Litigating State Secrets: A Comparative Study of National Security Privilege in Canadian, US and English Civil Cases

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One of the main obstacles in criminal and civil proceedings involving intelligence and executive officials is the objection to disclosure of information and evidence on the basis of national security privilege. Known as the "state secrets privilege" in the United States and "public interest immunity" in England, this evidentiary rule has been invoked successfully in an increasing number of cases in the US and England. Indeed, the privilege has been identified as one of the most serious obstacles to effective human rights remedies. In this essay, I discuss the use of national security privilege in civil litigation in the three jurisdictions, focusing specifically on the role the privilege has played in blocking claims by purported torture survivors and other victims of anti-terrorism activities in the US and England. I also evaluate the potential impact of the privilege on a torture survivor's civil claim, when such a case ultimately goes to trial in Canada. My conclusion, based on the approach courts have taken to the public interest balancing exercise, is that it will be very difficult for private litigants to obtain disclosure of information over which a claim of privilege has been made.

L'un des principaux obstacles dans les poursuites civiles et criminelles impliquant des représentants des services du renseignement est le refus de communiquer de l'information et des éléments de preuve fondés sur le privilège relatif à la sécurité nationale. Connue sous le nom de « privilège des secrets d'État » (*state secrets privilege*) aux États-Unis et « d'exception d'intérêt public » en Angleterre, cette règle de preuve a été invoquée avec succès dans un nombre croissant de causes aux É.-U. comme en Angleterre. En fait, ce privilège est considéré comme l'un des plus sérieux obstacles à l'efficacité des recours intentés en matière de droits de la personne. Dans cet essai, je discute du recours au privilège relatif à la sécurité nationale dans le cadre de poursuites civiles dans trois différents ressorts, en concentrant mon analyse sur le rôle que ce privilège a joué dans la stagnation des poursuites intentées par des victimes d'actes de torture présumées et d'autres victimes d'activités antiterroristes aux É.-U. et en Angleterre. J'évalue les conséquences éventuelles du privilège sur la poursuite civile intentée par une victime de torture, lorsque cette cause se retrouve finalement devant un tribunal au Canada. J'en conclus, en me fondant sur l'approche que les tribunaux judiciaires ont adoptée lorsqu'il s'agit de concilier de telles revendications avec l'intérêt public, que des plaideurs privés auraient beaucoup de difficulté à obtenir que des renseignements visés par la revendication d'un tel privilège leur soient communiqués.

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I. INTRODUCTION

In February 2009, the United Nations' Special Rapporteur on Human Rights released a scathing report on the role of intelligence agencies in the fight against terrorism.[1] Unlawful conduct by these agencies has led to the violation of the prohibition against torture, as well as to violations of other human rights and civil liberties.[2] The Special Rapporteur noted that "the lack of oversight and political and legal accountability has facilitated illegal activities by intelligence agencies," and such unlawful conduct "may have been condoned or even secretly directed by government officials."[3] He reaffirmed, therefore, as an immediate imperative for all states involved in anti-terrorism activities, the necessity of independent investigation of human rights violations, and accountability of intelligence agencies and government officials for their actions.[4]

One of the main obstacles to such independent investigation and accountability of intelligence and executive actors is the objection to disclosure of information and evidence on the basis of national security privilege.[5] Known as the "state secrets

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1. *Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism*, UN HRCOR, 10th Sess., UN Doc. A/HRC/10/3 (2009), online: <http://image.guardian.co.uk/sys-files/Guardian/documents/2009/03/09/ahrc.pdf> [*Report of the Special Rapporteur*].
2. *Ibid.* at 2.
3. *Ibid.*
4. *Ibid.* at 21.
5. *Canada Evidence Act*, R.S.C. 1985, c. C-5, s. 38 (refers to "potentially injurious" and "sensitive information" related to international relations, national security and national defence). The case law variously refers to "objections to disclosure on the basis of national security," "public interest privilege" and "public interest immunity." I adopt the concise term "national security privilege" used by Dawson J. in *R. v. F.A.* (15 January 2009), Toronto 2025/07 (Ont. Sup. Ct.) [*F.A.*] (decision not reported as subject to a publication ban), leave to appeal to S.C.C. granted, [2009] S.C.C.A. No. 116. The appeal argued at the Supreme Court of Canada in March 2010; as of the time of publication, the decision is under reserve.

privilege" in the United States and "public interest immunity" in England, this evidentiary rule has been invoked successfully in an increasing number of cases in the US and England.[6] Indeed, the privilege has been identified as one of the most serious obstacles to effective human rights remedies. The Special Rapporteur expressed grave concern about "the increasing use of State secrecy provisions and public interest immunities for instance by . . . the United Kingdom or the United States to conceal illegal acts from oversight bodies or judicial authorities, or to protect itself from criticism, embarrassment and—most importantly—liability."[7]

In light of the potentially dire consequences for the individual defendants, the prevalence of claims of national security privilege is highly problematic in criminal prosecutions and immigration proceedings, and has been discussed at length by many commentators in Canada and abroad.[8] Its use in the civil justice system, however, has not been the subject of legal scholarship. And yet, given the absence of other mechanisms of redress, it is to the civil courts that torture survivors and others may have to turn for compensation, exoneration and accountability.[9] No civil action brought by a wrongfully accused person in the national security context has gone to trial in Canada, although at least four prominent actions have been commenced against the Crown by Canadians who allege that the government was complicit in their detention and torture by other states.[10]

