir. 2010) (en banc) (evaluating a claim against a private contractor that allegedly operated black flights, rather than the CIA or its officers, for torture and rendition under the Alien Tort Statute); Arar v. Ashcroft, 585 F.3d 559, 563 (2d Cir. 2009) (en banc) (rejecting the alleged torture and rendition victim's argument that American officials acted under color of foreign law to establish a claim under the Torture Victim Protection Act).

111. For example, in *Jewel v. NSA*, 673 F.3d 902 (9th Cir. 2011), AT&T subscribers alleged that the NSA unlawfully collected their domestic communications and telephone records. *Id.* at 905-06. In *Kinoy v. Mitchell*, 67 F.R.D. 1 (S.D.N.Y. 1975), an attorney alleged that the Justice Department had unlawfully tapped his phones. *Id.* at 3-5.

tions.[112] By contrast, patent, product liability, employment, and discrimination cases are among the most likely to involve full grants of the privilege. Because patent and product liability cases are often private suits, not claims against the government, there is less concern that the government is using the privilege to cover up state action that violated a constitutional right. At the same time, those cases frequently involve highly classified technology or espionage programs, so the government's interest may be powerful.[113] The *Totten* bar also applies most explicitly to employment contract cases,[114] and most of the discrimination cases are also employment cases. FOIA cases, which touch on government transparency but not necessarily any particular violation of an individual's rights, fall somewhere in the middle of the spectrum.

The most problematic data point for this explanation is criminal cases. Criminal cases implicate core individual rights and liberty interests, but courts are still very likely to uphold the state secrets privilege in full. However, it is possible that considering the other side of the balance—the security interests involved—might help to explain this apparent discrepancy. Criminal cases involve powerful personal interests, but also strong government interests and public safety concerns. I examine this hypothesis in more detail below, in the Subparts on criminal[115] and Fourth Amendment[116] cases.

IV. EXAMINING TRENDS FROM THE DATA

In Part III, I identified three trends in the data I have collected on the state secrets privilege. This Part examines each in turn. First, I determined that

112. *See, e.g.*, United States v. Reynolds, 345 U.S. 1, 3 (1953) (adjudicating the state secrets privilege in the context of a wrongful death lawsuit resulting from the crash of a military flight testing secret electronic equipment); Bareford v. Gen. Dynamics Corp., 973 F.2d 1138, 1140 (5th Cir. 1992) (alleging that a defective weapons system caused deaths of and injuries to sailors), *vacated in part on denial of reh'g*, No. 91-2432, 1992 U.S. App. LEXIS 25805 (5th Cir. Oct. 14, 1992).

113. *See, e.g.*, *In re* "Agent Orange" Prod. Liab. Litig., 97 F.R.D. 427, 429-30 (E.D.N.Y. 1983) (upholding the state secrets privilege in a product liability lawsuit brought by Vietnam veterans and their families against the manufacturers of Agent Orange); Halpern v. United States, 151 F. Supp. 183, 184-85 (S.D.N.Y. 1957) (affirming the denial of a patent to an inventor because the patent documents included classified military and navy secrets which, if revealed, "would seriously hamper the administration of the Navy's research program"), *rev'd*, 258 F.2d 36 (2d Cir. 1958).

114. *See, e.g.*, Dep't of the Navy v. Egan, 484 U.S. 518, 520 (1988) (adjudicating a case brought by a laborer who sought reinstatement after he was fired because the navy denied him a security clearance, which his job required). *Totten* involved the details of a secret agent's employment contract, and courts have cited it for the narrow holding that courts may not enforce such contracts. *See, e.g.*, Guong v. United States, 860 F.2d 1063, 1064 (Fed. Cir. 1988) (citing *Totten* for the proposition that a "contract for 'secret services' . . . may not be judicially enforced"); *see also supra* Part II.A ("The *Totten* Court's logic depended upon both the employee-employer relationship and the consensual contract that Lloyd had entered into with the government . . . .").

115. *See infra* Part IV.B.

116. *See infra* Part IV.C.

courts are much less likely to rule on assertions of the state secrets privilege in the post-September 11 era. Second, I found that criminal defendants are especially unlikely to overcome state secrets assertions, especially post-September 11. Third, I noted that privilege assertions are denied, either in full or in part, in cases involving Fourth Amendment issues more frequently than in most other types of cases.

A. *Courts Have Been Less Likely to Reach the Privilege Issue After September 11*

The empirical data reveal that the most significant difference in dispositions of state secrets cases since September 11 is that courts more frequently avoid ruling on state secrets assertions. More specifically, courts often avoid the state secrets issue when the government is not a party to the case, though courts have reached state secrets claims slightly less frequently when the government is a party as well. The court never rules on the privilege in over two-thirds of cases in which the state secrets privilege is raised but the government is not involved. Instead, the court dismisses the case or grants summary judgment, or the case settles, without the court ruling on the state secrets privilege.

One common reason for this trend is that private parties have asserted the state secrets privilege as a defense much more frequently since September 11.[117] In cases that would ordinarily be private law matters, such as those involving personal injury, contracts, and intellectual property, private parties are claiming the state secrets privilege with greater frequency. For example, military contractors invoke the privilege to defend against personal injury or wrongful death lawsuits.[118] Companies producing secret technology products or weapons systems for the government have asserted the privilege to defend themselves in employment, patent, and product liability cases.[119] Without an

117. In her analysis of the cases collected by the Archives, Donohue remarks on this trend and examines it in detail. *See* Donohue, *supra* note 59, at 91-99. Donohue argues that the state secrets privilege "shapes litigation in important and prejudicial ways," even when the court does not rule on the issue. *Id*. at 99. She argues that the privilege may provide removal jurisdiction, extend the litigation process, and scare off litigants even without a ruling specifically on state secrets. *Id*. That is a difficult claim to assess empirically, though the effect is probably lessened because many of these cases never develop the state secrets claims much at all. In private litigation the court only rules on the privilege issue one-third of the time, and courts have been granting privilege claims much less frequently since September 11. *See supra* Part III.A. These findings do not prove that the privilege assertions are having little effect on private lawsuits, but they suggest that asserting the privilege in a private lawsuit post-September 11 is unlikely to be a dispositive litigation tactic.

118. *See infra* note 120.