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6. OpenTheGovernment.org, Media Release, "Secrecy Report Card 2007: Indicators of Secrecy in the Federal Government," online: OpenTheGovernment.org <www.openthegovernment.org/otg/SRC2007.pdf>. Between 1953 and 1976, at the height of the Cold War, the administration used the privilege only 6 times. Between 2001 and August 2007, the privilege was invoked successfully 38 times. *Ibid.* at 13.
7. *Supra* note 1 at para. 59.
8. See e.g. Peter Rosenthal, "Disclosure to the Defence After September 11: Sections 37 and 38 of the *Canada Evidence Act*" (2004) 48 Crim. L.Q. 186; Kathy Grant, "The Unjust Impact of Canada's *Anti-Terrorism Act* on an Accused's Right to Full Answer and Defence" (2003) 16 Windsor Rev. Legal Soc. Issues 137; Ellen Yaroshefsky, "Symposium: Secret Evidence and the Courts in the Age of National Security: Introduction" (2006–2007) 5 Cardozo Pub. L. Pol'y & Ethics J. 1; Ellen Yaroshefsky, "Secret Evidence is Slowly Eroding the Adversary System: CIPA and FISA in the Courts" (2006) 34 Hofstra L. Rev. 1063; and "Secret Evidence in the War on Terror," Note, (2005) 118 Harv. L. Rev. 1962. In the immigration context, see Stephen Townley, "The Use and Misuse of Secret Evidence in Immigration Cases: A Comparative Study of the United States, Canada, and the United Kingdom," Note, (2007) 32 Yale J. Int'l L. 219; Jaya Ramji-Nogales, "A Global Approach to Secret Evidence: How Human Rights Law Can Reform Our Immigration System" (2008) 39 Colum. H.R.L. Rev. 287; and Matthew R. Hall, "Procedural Due Process Meets National Security: The Problem of Classified Evidence in Immigration Proceedings" (2002) 35 Cornell Int'l L.J. 515. Most recent is Sudha Setty's article "Litigating Secrets: Comparative Perspectives on the State Secrets Privilege" (2009) 75 Brook. L. Rev. 201, which became available shortly before my article was finalized. Professor Setty explores the origins of the American doctrine in light of the current reform efforts, and in the context of the experience of other nations, including England, but not Canada.
9. Few access to justice mechanisms exist for those victims of the so-called 'war on terror' who are neither charged with a criminal offence nor the subject of a security certificate. For a detailed discussion of the available avenues of redress and their limitations, see Jasminka Kalajdzic, "Access to Justice for the Wrongfully Accused in National Security Investigations" (2009) 27 Windsor Y.B. Access Just. 171–205.
10. See e.g. *Benatta v. Canada (A.G.)*, [2009] O.J. No. 5392, [2009] CanLII 70999 (Sup. Ct.) (QL) [*Benatta*]. I refer also to the civil actions brought by Abdullah Almalki, Ahmad El Maati, and Muayyed Nureddin. A fifth action brought by Maher Arar settled before trial in 2007.

In this essay, I will discuss the use of national security privilege in civil litigation in both the United States and England, focusing specifically on the role the privilege has played in blocking claims by torture survivors and other victims of anti-terrorism activities. In response to the perceived injustices of the use of national security privilege, US lawmakers have proposed legislation that would give courts greater control over the operation of the privilege. Since courts in both Canada and the UK already possess many of the powers of review that the American legislation envisions for its own courts, the potential utility of the draft statute will be assessed based on the Canadian and English experiences with the privilege. I also evaluate the potential impact of the privilege on a torture survivor's civil claim, when such a case ultimately goes to trial in Canada. My conclusion, based on the approach courts in each jurisdiction have taken to the public interest balancing exercise, is that it will be very difficult for private litigants to get disclosure of information over which the government has claimed national security privilege in any of the three jurisdictions, and as a result, they will face serious obstacles in the pursuit of their civil claims. Brief proposals for reform to avoid such an injustice will be offered at the end of the article.

II. US State Secrets Privilege

A. Nature and Origin

In the United States, the state secrets privilege is a common law evidentiary privilege whose purpose is to block the disclosure in litigation of information that will damage national security. While it has an English pedigree, the privilege is commonly said to derive from the President's constitutional authority over military and diplomatic affairs, and must be formally asserted by the head of the executive branch agency with control over the state secrets in question.[11]

The first full-scale treatment of the privilege occurred in 1953, with the US Supreme Court's seminal decision in *Reynolds*.[12] This case involved a tort claim by the widows of civilian observers killed on a military aircraft when it crashed while testing secret electronic equipment. In response to the plaintiffs' request for disclosure of the confidential accident report and of statements made by the surviving crew members during the investigation, the government brought a motion claiming the report was protected by state secret privilege, on the basis that the aircraft and crew were on a highly secret military mission.[13] The District Court and Federal Appeals Court both rejected the privilege claim and ordered that the documents and wit-

11. *El-Masri v. Tenet*, 437 F. Supp.2d 530 at 536 (E.D. Va. 2006) [*El-Masri District Ct.*].
12. *United States v. Reynolds*, 345 U.S. 1, 73 S. Ct. 528 (1953) [*Reynolds* cited to U.S.].
13. *Ibid.* at 4 (the formal claim of privilege was made by the Secretary of the Air Force).

nesses be produced. Importantly, when the government refused, the District Court entered final judgment for the plaintiffs on the grounds that the refusal to produce the documents established the Air Force's negligence.[14]

A majority of the Supreme Court reversed and found that the privilege claim was valid. Although the Court did not agree that the executive should have the sole and final word on the question of non-disclosure, it did not propose a robust balancing exercise either. The majority stated:

> Judicial control over the evidence in a case cannot be abdicated to the caprice of executive officers.
>
> Yet we will not go so far as to say that the court may automatically require a complete disclosure to the judge before the claim of privilege will be accepted in any case. It may be possible to satisfy the court, from all the circumstances of the case, that 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. When this is the case, the occasion for the privilege is appropriate, and the court should not jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence, even by the judge alone, in chambers.[15]

Thus a court faced with a claim of privilege, "under circumstances indicating a reasonable possibility that military secrets were involved," should prohibit disclosure of the document, and refuse to inspect the document at issue.[16] The Supreme Court prohibited disclosure to the *Reynolds* plaintiffs, and remanded the case to the District Court where the widows could proceed with their suit on the basis of other evidence. In response to arguments by the plaintiffs that the operation of the privilege unfairly obstructed their tort claim, the Supreme Court relied on the differences between civil and criminal prosecutions and stated:

> Respondents have cited us to those cases in the criminal field, where it has been held that the Government can invoke its evidentiary privileges only at the price of letting the defendant go free. The rationale of the criminal cases is that, since the Government which prosecutes an accused also has the duty to see that justice is done, it is unconscionable to allow it to undertake prosecution and then invoke its governmental privileges to deprive the accused of anything which might be material to his defense. *Such rationale has no application in a civil forum*, where the Government is not the moving party, but is a defendant only on terms to which it has consented.[17]

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14. *Ibid.* at 5 (judgment could be rendered in the plaintiffs' favour as a result of non-disclosure by virtue of Rule 37(b)(2)(i) of the *Tort Claims Act*, 28 U.S.C. § 2674).
15. *Ibid.* at 9–10.
16. *Ibid.* at 10–11.
17. *Ibid.* at 12 [citations omitted] [emphasis added].

In the result, the *Reynolds* approach to the state secret privilege requires little scrutiny of the government claim, no mandatory court inspection of the documents in question and no remedial measures for the thwarted civil litigant. While approaching a class privilege in its effect, *Reynolds* nevertheless does call for a balancing exercise: courts are to weigh the showing of necessity made by those seeking the information against the appropriateness of the government's invocation of the privilege. In the case of a procedurally proper claim of privilege involving military secrets, however, even the most compelling case of necessity will not overcome the privilege.[18] Still, litigants are free to pursue their claim without the excluded evidence.

Various lower courts have revisited the state secrets privilege from time to time since *Reynolds*, and have, on the whole, misapplied the principles flowing from the case to create an absolute bar to litigation once an action is shown to involve state secrets. For example, some courts have ruled, contrary to *Reynolds*, that the litigant's need for the information plays no part in the balancing test.[19] Some courts dismiss a claim at the pleadings stage when the privileged information will be crucial to either the plaintiff or the defence,[20] and others dismiss even where the plaintiff intends to produce only non-privileged information to support its case.[21] Not only do few courts order inspection of the documents in question, but most show utmost deference to the executive's assessment of the risk to national security. Put simply, "these lower court decisions have deviated markedly from the standards of *Reynolds*, ultimately leading to the current manifestation of the state secrets privilege which is causing cases to be completely dismissed with no opportunity for adjudication in any forum."[22] The privilege has become a *de facto* immunity against suit. Viewed at its worst, the government's use of the privilege "represents a broader pattern of denying access to justice in cases where victims of 'extraordinary rendition' have attempted to bring a civil claim for compensation in the US courts."[23] A recent case involving a victim of rendition illustrates the state of law on the point, and the ramifications for the accountability project called for by the UN Special Rapporteur and others.

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18. *Ibid.* at 11.
19. *Re United States*, 1 F.3d 1251 (Table), 1993 U.S. App. LEXIS 14977 (C.A. Fed.).
20. *Bareford v. General Dynamics Corp.*, 973 F.2d 1138 (5th Cir. 1992).
21. *Fitzgerald v. Penthouse International Ltd.*, 776 F.2d 1236 (4th Cir. 1985).
22. Carrie Newton Lyons, "The State Secrets Privilege: Expanding its Scope Through Government Misuse" (2007) 11 Lewis & Clark L. Rev. 99 at 105 (this article contains a detailed discussion of *Reynolds*, *supra* note 12 and the line of authorities preceding *El-Masri District Ct.*, *supra* note 11). See also Holly Wells, "The State Secrets Privilege: Overuse Causing Unintended Consequences" (2008) 50 Ariz. L. Rev. 967.
23. *El-Masri v. United States*, Inter-American Commission on Human Rights (April 2008 *Amicus Curiae* Brief of The Redress Trust at para. 76), online: REDRESS <http://www.aclu.org/pdfs/safefree/redressamicusbrief_khaledelmasrivunitedstates_30march2009.pdf>.