119. *See, e.g.*, Raytheon Co.'s Opposition to Overland Storage Inc.'s Motion to Compel Production of Documents Relating to Classified Programs at 2-3, Raytheon Co. v. Overland Storage, Inc., No. 2:03CV13 (E.D. Tex. Mar. 3, 2004), 2004 WL 3359781 (alleging a state secrets defense in a patent case); Defendant Honeywell International Inc. & Honeywell Technology Solutions Inc.'s Answer to Plaintiff's Complaint at 8, McLane v. Honeywell

inside view into these parties' strategies, it is impossible to know exactly why the litigants invoked the state secrets doctrine. The most likely explanation is that defendants are simply reserving every possible defense, and that use of the state secrets privilege is encouraged by its increased visibility since September 11. It might also be a product of the major increase in the use of private military contractors in the wars in Iraq and Afghanistan.[120] The increased reliance on private defense companies may have resulted in more lawsuits against those companies in which there is a colorable state secrets claim.

One fairly typical example is *McLead v. L-3 Communications Vertex Aerospace, LLC*, a lawsuit brought by the families of fourteen American soldiers killed in a helicopter crash in Iraq.[121] The plaintiffs claimed that employees of L-3, the company responsible for the helicopter's maintenance, negligently left a foreign object in the helicopter's engine during an inspection, which caused the crash.[122] L-3 pleaded several affirmative defenses, including improper venue, the government contractors defense, the political question doctrine, derivative governmental immunity, intervening causes, contractual defenses, and contributory negligence.[123] It also argued that the claims were "barred in whole or in part by . . . the state secrets doctrine."[124] Cases like *McLead* support the "kitchen sink" hypothesis: the state secrets claim appears in a laundry list of alternative defenses, and the court never ruled on the issue because the case settled.

As another example, consider *McManaway v. KBR, Inc.*, a lawsuit brought by Indiana National Guard members who claimed they were exposed to toxic chemicals while serving in Iraq.[125] The servicemen sued two private contractors, alleging that the contractors were responsible for the servicemen's expo-

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Int'l Inc., No. 1:07-cv-2816 RDB (D. Md. Oct. 23, 2007), 2007 WL 4603348 (asserting a state secrets defense in a product liability case).

120. *Cf.* Dunigan, *supra* note 98 (noting that the "degree of privatization [of American military forces in Iraq] is unprecedented in modern warfare"). Some cases involving military contractors are those in which the state secrets privilege was invoked but not ruled upon. *See, e.g.*, Saleh v. Titan Corp., 580 F.3d 1, 2 (D.C. Cir. 2009) (involving a torture lawsuit against a private intelligence contractor); Lane v. Halliburton, No. H-06-1971, 2006 WL 2796249, at *1 (S.D. Tex. Sept. 26, 2006) (involving a personal injury and fraud suit against a military contractor in Iraq); Smith v. Halliburton Co., No. H-06-0462, 2006 WL 2521326, at *1 (S.D. Tex. Aug. 30, 2006) (involving a personal injury and wrongful death suit against a military contractor in Iraq); Whitaker v. Kellogg Brown & Root, Inc., 444 F. Supp. 2d 1277, 1278, 1282 (M.D. Ga. 2006) (dismissing a wrongful death suit against a military contractor in Iraq on political question grounds). Note that the court opinions in these cases do not always mention the state secrets issue; they often decide the case on other grounds.

121. No. C-08-264, 2010 WL 143715, at *1 (S.D. Tex. Jan. 8, 2010).

122. *Id.*

123. Defendant L-3 Communications Vertex Aerospace, LLC's Answer to Plaintiffs' Second Amended Complaint at 3-4, *McLead*, 2010 WL 143715 (No. C-08-264), 2009 WL 464073.

124. *Id.* at 4.

125. 695 F. Supp. 2d 883, 887-89 (S.D. Ind. 2010).

sure.[126] The contractors, KBR and Kellogg Technical Services, asserted a litany of at least twenty-nine affirmative defenses. State secrets was the twenty-sixth.[127] The district court dismissed the case for lack of personal jurisdiction.[128] Again, *McManaway* supports the notion that defendants are simply using the state secrets privilege as one possible defense in a very long list, but do not necessarily attach any particular value to it. Thus, *McLead* and *McManaway* represent a class of cases in which the state secrets privilege was asserted but use of the doctrine probably did not affect the outcome. These are cases that likely would have been dismissed for the same reason or settled on similar terms, regardless of whether the defendant claimed the privilege. This explanation probably accounts for the bulk of cases in which private parties invoked state secrets.

Courts have also been less likely to reach state secrets claims in suits involving the government since September 11, but the change was much less dramatic. One possible explanation is that lawsuits challenging the new government surveillance, detention, and rendition programs relied on untested legal theories, such as extraterritorial application of the Constitution or extension of *Bivens* liability[129] to new contexts.[130] As a result, these claims might tend to be more vulnerable than others to dismissal or summary judgment. This interpretation is supported by cases like *Arar v. Ashcroft*, in which Maher Arar, who was detained on suspicion of being a member of al Qaeda, alleged that his Fifth Amendment rights were violated because he was detained without access to American courts, mistreated in custody, and rendered to Syria, where he was tortured.[131] The Second Circuit upheld dismissal of the case for failure to state a claim and lack of subject matter jurisdiction.[132] The government asserted the state secrets doctrine before the district court, but neither the district court nor the court of appeals found it necessary to reach the state secrets issue because the case could be dismissed on other grounds.[133]

B. *Criminal Defendants Have Particular Difficulty Overcoming Privilege Assertions*

Assertion of the state secrets privilege in a criminal case is especially problematic. Criminal cases are initiated by the government and seek to deprive an

126. *See id*.

127. Defendants' First Amended Answer & Affirmative Defenses at 9, *McManaway*, 695 F. Supp. 2d 883 (No. 3:08-cv-186-RLY-WGH), 2009 WL 108453.

128. *McManaway*, 695 F. Supp. 2d at 896.

129. *See generally* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971).

130. *See supra* note 105.

131. 585 F.3d 559, 563 (2d Cir. 2009) (en banc).

132. *Id*.