B. *El-Masri v. Tenet*

On October 9, 2007, the US Supreme Court denied the petition of Khaled El-Masri, a German citizen of Lebanese descent, who sought damages for violation of the Due Process Clause and various international human rights instruments stemming from his extraordinary rendition and torture by Central Intelligence Agency (CIA) agents.[24] El-Masri was forcibly abducted while vacationing in Macedonia in late 2003. He was transferred to US agents' custody after over three weeks of incommunicado detention. The Americans allegedly beat and drugged him, then flew him on a private jet to a secret CIA-run prison in Afghanistan, where he was interrogated and tortured. Five months after his rendition, he was released without charge and left on a hill in Albania in the middle of the night. He eventually found his way back to his home in Germany, where he continues to suffer from the severe psychiatric effects of his torture and abduction.[25] The CIA's targeting of El-Masri was reported to have been acknowledged by senior White House officials as an "error" resulting from mistaken identity,[26] in a rendition program that the US President himself acknowledged publicly.[27] Nevertheless, the federal government asked the court to dismiss the case on the grounds that the proceedings would reveal state secrets and jeopardize national security. The 4th Circuit Court of Appeals agreed that the state secrets privilege properly applied and struck the claim.[28]

At the *El-Masri* trial, the Director of the CIA filed an *ex parte* declaration, as well as an unclassified version, stating that damage to national security could result if the defendants were required to admit or deny El-Masri's allegations.[29] The District Court found that the privilege was validly asserted, and then went on to consider whether special procedural mechanisms could be devised to prevent the disclosure of the state secrets if the case were allowed to proceed. Where the very question on which a case turns is itself a state secret—here, the existence and operation of America's extraordinary rendition program—dismissal was said to be the

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24. *El-Masri District Ct.*, *supra* note 11. Many court documents are available online: see e.g. American Civil Liberties Union <http://www.acluva.org/docket/elmasri.html>.
25. *Supra* note 23 at 8–9.
26. Dana Priest, "Wrongful Imprisonment: Anatomy of a CIA Mistake: German Citizen Released After Months in 'Rendition'" *The Washington Post* (4 December 2005) A.01.
27. George W. Bush, "Trying Detainees: Address on the Creation of Military Commissions" (6 September 2006), online: PresidentialRhetoric.com <http://www.presidentialrhetoric.com/speeches/09.06.06.html>. The rendition program and use of torture have since been acknowledged publicly in other ways, including by the US District Court for the District of Columbia in *Mohammed v. Obama* (2009) at 47–65, online: US District Court for the District of Columbia <https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2005cv1347-253>.
28. *El-Masri v. United States*, 479 F.3d 296 (4th Cir. 2007).
29. *El-Masri District Ct.*, *supra* note 11 at 537.

appropriate remedy.[30] The Court held that, because the entire aim of the suit was to prove the existence of state secrets, procedures like security clearing counsel would be inadequate as they would entail considerable risk of inadvertent disclosure. In the result, El-Masri's private interests were trumped by national interests in preserving state secrets.

In his closing words, Judge Ellis of the District Court commented on the apparent unfairness of his decision, stating that:

> [A]ll fair-minded people, including those who believe that state secrets must be protected, that this lawsuit cannot proceed, and that renditions are a necessary step to take in this war, must also agree that El-Masri has suffered injuries as a result of our country's mistake and deserves a remedy. Yet, it is also clear from the result reached here that the only sources of that remedy must be the Executive Branch or the Legislative Branch, not the Judicial Branch.[31]

Commentators universally decried the result in *El-Masri* and the state secrets privilege as emblematic of broader patterns of secrecy and the lawless enclave in which national security claims reside.[32] The American Civil Liberties Union has been especially vocal about its opposition to what it calls the mutation of a common law evidentiary rule into "an alternative form of immunity that is used more and more often to shield the government and its agents from accountability for systemic violations of the Constitution and core human rights principles."[33] The critics also pointed out that the asserted dangers to national security were often subsequently demonstrated to have been exaggerated: "To put it another way, when national security claims are advanced there may well be a confusion of the interests of the administration in power with the interest of the nation."[34] For example, when the confidential accident report that was the subject of the *Reynolds* case was declassified decades later, it was determined that "[t]here were no national security or military secrets; there was, on the other hand, compelling evidence of the government's negligence."[35]

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30. *Ibid.* at 539. See also *Sterling v. Tenet*, 416 F.3d 338 at 347–348 (4th Cir. 2005).
31. *El-Masri District Ct.*, *supra* note 11 at 541.
32. Jonathan Hafetz, "Habeas Corpus, Judicial Review, and Limits on Secrecy in Detentions at Guantánamo" (2006–2007) 5 Cardozo Pub. L. Pol'y & Ethics J. 127 at 127–128. See also J. Steven Gardner, "The State Secret Privilege Invoked in Civil Litigation: A Proposal for Statutory Relief" (1994) 29 Wake Forest L. Rev. 567; Amanda Frost, "The State Secrets Privilege and Separation of Powers" (2007) 75 Fordham L. Rev. 1931; and Setty, *supra* note 8.
33. U.S., *State Secrets Protection Act of 2008: Hearing on H.R. 5607 Before the Subcommittee on the Constitution, Civil Rights and Civil Liberties*, 110th Cong. (Washington, D.C.: United States Government Printing Office, 2009) at 39 (Steven Shapiro, American Civil Liberties Union), online: US Government <http://judiciary.house.gov/hearings/printers/110th/43832.pdf>.
34. T. I. Emerson, "National Security and Civil Liberties" (1982–1983) 9 Yale J. World Pub. Ord. 78 at 80–81.
35. U.S., *supra* note 33 at 41, citing *Herring v. United States*, Civil Action No. 03–5500 (LDD) (E.D. Pa. 2004).

In keeping with Judge Ellis' view that cases involving state secrets are not proper grist for the judicial mill, several legal commentators have offered recommendations for alternative approaches, including a statutory amendment that would compensate people whose claims cannot go forward due to state secrecy,[36] or that would force the government to choose between permitting the suit to go forward or else have judgment rendered for the plaintiff.[37] These and other proposals will be discussed in more detail in Part V, below. A more immediate and arguably more realistic solution, which would keep courts in control of the evidence and litigation process, will be explored in the next section.

C. Legislating State Secrets

A legislative solution to the state secrets privilege problem is currently before Congress. The *State Secret Protection Act* of 2009 is a bipartisan bill sponsored by leading members of the Senate Judiciary Committee, and by Representative Jerrold Nadler, chairperson of the House Subcommittee on the Constitution, Civil Rights and Civil Liberties.[38] First introduced in July 2008,[39] the Bill aims to narrow the scope of the state secret privilege by empowering courts to exercise independent judgment about the validity of privilege claims. The Bill does so in three principal ways. First, courts are required to inspect the information over which the privilege has been claimed before determining if the privilege is valid.[40] In fulfillment of this mandate, at a prehearing conference, courts may order disclosure "of anything needed to assess the claim, including all information the Government asserts is protected by the privilege and other material related to the Government's claim."[41] The unquestioning deference to government privilege claims exhibited by the Court in *El-Masri*, therefore, would be unacceptable under the new regime.

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36. Gardner, *supra* note 32 at 601–606.
37. Robert M. Chesney, "State Secrets and the Limits of National Security Litigation" (2007) 75 Geo. Wash. L. Rev. 1249 at 1312–1313; and Louis Fisher, *In the Name of National Security: Unchecked Presidential Power and the Reynolds Case* (Lawrence, Kan.: University Press of Kansas, 2006).
38. U.S., Bill S. 417, *State Secrets Protection Act*, 111th Cong., 2009. The Bill was introduced on February 11, 2009 by Senate Judiciary Committee Chairperson Patrick Leahy, Ranking Member Arlen Specter, Committee Member Russ Feingold and former Committee Chairperson Edward Kennedy. Since then debate over this bill has been repeatedly postponed. Substantively similar legislation to Bill S. 417 was introduced on the same day by Rep. Nadler: U.S., Bill H.R. 984, *State Secret Protection Act of 2009*, 111th Cong., 2009. On June 4, 2009, Bill H.R. 984 was passed by the House Subcommittee and sent to the Judiciary Committee for further consideration. On November 5, 2009, the Judiciary Committee recommended that the Bill be considered by the House as a whole. See the discussion of this legislation by OMB Watch, "State Secrets Protection Act Passes House Subcommittee on Constitution Civil Rights and Civil Liberties" (15 June 2009), online: OMB Watch <http://www.ombwatch.org/node/10112>.
39. U.S., Bill H.R. 5607, *State Secrets Protection Act of 2008*, 110th Cong., 2008.
40. Bill H.R. 984, *supra* note 38, s. 5(a) ("Once the Government has asserted the privilege, and before the Court makes any determinations under section 6, the court shall undertake a preliminary review of the information the Government asserts is protected by the privilege . . .").
41. *Ibid.*, s. 5(d)(3).

Second, courts must conduct hearings to determine whether the privilege claim is substantively valid. The standard to be applied is higher than that used in the post-*Reynolds* line of authorities: "In ruling on the validity of the privilege, the court shall make an independent assessment of whether the harm identified by the Government, as required by section 2, is reasonably likely to occur should the privilege not be upheld."[42] The harm described in section 2 must pass a high threshold:

> In any civil action brought in Federal or State court, the Government has a privilege to refuse to give information and to prevent any person from giving information *only* if the Government shows that public disclosure of the information that the Government seeks to protect *would be reasonably likely to cause significant harm* to the national defense or the diplomatic relations of the United States.[43]

It is not sufficient, therefore, for the government to state that some harm might result from disclosure. The harm must be "significant" and "reasonably likely to occur." The onus is on the government to meet this threshold.[44]

A third measure in the Bill seeks to reinstate state secrets claims as an evidentiary privilege, as opposed to a non-justiciable immunity. Pending resolution of the claim, and subsequent to a decision validating the privilege, courts are to consider crafting a non-privileged substitute "that would provide the parties a substantially equivalent opportunity to litigate the case."[45] If the government fails to produce the court-ordered substitute, the court "shall find against the government on the factual or legal issue to which the privileged information is relevant."[46] Similarly, after weighing all of the equities and considering all of the evidence, including the privileged information for which a non-privileged substitute may not be possible to create, the court may make "appropriate orders in the interest of justice, such as striking the testimony of a witness, finding in favo[u]r of or against a party on a factual or legal issue to which the information is relevant, or dismissing a claim or counterclaim."[47] Finally, to counter the trend toward invoking the privilege at the pleading stage and terminating the litigation before the plaintiff has an opportunity to establish the truth of his or her allegations based on non-privileged information, the Bill expressly precludes a court from granting summary judgment before the completion of discoveries.[48]

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42. *Ibid.*, s. 6(c).
43. *Ibid.*, s. 2 [emphasis added].
44. *Ibid.*, s. 6(d).
45. *Ibid.*, s. 3(c) (pending resolution of the privilege claim) and 7(b)(1) (after court determination of claim).
46. *Ibid.*, s. 7(b)(2).
47. *Ibid.*, s. 7(d).
48. *Ibid.*, s. 7(c).