133. *Id*.; Arar v. Ashcroft, 414 F. Supp. 2d 250, 287 (E.D.N.Y. 2006), *aff'd*, 585 F.3d 559.

individual of his liberty or property. Denying evidence to the defendant after bringing a case against him runs afoul of intuitive notions of fairness and of basic principles of our criminal justice system.[134] Additionally, unlike almost any other context, criminal cases pit the common law state secrets privilege against a criminal defendant's Fifth, Sixth, and Fourteenth Amendment rights to due process, to confront the witnesses and evidence against him, and to present a meaningful defense.

Before discussing the application of the state secrets privilege in criminal cases, it is important to review my methodology for identifying and classifying these cases. Criminal cases represent by far the largest change between my dataset and the original State Secrets Archives. The Archives contain thirty-seven criminal cases, several of which I removed as duplicates. My dataset contains sixty-four criminal cases. One reason for this difference is that many of these cases are more recent than the Archives' update in early 2012. Another is the Classified Information Procedures Act (CIPA).[135]

CIPA was designed to combat "graymail" by criminal defendants—threats to reveal classified information publicly during trial to push the government to dismiss charges.[136] The Justice Department's synopsis of CIPA states that "CIPA is a procedural statute; it neither adds to nor detracts from the substantive rights of the defendant or the discoery [sic] obligations of the government."[137] Many of CIPA's provisions are indeed relatively innocuous. It provides for a pretrial conference to discuss the use of classified material, requires courts to issue protective orders to protect classified information,[138] and requires defense attorneys (but not defendants or judges) to obtain security clearances or seek exemptions before viewing classified material.[139] More problematically, CIPA authorizes courts to provide redacted versions or summaries of classified documents to criminal defendants.[140] This limitation on discovery is grounded in the state secrets privilege:

> CIPA "does not confer on the government a privilege to refrain from disclosing classified information; it merely presupposes one." This privilege most likely has its origins in the common-law privilege against disclosure of state secrets . . . . Thus, the task before a court in deciding whether a protective or-

134. *See* U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; [and] to have compulsory process for obtaining witnesses in his favor . . . ."). Indeed, this was the "delicate question" that Chief Justice Marshall identified in *Burr*. *See* United States v. Burr, 25 F. Cas. 30, 37 (C.C.D. Va. 1807) (No. 14,692).

135. 18 U.S.C. app. §§ 1-16 (2013).

136. *See* EDWARD C. LIU & TODD GARVEY, CONG. RESEARCH SERV., R41742, PROTECTING CLASSIFIED INFORMATION AND THE RIGHTS OF CRIMINAL DEFENDANTS: THE CLASSIFIED INFORMATION PROCEDURES ACT 10 (2012).

137. OFFICES OF THE U.S. ATT'YS, CRIMINAL RESOURCE MANUAL § 2054 (1997) (providing a synopsis of CIPA).

138. 18 U.S.C. app. §§ 2-3.

139. *See* OFFICES OF THE U.S. ATT'YS, *supra* note 137, § 2054.

140. *See id*.

> der is appropriate under CIPA is to determine when a defendant's right to present a defense displaces a validly asserted state-secrets privilege.[141]

That said, not all CIPA cases are state secrets cases, just as not all classified material is covered by the state secrets privilege. For example, when a court requires a defense attorney to obtain a security clearance to view classified evidence but does not otherwise restrict access to the information, the state secrets privilege is not invoked.[142] However, the state secrets privilege is the basis for the government's abrogation of its ordinary discovery obligations when it provides summaries of its evidence or determines ex parte whether to turn over certain evidence at all.[143] Even where courts determine that classified documents are not discoverable due to ordinary rules of procedure, that determination is sometimes made in an ex parte hearing to the exclusion of the defendant and his counsel. Thus, I include in my dataset cases in which defendants challenged summaries of classified material provided under CIPA or were excluded from hearings regarding the discoverability of classified information.[144] Because these cases do not always mention the state secrets privilege explicitly, many are missing from the Archives. Though important, CIPA is only one unique aspect of the application of the privilege in criminal cases.

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141. United States v. Hanjuan Jin, 791 F. Supp. 2d 612, 618 (N.D. Ill. 2011) (citation omitted) (quoting United States v. Abu-Jihaad, 630 F.3d 102, 140 (2d Cir. 2010)). Note that the House of Representatives Select Committee on Intelligence stated in no uncertain terms in its report on CIPA that the state secrets privilege does not apply in criminal cases, but courts have explicitly rejected the Committee's interpretation. *See, e.g.*, United States v. Aref, 533 F.3d 72, 78-79 (2d Cir. 2008).

142. *See, e.g.*, United States v. Hashmi, 621 F. Supp. 2d 76, 83 (S.D.N.Y. 2008) (requiring defense counsel to obtain a security clearance but not otherwise restricting discovery).

143. *See* United States v. Sedaghaty, 728 F.3d 885, 905 (9th Cir. 2013) (overturning a conviction in which CIPA summaries provided to the defendant contained an "unfairly colored presentation of the information" and "omitted facts helpful to [his] defense"); United States v. Klimavicius-Viloria, 144 F.3d 1249, 1261 (9th Cir. 1998) ("In order to show that material is classified, the government must make a formal claim of state secret privilege. . . . Ex parte hearings are generally disfavored. In a case involving classified documents, however, *ex parte*, *in camera* hearings in which government counsel participates to the exclusion of defense counsel are part of the process that the district court may use in order to decide the relevancy of the information." (citation omitted)).

144. There is an argument to be made that this latter class of cases does not really involve state secrets either. The government is still required, even after invoking the state secrets doctrine, to turn over evidence to the defendant if it is material and helpful to the defense. This standard is essentially the same as that for ordinary *Brady* disclosure. *See* Brady v. Maryland, 373 U.S. 83, 87 (1963) (holding that the prosecution may not suppress evidence that is material and favorable to the accused); *see also* Strickler v. Greene, 527 U.S. 263, 280 (1999) (ruling that the government must turn over to the defendant all material impeachment and exculpatory evidence, even if the defendant does not request it). However, the key difference in state secrets cases is that the defendant is excluded from the hearings on discoverability and is usually prohibited from knowing exactly what the evidence is, even if defense counsel has a security clearance. Thus the state secrets privilege fundamentally transforms adversarial proceedings into ex parte ones. Because the state secrets privilege changes the nature of the proceedings, I classify these cases as state secrets cases.

Recognizing the concerns unique to criminal cases, courts have acknowledged that "the state-secrets privilege applies to criminal cases, but that 'it must give way under some circumstances to a criminal defendant's right to present a meaningful defense.'"[145] Courts apply this principle by conducting a special inquiry when the government claims state secrets in criminal cases. When a court finds that evidence in a criminal case is covered by the privilege, the court *must* examine the allegedly secret evidence.[146] If the evidence "is helpful or material to the defense," the government must turn it over, even if it would be protected by the state secrets privilege in a civil case.[147] This is a marked contrast to civil cases, where courts must suppress evidence covered by the privilege even if the evidence is necessary to a party's case.[148] It is also different from state secrets doctrine in civil cases because the court in a criminal case must always review the allegedly secret evidence in camera.[149] In civil cases, in camera review is only used when "affidavits are insufficient."[150]

Despite this additional layer of protection, a criminal defendant's chances of overcoming the state secrets privilege are quite low. Courts reach the state secrets issue more frequently in criminal cases than they do in most other types of cases—about 87% of the time compared to 78% overall. But when courts do reach the issue, they have upheld the privilege in full more often in criminal cases (77% of the time) than in civil cases (62%). Even more striking is the change over time. In criminal cases prior to September 11, courts upheld the privilege 60% of the time, denied it 30% of the time, and upheld it in part 11% of the time. Those numbers are similar to (though slightly more hostile to privilege assertions than) the overall trend for all cases. Since September 11, only five criminal defendants (13%) have overcome invocation of the state secrets privilege in part. None have overcome it entirely, but courts have upheld the privilege in full in 87% of cases. Despite the small sample size (27 decided cases before September 11 and 38 after), a chi-squared test reveals that these differences are statistically significant, with $p < 0.001$. The infrequent use of the state secrets privilege in criminal cases mitigates concerns about abuse to some extent; it suggests that prosecutorial discretion may be the reason for the government's success in asserting the privilege in criminal contexts. Still, the core constitutional rights and liberty interests implicated in criminal cases,

145. United States v. Stewart, 590 F.3d 93, 131 (2d Cir. 2009) (quoting *Aref*, 533 F.3d at 79); *see also Aref*, 533 F.3d at 79-80.

146. *Stewart*, 590 F.3d at 131.

147. *Id*. (quoting *Aref*, 533 F.3d at 80).

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

149. *Compare Aref*, 533 F.3d at 80 (noting that in criminal cases, "the district court must first decide whether the classified information the Government possesses is discoverable"), *with Reynolds*, 345 U.S. at 11 (noting that in civil cases, "even the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that military secrets are at stake").

150. *See* Hayden v. NSA/Cent. Sec. Serv., 608 F.2d 1381, 1387 (D.C. Cir. 1979).

along with the overwhelming success rate for the government, necessitate a closer look.

A federal court first recognized the state secrets privilege in a criminal case in *United States v. Haugen* in 1944.[151] The government alleged that Richard Haugen had counterfeited meal tickets issued by the Olympic Commissary Company (OCC).[152] The government claimed that he violated federal law, including defrauding the United States, because the OCC was a government subcontractor on a secret defense project.[153] A government witness testified to establish this contractual relationship (a necessary element of the crime), but the government claimed that the contracts themselves were so secret that it could not even reveal the names of the persons who had signed them on behalf of either the government or the contractors.[154] The court held that the government properly refused to turn over the contracts because they were military secrets.[155] The court noted that when a party cannot supply primary evidence (in this case the contract itself), it must present the best secondary evidence available.[156] Consequently, the court demanded testimony from someone familiar with the original contract.[157]

Given that the privilege has been asserted in only seventy-four criminal cases since *Haugen*, there is an argument to be made that prosecutors do a good job of asserting the privilege in criminal cases only when it is truly necessary. This argument suggests that courts have consistently upheld the privilege because prosecutors use it only sparingly and appropriately. But it is impossible to support that argument with direct evidence, and the workings of the privilege in criminal cases still conflict with fundamental principles of the American criminal justice system.

An informative recent example is *United States v. Abu-Jihaad*. Hassan Abu-Jihaad was an American citizen who enlisted in the U.S. Navy. He was charged with disclosing national defense information to unauthorized persons and providing material support to terrorists.[158] Some of the evidence against him was collected through surveillance of computer files and e-mails pursuant to the Foreign Intelligence Surveillance Act (FISA).[159] Abu-Jihaad moved to suppress this evidence. Specifically, the defense challenged the FISA court's probable cause finding, but it did not have access to any of the evidence that the

151. 58 F. Supp. 436, 438 (E.D. Wash. 1944).

152. *Id*. at 437.

153. *Id*.

154. *Id*. at 438.

155. *Id*.

156. *Id*. at 438-39.

157. *Id*. at 439-40. The court never explained why a redacted version of the contract was not the best available evidence.

158. United States v. Abu-Jihaad, 630 F.3d 102, 108-09, 116-17 (2d Cir. 2010).

159. *Id*. at 117.

government submitted to the FISA court in support of the searches.[160] Abu-Jihaad asked the court to order the government to turn over the evidence supporting the FISA applications.[161] The government claimed state secrets. The trial court judge reviewed the FISA authorizations in camera, determined that they were covered by the privilege and unhelpful to the defense, and denied the motion.[162] On appeal, the Second Circuit again reviewed the classified evidence in camera.[163] The appellate court affirmed, writing that the classified evidence "did not deny Abu-Jihaad evidence that was either helpful or material to his defense."[164]

Abu-Jihaad demonstrates that the state secrets privilege effectively transforms certain evidentiary inquiries in criminal cases from adversarial processes into ex parte proceedings between the prosecutors and the judge. The FISA court had made a factual determination that Abu-Jihaad was "acting as an 'agent of a foreign power.'"[165] Abu-Jihaad sought to contest that factual determination, but he was denied access to the evidence the FISA court had relied upon in making it.[166] The state secrets privilege stripped the defendant of the right to participate in that process, or even to see the government's evidence at all. Instead, based solely on its own review of the evidence and the prosecution's claims, the court determined that the evidence was collected legally and that the FISA court's factual determinations were correct.[167] Abrogating the adversarial process in this way risks infringing upon the defendant's fundamental due process rights.[168]

One of the few criminal defendants in the post-September 11 era who successfully challenged the state secrets privilege was Pirouz Sedaghaty (also known as Seda). Sedaghaty was accused of falsifying charitable tax returns to funnel money to Chechen rebels.[169] Sedaghaty's defense was that he had been

160. Motion for Disclosure of FISA Applications & Orders & for Adversary Hearing on Motion to Suppress at 2, 5, United States v. Abu-Jihaad, 531 F. Supp. 2d 299 (D. Conn. 2008) (No. 3:07CR57 (MRK)), 2007 WL 4961128 [hereinafter Abu-Jihaad Motion for Disclosure].