The American Civil Liberties Union is optimistic that the *State Secret Protection Act* will restore the state secrets privilege to its common law origin as an evidentiary privilege. Despite the recognition of judicial deference to the government's assessment of national security risks, there is a belief that the *Act* will assure a "vital and independent judicial role in national security cases as a constitutional safety valve against over-classification and excessive secrecy."[49] The ultimate success of the *Act* (assuming it is passed in its current form) will turn largely on the degree of deference courts will ascribe to the executive's assessment of risk to national defence or diplomatic relations. American courts' track records in this respect have been discouraging from the perspective of plaintiffs. Existing case law on the extent of the deference owed has been mixed, but for the most part, American courts have adopted the "utmost deference" approach.[50] Far fewer have argued that such a standard is too high, and have called instead for "considerable deference" in assessing the validity of the risk.[51]

By requiring court inspection of the documents in every case, the *State Secrets Protection Act* may move toward clarifying the confusion among US lower courts, which have, for the most part, not required government counsel to produce the documents for the court's review. Presumably, such inspection would avoid *Reynolds*-type situations, where the documents do not engage national security interests at all, but rather only risk causing embarrassment. In addition, there is some prospect of courts weighing in on the substantive balancing of public interests: subsection 6(c) indicates that in making their independent assessment of whether harm is likely to occur, courts "shall weigh testimony from Government experts in the same manner as it does, and along with, any other expert testimony."[52]

In spite of the procedurally entrenched obligation to inspect documents, however, there remains the problem of judicial deference and the balancing of competing interests. There is reason to be pessimistic about the extent to which courts will feel empowered by the *Act* to weigh the competing public interests in determining whether to order disclosure of documents or adequate substitutes. The *El-Masri* case exemplifies an unwillingness to include the litigant's interests in this analysis. More recently, the Obama administration invoked the state secrets privilege in its motion to dismiss a lawsuit that seeks to stop the government's warrantless wiretapping pro-

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49. U.S., *supra* note 33 at 46.
50. Lyons, *supra* note 22 at 108.
51. *Ellsberg v. Mitchell, 709 F.2d 51 at 58 (D.C. Cir. 1983)*; and *Re United States*, 872 F.2d 472 at 475 (D.C. Cir. 1989) ("a court must not merely unthinkingly ratify the executive's assertion of absolute privilege, lest it inappropriately abandon its important judicial role").
52. Bill H.R. 984, *supra* note 38, s. 6(c).

gram against American residents.[53] In its written argument, the government left no room for doubt that the interests of the plaintiffs were irrelevant: "While the dismissal of private claims is a significant step, long-standing authority holds that 'the greater public good' is the protection of the national security interests of the United States."[54] Admittedly, a civil liberties lawsuit like *Jewel* engages different and perhaps less pressing public interests than a claim by a torture survivor. Nevertheless, the government's use of the privilege to block civil litigation does not bode well for the fate of the *State Secrets Protection Act* before Congress, or for the likelihood that American courts will alter their approach to the privilege in a way that does not preclude a remedy for victims of human rights abuse.[55] A September 2009 directive from the Office of the Attorney General regarding policies and procedures governing the invocation of state secrets seeks to impose tighter internal controls over use of the privilege, but does not provide for judicial oversight.[56]

More scrupulous attention within government departments to the nature and impact of state secrets, and clearer judicial review mechanisms, are welcome improvements. Nevertheless, civil litigation may continue to be thwarted, despite the Attorney General's directive and even if the *States Secrets Protection Act* is passed. This is because, as will be seen, the English approach to the privilege in many ways mirrors the procedure envisioned by the proposed legislation, in terms of the inspection of documents and engaging in a public interest balancing exercise. Nevertheless, remedies for victims remain elusive.

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53. *Jewel v. National Security Agency*, 08-CV-4373 VRW; 2010 U.S. Dist. LEXIS 5110 (N.D. Cal. 2009) [*Jewel*]. The government's motion was argued in July 2009 and its brief is available online: Electronic Frontier Foundation <http://www.eff.org/files/filenode/jewel/jewelmtdobama.pdf>.

54. *Jewel*, *ibid.* at 12 [citations omitted].

55. There is one current exception: on April 28, 2009, the 9th Circuit Appeals Court released its opinion in *Mohamed v. Jeppesen Dataplan Inc.*, 579 F.3d 943 at 4942 (9th Cir. 2009) [*Jeppesen*], where the Court adopted *Reynolds* and declared that the privilege is to be claimed over specific evidence, and does not justify dismissal of an action except where the confidential documents are "indispensable" to proving the claim. On October 27, 2009, however, the 9th Circuit Court of Appeals announced it would rehear the case *en banc* during the week of December 14, 2009 (as of the time of writing, no decision by the 11-judge panel had been released).