161. *Id*.

162. *Abu-Jihaad*, 531 F. Supp. 2d at 301.

163. *Abu-Jihaad*, 630 F.3d at 130 ("[W]e have conducted a careful *in camera* review of the challenged FISA orders, the government's applications for those orders, and the classified materials submitted in support of those applications.").

164. *Id*. at 141-42.

165. Abu-Jihaad Motion for Disclosure, *supra* note 160, at 2.

166. *See Abu-Jihaad*, 630 F.3d at 129.

167. *See id*.

168. Indeed, the bare minimum due process requirements for a citizen-detainee, even when the national security stakes are high, include "notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker." Hamdi v. Rumsfeld, 542 U.S. 507, 533 (2004) (plurality opinion). Abu-Jihaad was not a detainee, but even more exacting due process requirements apply to citizens tried in criminal cases. *Abu-Jihaad* therefore illustrates that the state secrets doctrine can erase even the most basic due process rights.

169. United States v. Sedaghaty, 728 F.3d 885, 891 (9th Cir. 2013).

honest with the charity's accountant and the Federal Bureau of Investigation (FBI), and that any errors on his tax return were simple mistakes.[170] The government acknowledged that it had classified information helpful to the defense, but argued that it could not turn over the classified evidence in full.[171] Instead it provided an unclassified summary.[172] Sedaghaty objected, but the trial court approved the government's proposed summary. Sedaghaty was convicted.[173] On appeal, the Ninth Circuit found that the summary "unfairly colored presentation of the information and, even more problematic, that the substitution omitted facts helpful to Seda's defense."[174] In part because of the inadequate summary, the appellate court reversed Sedaghaty's conviction and remanded the case for a new trial.[175]

Sedaghaty shows what can happen when decisions about the discoverability of classified evidence are made ex parte between the court and the prosecutor. In one sense, *Sedaghaty* is encouraging. It indicates that courts—at least at the appellate level—are conducting careful and discerning reviews of claims of the state secrets privilege. On the other hand, the facts of the case prove that prosecutorial overreach does happen, and that courts do not always counter it. Cases like this make us less confident that prosecutorial discretion is an effective check against abuses of the state secrets privilege. But it is in the nature of the state secrets privilege that we cannot know how often those abuses occur.

C. *Fourth Amendment Cases*

At first glance, courts seem to treat state secrets claims in Fourth Amendment cases differently than they do in most other types of cases. Judges deny assertions of state secrets, in full or in part, in Fourth Amendment cases about as frequently as they uphold them. In almost every other type of case, courts uphold the privilege in full more than half of the time if they reach the issue. As noted above, when courts reach the privilege issue in Fourth Amendment cases, they uphold the privilege in full 53% of the time. They uphold it in part and deny it in part in 34% of cases, and they deny it in full in 13% of cases.

This Subpart examines possible explanations for the relatively frequent denial of state secrets assertions in Fourth Amendment cases. I have already proposed an explanation favorable to the courts: they are more discerning of privilege claims in cases that necessarily implicate violations of fundamental constitutional rights and where the secret government activity is or resembles domestic law enforcement.[176] Private law cases, by contrast, implicate individ-

170. *See id*. at 895.

171. *See id*. at 905.

172. *See id*.

173. *Id*. at 897.

174. *Id*. at 905.

175. *Id*. at 892-93.

176. *See supra* note 111 (providing examples of Fourth Amendment cases in which the relevant government activity was akin to domestic law enforcement).

ual interests that are threatened by private actors, often inadvertently. As a result, there is less of a concern that the government is using the privilege to block judicial oversight of willful constitutional violations. Other types of cases are also more likely to involve military or espionage secrets. Application of the state secrets privilege might be more palatable for courts when cases involve such weighty national security interests.

A crucial case for understanding the intersection of the Fourth Amendment and the state secrets doctrine is *Al-Haramain Islamic Foundation, Inc. v. Bush*[177] (later consolidated in the multidistrict litigation *In re NSA Telecommunications Records Litigation* (*NSA Telecom*)[178]). *Al-Haramain* grew out of a suit brought by the Al-Haramain Islamic Foundation against President George W. Bush and other executive officials. The Foundation, which was designated a Foreign Terrorist Organization, claimed it had been subjected to warrantless electronic surveillance in violation of FISA and the Fourth Amendment.[179] On appeal, the Ninth Circuit held that the subject matter of the case was not a state secret because the government had "provided to the American public a wealth of information" about its warrantless surveillance program.[180] However, the application of the privilege to certain sealed evidence was still undecided.[181] The crucial state secrets decision came in an order from Judge Vaughn Walker of the Northern District of California.[182] The only state secrets issue before the court was whether FISA preempted the state secrets doctrine.[183]

Judge Walker held that it did. FISA specifically provides for in camera review of surveillance authorizations upon the Attorney General's claim (via an affidavit) that revealing the authorization would harm national security.[184] The court held that this procedure was similar enough to the requirements for assessing claims of the state secrets privilege that FISA foreclosed a *Reynolds*-type evaluation of state secrets assertions in those cases.[185] In fact, the court expressed concern that the executive might use FISA in combination with the state secrets privilege to conceal Fourth Amendment violations: "Given the possibility that the executive branch might again engage in warrantless surveillance and then assert national security secrecy in order to mask its conduct, Congress intended for the executive branch to relinquish its near-total control

177. 507 F.3d 1190 (9th Cir. 2007).

178. *See* Transfer Order at 1-2, *In re* NSA Telecomms. Records Litig., MDL No. 06-1791 (J.P.M.L. Dec. 15, 2006).

179. *See Al-Haramain*, 507 F.3d at 1193.

180. *Id.* at 1199-200.