56. U.S., Attorney General, *Memorandum for Heads of Executive Departments and Agencies Re: Policies and Procedures Governing Invocation of the State Secrets Privilege* (23 September 2009), online: Department of Justice <http://www.justice.gov/opa/documents/state-secret-privileges.pdf>. Among other directions, this memorandum requires that a government department or agency seeking to invoke the privilege in litigation submit detailed declarations about the nature of the information and the "significant harm to national security that disclosure can reasonably be expected to cause." *Ibid.* at 2. The assistant Attorney General for the Division responsible for the matter must personally evaluate the evidence submitted and make a recommendation to the newly-created State Secrets Review Committee, comprised of senior Department of Justice officials designated by the US Attorney General. The Committee makes a recommendation to the Attorney General, who must personally approve the invocation of the privilege. Should the privilege be invoked in a manner that precludes adjudication of claims that "raise[] credible allegations of government wrongdoing, the Department will refer those allegations to the Inspector General of the appropriate department or agency for further investigation." *Ibid.* at 3.

III. ENGLISH PRIVILEGE

A. Nature and Origin

Given that *Reynolds* adopted the common law position on state secrets imported from England, it is not surprising that the privilege was classically considered non-justiciable by English courts. The high water mark for deference to public interest immunity, as state secrets privilege is called in the United Kingdom, occurred in the House of Lords' decision in *Duncan v. Cammell Laird & Co. Ltd.* in 1942.[57] This negligence action was brought by the dependent family members of some of the 99 people killed when a submarine built by the defendant under contract with the Admiralty sank during a submergence test. The Admiralty's office instructed the defendants "not to disclose the documents set out in the said list or their contents to the plaintiffs . . . nor produce them for inspection in this action . . . [but rather] to claim privilege for the documents on the ground that it would be injurious to the public interest that the same should be disclosed or produced for inspection."[58] Lord Simon framed the two main issues involved in the appeal as follows:

> First, what is the proper form in which objection should be taken that the production of a document would be contrary to the public interest? And, secondly, when this objection is taken in proper form, should it be treated by the court as conclusive, or are there circumstances in which the judge should himself look at the documents before ruling as to their production?[59]

With respect to the first question, Lord Simon held that an objection to production must be made by the Minister with responsibility for the information in question, or by the Secretary of State. The proper form of objection is by way of an affidavit, in which the Minister "assures the court . . . that the production would in his opinion be prejudicial to the public service."[60] Exposure of Parliament to criticism or inconvenience on the part of government witnesses called to testify is not sufficient. Much faith is placed, therefore, in the Minister properly assessing the nature of the prejudice that would result from public disclosure of the information.

Lord Simon then considered the remaining question of whether, when an objection has been duly taken, the judge should treat that as conclusive. He referred to other cases "where the view has been expressed that the judge might properly probe the objection by himself examining the documents . . . '[to] ascertain whether

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57. [1942] A.C. 624 (H.L.) [*Duncan*].
58. *Ibid.* at 627.
59. *Ibid.* at 636–637.
60. *Ibid.* at 638.

the fear of injury to the public service was his real motive in objecting.'"[61] Lord Simon held that examination of the documents in question could not be done by the presiding justice in the absence of the party requesting disclosure, because "it is a first principle of justice that the judge should have no dealings on the matter in hand with one litigant save in the presence of and to the equal knowledge of the other."[62] Since disclosure of the evidence in a public hearing would result in the very harm that is sought to be avoided, no examination of the documents is appropriate. Thus, the objection to production by the Minister on grounds of injury to the public interest—national defence or good diplomatic relations—properly made, ought to be given effect. With respect to the competing public interests, the interests of the individual litigant and the administration of justice are subsumed by and subordinate to the greater public welfare, since "the public interest is also the interest of every subject of the realm, and while, in these exceptional cases, the private citizen may seem to be denied what is to his immediate advantage, he, like the rest of us, would suffer if the needs of protecting the interests of the country as a whole were not ranked as a prior obligation."[63]

The House of Lords significantly altered its approach to public interest immunity in the pivotal case of *Conway v. Rimmer*.[64] In this action for malicious prosecution, the Home Secretary had objected to production of police reports related to a criminal investigation on the basis of a class privilege, not a claim that the contents risked injury to national security. The Lords held that a Minister's affidavit was not final, even if accorded the greatest of weight; courts could ask for clarification of the objection and, importantly, had the power to inspect documents privately and ultimately order their production. The Lords were "especially critical of the argument that whole classes of documents should be withheld on the grounds of candour and uninhibited freedom of expression with and within the public service."[65] While the "contents" claims of privilege were entitled to a high degree of deference, the court was entitled to inspect the documents and weigh the competing public interests in disclosure, on the one hand, and in preserving the immunity, on the other.