181. *See In re* NSA Telecomms. Records Litig., 564 F. Supp. 2d 1109, 1110-12, 1114 (N.D. Cal. 2008).

182. *See id.* at 1110-11.

183. *Id.*

184. *See* 50 U.S.C. § 1806(f) (2012).

185. *See In re NSA Telecomms. Records Litig.*, 564 F. Supp. 2d at 1124 ("Congress has provided what is necessary for this court to determine that FISA preempts or displaces the state secrets privilege . . . .").

over whether the fact of unlawful surveillance could be protected as a secret."[186] This logic reflects a clear concern about the potential for executive branch abuse of the state secrets privilege to prevent the judiciary from reviewing violations of fundamental constitutional rights.

After holding that FISA preempted the state secrets privilege, the court ordered the executive branch to furnish the plaintiffs' attorneys with security clearances so that they could "read and respond to sealed portions of the court's future orders and, if necessary, some portion of defendants' classified filings."[187] Despite several court orders, the executive branch refused to provide necessary information to plaintiffs' counsel.[188] The government also continued to rely upon legal arguments that the court had already rejected.[189] As a result, the court granted summary judgment for the plaintiffs and awarded the individual plaintiffs damages and attorneys' fees.[190] The court's willingness to grant summary judgment against the government again reflects the importance the court attached to vindicating claims of constitutional violations. However, on appeal, the Ninth Circuit reversed the district court's judgment and dismissed the case on grounds of sovereign immunity.[191] The Ninth Circuit noted that its holding "effectively brings to an end the plaintiffs' ongoing attempts to hold the Executive Branch responsible for intercepting telephone conversations without judicial authorization."[192] It also rebuked the government for asserting that the plaintiffs had engaged in "game-playing," calling the claim "as careless as it is inaccurate."[193] The court also noted that the fact "[t]hat [plaintiffs'] suit has ultimately failed does not in any way call into question the integrity with which they pursued it."[194]

Another useful example is *Kinoy v. Mitchell*, a case brought in the 1970s by an attorney who claimed that the Justice Department had listened in on his telephone conversations with a client in violation of the Fourth, Fifth, Sixth, and Ninth Amendments.[195] During discovery, Kinoy learned that the FBI had overheard twenty-three of his telephone conversations.[196] The FBI stated that it

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186. *Id*. at 1123.

187. *In re* NSA Telecomms. Records Litig., 700 F. Supp. 2d 1182, 1190-91 (N.D. Cal. 2010).

188. *See id*. at 1190-92.

189. *See id*. at 1192-93 (describing one government argument as "essentially a re-tread of standing arguments made in March 2008," and noting that the court had already considered and rejected another).

190. *See In re* NSA Telecomms. Records Litig., No. C 07-0109 VRW, 2010 U.S. Dist. LEXIS 136156, at *4-6, *64-65 (N.D. Cal. Dec. 21, 2010) (awarding the individual plaintiffs $20,400 each in liquidated damages and a total of $2,515,387.09 in attorneys' fees).

191. *See* Al-Haramain Islamic Found., Inc. v. Obama, 705 F.3d 845, 848 (9th Cir. 2012).

192. *Id*.

193. *Id*. at 848-49.

194. *Id*. at 849.

195. 67 F.R.D. 1, 3-4 (S.D.N.Y. 1975).

196. *Id*. at 5.

had never directly monitored Kinoy himself, but that nine of the calls had been monitored pursuant to foreign intelligence investigations, and the other fourteen pursuant to domestic intelligence investigations.[197] Kinoy served the government with a subpoena requesting access to the authorizations of all the wiretaps, but the government asserted that the authorizations were protected by the state secrets privilege.[198]

In its analysis of this claim, the court noted that the state secrets privilege must be invoked by "the head of the department or agency responsible for the records" and set forth "with enough particularity to enable the Court to make an informed decision [about] the nature of the material withheld and of the threat to the national security should it be revealed."[199] The Attorney General provided an affidavit claiming the privilege.[200] The court examined the affidavit and determined it inadequate to support the privilege claim because it was not clear that the "Attorney General personally considered the material as to which he lodged this claim of privilege and decided that it was a military or state secret."[201] Though the court invited the government to provide the requisite supporting materials, the Fourth Amendment claims were eventually dismissed due to qualified immunity.[202]

Both *Al-Haramain* and *Kinoy* support the hypothesis that emphasizes the importance of constitutional rights violations and reduced national security concerns in explaining the results in Fourth Amendment cases. Each case involved allegedly significant violations of Fourth Amendment rights, and in each there were reasons to think that national security interests might not be quite as weighty as they are in other state secrets cases. *Al-Haramain* did implicate surveillance of alleged terrorist organizations, but that surveillance resembled ordinary law enforcement more closely than military operations.[203] The connection to military or espionage secrets—the core of the state secrets doctrine—was even more attenuated in *Kinoy*. Though Kinoy's claims were eventually dismissed, the court was committed to a thorough analysis of the government's privilege assertions. The results in *Al-Haramain* and *Kinoy* are

197. *Id*.

198. *Id*. at 5, 8 ("The first of the Richardson affidavits is clearly an attempt to assert the well-established governmental privilege which protects absolutely secrets of state and military secrets, because disclosure would jeopardize the national security.").

199. *Id*. at 8.

200. *Id*. at 7.

201. *Id*. at 9.

202. *See id*. at 17 (giving the government forty-five days to reassert its privilege claims with a sufficient supporting affidavit); Kinoy v. Mitchell, 851 F.2d 591, 593 (2d Cir. 1988) (explaining that an intervening Supreme Court decision holding that the Attorney General was "entitled to qualified immunity in actions by persons alleging that such wiretaps violated their Fourth Amendment rights" removed the Fourth Amendment claims from the case).

203. *See* Al-Haramain Islamic Found., Inc. v. Obama, 705 F.3d 845, 848 (9th Cir. 2012) (describing the U.S. Treasury Department's investigation into the plaintiff, which included tapping the Al-Haramain Islamic Foundation's domestic telephone and e-mail traffic).

encouraging from a civil liberties perspective, but other Fourth Amendment cases reveal that courts do not always resolve the balance between constitutional rights and national security so favorably.

In *American Civil Liberties Union v. NSA*, a group of journalists, academics, and lawyers sued the NSA.[204] The plaintiffs regularly communicated with persons overseas whom they believed might be monitored pursuant to the Bush Administration's Terrorist Surveillance Program (TSP).[205] They claimed that the NSA had monitored their communications in violation of the Fourth Amendment and sought a permanent injunction prohibiting continuation of the TSP.[206] The district court granted summary judgment on that issue for the plaintiffs,[207] but the Sixth Circuit reversed.[208] It held that the plaintiffs lacked standing because they had failed to show any individualized injury.[209] The court held that the plaintiffs had not proved that the NSA had monitored any of their individual communications.[210] When the plaintiffs sought the NSA records to prove that the NSA had monitored their phone calls, the NSA asserted state secrets. Thus the NSA used the privilege to preclude discovery of the only evidence that might establish standing.[211] Indeed, the court of appeals found that without the secret evidence, the plaintiffs could not establish standing.[212] Moreover, the court decided that, because those records were secret, the plaintiffs would *never* be able to show an individualized injury and thus could not ever establish standing to sue the NSA.[213]

American Civil Liberties Union v. NSA raises the specter of the sort of abuse that makes the state secrets doctrine so problematic. The plaintiffs had a colorable claim that the government had violated their Fourth Amendment rights. But the government successfully invoked the privilege to prevent them from even finding out whether they were the victims of a constitutional violation.[214] As a result, they had no standing and could not challenge the program's legality in court—precisely the concern that Judge Walker highlighted in *NSA*

204. 493 F.3d 644, 648-49 (6th Cir. 2007) (Batchelder, J., announcing the judgment of the court).

205. *Id*.

206. *See id*. at 649-50.

207. Am. Civil Liberties Union v. NSA, 438 F. Supp. 2d 754, 782 (E.D. Mich. 2006), *vacated*, 493 F.3d 644.

208. *See Am. Civil Liberties Union*, 493 F.3d at 687-88.

209. *See id*. at 653-57.

210. *See id*. at 653.

211. *See id*. at 650.

212. *See id*. at 653, 655-56.

213. *See id*. at 653 ("But the plaintiffs do not—and because of the State Secrets Doctrine cannot—produce any evidence that any of their own communications have ever been intercepted by the NSA, under the TSP, or without warrants.").

214. *See id*.

Telecom.[215] However, a similar (and more recent) case takes a different approach.

Jewel v. NSA is an ongoing class action lawsuit (also consolidated in the *NSA Telecom* multidistrict litigation[216]) on behalf of subscribers of AT&T's telephone and Internet services alleging that the NSA obtained their communications in violation of the First and Fourth Amendments.[217] The district court dismissed the case for lack of standing.[218] The Ninth Circuit reversed, holding that "Jewel's claims . . . meet the constitutional standing requirement of concrete injury," but left the state secrets issue for the district court.[219] On remand, the district court followed the Ninth Circuit's reasoning in *Al-Haramain*, finding that the multiple public disclosures regarding the NSA's surveillance programs meant that the subject matter of the litigation was not a state secret.[220] The district court also followed the logic from *NSA Telecom*, rejecting the government's state secrets claim on the ground that FISA preempted the common law privilege.[221] Although state secrets did not preclude justiciability entirely, the district court found that "there would be significant evidence that would be properly excluded should the case proceed."[222] Only time will tell whether the state secrets exclusions will prove fatal to the *Jewel* plaintiffs' claims.

The surveillance cases illustrate two different approaches to the state secrets privilege. *American Civil Liberties Union v. NSA* demonstrates that some courts allow state secrets to triumph even when fundamental constitutional rights are at issue. When that was the case, the combination of the state secrets privilege and standing requirements precluded any judicial review of the constitutionality of the surveillance program.[223] Examples like *American Civil Liberties Union v. NSA* create legitimate concerns that successful invocation of the privilege can insulate unconstitutional government programs from review.

Whether the approach taken in *Al-Haramain* and *Jewel* is less problematic is debatable. On one hand, the courts in both cases denied motions to dismiss based on the state secrets privilege, holding that the surveillance program was not sufficiently secret to earn blanket protection.[224] On the other hand, the

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215. *In re* NSA Telecomms. Records Litig., 564 F. Supp. 2d 1109, 1123 (N.D. Cal. 2008) (warning of "the possibility that the executive branch might again engage in warrantless surveillance and then assert national security secrecy in order to mask its conduct").

216. Judge Walker, who was then handling the *NSA Telecom* MDL, signed an order relating *Jewel* to *Hepting v. AT&T*. *See* Related Case Order, Jewel v. NSA, No. 4:08-cv-04373 (N.D. Cal. Oct. 24, 2008). *Hepting* was one of the cases originally consolidated in the MDL. *See In re* NSA Telecomms. Records Litig., 444 F. Supp. 2d 1332, 1335 (J.P.M.L. 2006).

217. 673 F.3d 902, 905-06 (9th Cir. 2011).

218. Jewel v. NSA, No. C 07-0693, 2010 WL 235075, at *21 (N.D. Cal. Jan. 21, 2010).

219. *Jewel*, 673 F.3d at 905.

220. Jewel v. NSA, 965 F. Supp. 2d 1090, 1102-03 (N.D. Cal. 2013).

221. *See id*. at 1103-04.

222. *Id*. at 1103.

223. *See* Am. Civil Liberties Union v. NSA, 493 F.3d 644, 653 (6th Cir. 2007).

224. *See* Al-Haramain Islamic Found., Inc. v. Bush, 507 F.3d 1190, 1200-01 (9th Cir. 2007); *Jewel*, 965 F. Supp. 2d at 1102-03.

courts in both cases based their rulings in large part on FISA preemption rather than the privilege itself.[225] *Al-Haramain* was eventually dismissed due to sovereign immunity,[226] and the state secrets privilege will continue to play an important role in *Jewel*. So even though state secrets claims were defeated (at least partially) in both cases, there is still no guarantee of meaningful judicial consideration of the NSA surveillance programs. The logic that governed both cases is also troubling. As the *Al-Haramain* court wrote, "the government's many attempts to assuage citizens' fears that they have not been surveilled now doom the government's assertion that the very subject matter of this litigation, the existence of a warrantless surveillance program, is barred by the state secrets privilege."[227] Problematically, one lesson that the government can draw from these cases is that total secrecy insulates government programs from judicial review entirely. Making limited disclosures may render a program vulnerable to lawsuits, so the safest course is to hide as much as possible. Overall, the Fourth Amendment cases are troubling from a civil liberties perspective. Even though more state secrets assertions are denied (at least in part) in Fourth Amendment cases than in most other types of cases, it appears that those denials do not necessarily result in meaningful judicial review.

CONCLUSION

When a case like *Mohamed v. Jeppesen Dataplan, Inc.* is dismissed on state secrets grounds, it offends fundamental conceptions of democracy. The state secrets doctrine creates a conundrum. It precludes judicial review and public evaluation of government actions that may well violate fundamental constitutional rights, including the rights to life and liberty. Especially because the doctrine discourages courts from reviewing allegedly secret evidence—and thus evaluating the substance of state secrets assertions—the lack of judicial review is repugnant. At the same time, the state secrets privilege protects critical national security concerns. It is therefore crucially important that courts strike the proper balance between these compelling interests. But the secrecy of the information involved precludes effective review of individual applications of the state secrets privilege.

The information that is available regarding the state secrets privilege provides important insights, but no conclusive answers. A sudden increase in use of the state secrets doctrine following September 11 prompts concerns that the government might be abusing the privilege to protect unconstitutional counterterrorism programs. That fear is heightened by the simultaneous creation of detention, rendition, and surveillance programs that are both allegedly unconstitu-

225. *See Jewel*, 965 F. Supp. 2d at 1103; *In re* NSA Telecomms. Records Litig., 564 F. Supp. 2d 1109, 1124 (N.D. Cal. 2008).

226. *See* Al-Haramain Islamic Found., Inc. v. Obama, 705 F.3d 845, 855 (9th Cir. 2012).

227. *Al-Haramain*, 507 F.3d at 1200 (emphasis omitted).

tional and consistently shielded from judicial oversight by the state secrets doctrine. However, some of the post-September 11 increase in assertions of the privilege—and almost all of the statistically significant differences in how courts handle the privilege—are due to invocation of the privilege by private parties. It has become a staple in the laundry list of affirmative defenses that government contractors assert in private lawsuits. In the large majority of those cases, courts do not even reach the issue; the cases settle or are dismissed on other grounds. This revelation ameliorates concerns about government overuse of the privilege to some extent, but does not eliminate them completely.

The data provide mixed evidence as to whether courts are adequately protecting constitutional rights when state secrets are involved. Courts are relatively likely to deny the privilege, at least in part, in Fourth Amendment cases. Because those cases necessarily involve allegations that the government has violated a constitutional right, this trend suggests that courts may be weighing those rights heavily in their analysis. But some cases, like *American Civil Liberties Union v. NSA*, indicate that the privilege can be used to impede judicial review of potentially unconstitutional programs even in the Fourth Amendment context. The revelations during the summer of 2013 of the extent of the government's warrantless data collection[228] provide a troubling potential frontier for such use of the doctrine. Cases like *Al-Haramain* and *Jewel* indicate that even when the privilege is denied in part, plaintiffs may still be unable to mount constitutional challenges to secret government programs.

Also concerning is the fact that courts are very likely to uphold privilege assertions in criminal cases. This trend has become especially pronounced since September 11: since 2001, very few criminal defendants have managed to overcome an assertion of the state secrets privilege, even in part. Courts always conduct an in camera review of secret evidence in criminal cases, and (at least in theory) they only block its discovery if it is both immaterial and unhelpful to the defense. Nonetheless, the privilege converts what should be an adversarial process into an ex parte proceeding. This procedural deficiency is an intrusive infringement on defendants' rights. Without examining the evidence at issue, it is impossible to tell whether the success rate for privilege claims in criminal cases in the post-September 11 era is due to prosecutorial restraint or judicial rubber-stamping. But cases like *Sedaghaty* show that prosecutorial overreach does occur, and that courts do not always counter it effectively.

These initial findings suggest a few avenues for additional research. First, it might be possible to conduct an evaluation of the adequacy of state secrets claims in cases old enough for the secret evidence to be declassified. Unfortunately, evidence protected by the privilege is so highly sensitive—classification

228. *See, e.g.*, Glenn Greenwald, *XKeyscore: NSA Tool Collects 'Nearly Everything a User Does on the Internet*,' GUARDIAN (July 31, 2013, 8:56 AM EDT), http://www.theguardian.com/world/2013/jul/31/nsa-top-secret-program-online-data; *NSA Collects 'Word for Word' Every Domestic Communication, Says Former Analyst* (PBS television broadcast Aug. 1, 2013) (transcript available at http://www.pbs.org/newshour/bb/government_programs/july-dec13/whistleblowers_08-01).

alone is insufficient to establish the privilege—that much of it still might not be available. But if a large enough sample could be collected and analyzed, it might be possible to evaluate whether courts adequately assessed privilege claims in those cases. Those data could provide empirical evidence for the assumption that courts treated those claims fairly prior to September 11. Similar treatment of privilege claims since September 11 would then be more convincing evidence that courts are still evaluating those claims effectively.

Second, a more comprehensive case-by-case analysis could provide additional insights. Particularly intriguing is the question of how often courts conduct an in camera review when evaluating state secrets assertions, and, if so, how often they agree with the government's claims. Additionally, it is feasible to develop a more thorough coding scheme that could identify which cases involved constitutional claims and which cases involved traditional military or espionage secrets (as opposed to claimed secrecy of domestic law enforcement programs). Analysis of those data might provide evidence as to whether courts are looking at the right factors.

The state secrets doctrine marks the outer limits of our liberty, the periphery of our constitutional protections. Unfortunately, evaluating courts' treatment of the state secrets privilege is very difficult, and the lack of definitive explanations is frustrating. The available evidence is mixed. There are some indications in the raw data and in the substance of certain Fourth Amendment opinions that courts may be conducting effective evaluations of state secrets claims. But other Fourth Amendment opinions and the data on criminal cases are troubling. It is indisputable that the government has successfully invoked the state secrets privilege to insulate programs that involve torture, detention, and surveillance from constitutional oversight. The more information we collect about the use of the doctrine and the more effectively judges review privilege claims, the surer we can be of an accountable government that upholds democratic and constitutional values.