The impact of *Conway* is illustrated in *Balfour v. Foreign and Commonwealth Office*,[66] where the Employment Appeals Tribunal refined the competing public

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61. *Ibid.* at 638–639 [citations omitted].
62. *Ibid.* at 640–641.
63. *Ibid.* at 643.
64. [1968] A.C. 910 (H.L.) [*Conway*].
65. Adrian Keane, *The Modern Law of Evidence*, 7th ed. (Oxford: Oxford University Press, 2008) at 565.
66. (29 January 1993) [1993] UKEAT 182_92_1401 (UK Employment Appeal Tribunal), online: <http://www.bailii.org/uk/cases/UKEAT/1993/182_92_1210.html>.

interests affected by a public interest immunity claim. The case was a wrongful dismissal action brought by an employee of the defendant Office. Objection was made to producing documents identified by the plaintiff as relevant, on the ground of public interest immunity relating to intelligence and security services. Confronted with the argument that inspection of the reports was precluded by *Duncan*, the Appeal Tribunal said:

> That clearly reveals two separate categories of situations where the public interest is involved. The first where the reasons given are susceptible of being weighed by judicial experience, and there the judge has to do the weighing or balancing process which usually involves an inspection by him, and the second where the reasons given by the Minister are of a character which judicial experience is not competent to weigh. In the latter case, the judge by definition has no effective means for weighing the reasons adduced but *it is still his function to perform the balancing act between the two public interests, one of the proper administration of justice which requires relevant evidence to be disclosed and not hidden, the other the protection of national security, although it will be the latter that will prevail, if . . . evidence of the necessary factual link between the documents and the reasons adduced is produced.*[67]

The Appeal Tribunal confirmed that there was no absolute immunity for any class of documents and that it is the court, not the executive, which has the final say. The Court acknowledged, however, that this is often a distinction without a difference in matters relating to national security:

> We would, for our part, prefer to describe the process involved in deciding whether there should be discovery of documents in respect of which public immunity is claimed and it is shown by ministerial certificate that their disclosure would or might endanger national security as one where the scale against disclosure is decisively the heavier rather than as one where there is no balancing exercise at all. We accept that since *Conway v. Rimmer*, it is the court that has to decide. But in the vast majority of cases raising issues of national security, this is more a question of phraseology than of principle because the end result is the same.[68]

The Court of Appeal upheld the decision to refuse disclosure, while confirming that there must be vigilance by the courts when public interest immunity is raised. Once the harm has been particularized and there is an actual or potential risk to national security demonstrated by the certificate or affidavit, a court should not exercise its right to inspect.[69]

Thus, despite the fine-tuning of the procedural approach to public interest immunity that has taken place since the House of Lords first proclaimed its non-justiciability in 1942, litigants seeking disclosure of confidential government docu-

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67. *Ibid.* [emphasis added].
68. *Ibid.*
69. *Balfour v. Foreign and Commonwealth Office*, [1994] 2 All ER 588 (C.A.). See also Keane, *supra* note 65 at 573.

ments continue to face formidable barriers to disclosure. In the context of the fight against terrorism, a recent case exemplifies the frailties of relying on the executive's assessment of injury to the public interest and the dire ramifications of the common law rule for a victim seeking redress.

B. *Binyam Mohamed v. Secretary of State for Foreign and Commonwealth Affairs*

Binyam Mohamed, an Ethiopian national and a legal resident of England, was arrested by US forces in Pakistan in April 2002. He was held incommunicado for one month and interviewed by the UK security service on May 17, 2002, in Pakistan. He then disappeared for two years. During this time, he alleges he was tortured and made to confess to various terrorist activities, including a dirty bomb plot. In May 2004, he was transferred to Bagram in Afghanistan, and then to Guantanamo Bay on September 20, 2004. Based on confessions he made in 2004, he was charged as an enemy combatant with various offences under the US *Military Commissions Act* of 2006.[70]

A civil action was commenced in May 2008 for disclosure from the English government pursuant to *Norwich Pharmacal v. Customs and Excise Commissioners*.[71] Mohamed sought 42 documents, including the Security Service agent's notes of the May 2002 interview, and all other documents in Britain's possession relevant to Mohamed's allegation that he confessed under torture by the Americans. In response, the government stated that the decision not to provide disclosure was made in the public interest on the basis that to disclose would cause grave damage to the UK's national security.[72]

In its first open judgment,[73] the Divisional Court reviewed the 42 documents and ultimately ordered the Foreign Secretary to provide the information to Mohamed's lawyers in confidence, subject to claims of public interest immunity. The Court agreed that the documents were the only independent evidence to corroborate

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70. See *Mohamed v. Secretary of State for Foreign and Commonwealth Affairs*, [2008] EWHC 2519 (Admin); [2008] WLR (D) 323 (Q.B.D.) [*Mohamed 2008*].

71. [1974] A.C. 133 (H.L.) [*Norwich*]. The Norwich principle provides that "if through no fault of his own a person gets mixed up in the tortuous acts of others so as to facilitate their wrong-doing he may incur no personal liability but he comes under a duty to assist the person who has been wronged by giving him full information and disclosing the identity of the wrongdoers." *Ibid.* at 175.

72. *Mohamed 2008*, *supra* note 70 at para. 46.

73. *Mohamed v. Secretary of State for Foreign and Commonwealth Affairs*, [2008] EWHC 2048 (Admin); [2008] WLR (D) 295 (Q.B.D.).

Mohamed's allegations of torture. The UK government then delivered a certificate indicating that it objected to producing the documents on the basis of the position taken by the US State Department in a letter to the Foreign and Commonwealth Office: the Americans claimed that public disclosure of the documents would "be likely to result in serious damage to the United States[']national security and could harm existing intelligence information sharing arrangements between the United Kingdom Government and the United States Government."[74] Because of the US position, the Foreign Secretary's certificate claimed public interest immunity over the documents, since to disclose them would harm the intelligence relationship between the US and the UK, and therefore would be injurious to the UK's national security. Moreover, disclosure would also damage the international relations of the UK more generally, as well as its liaison relationships with third parties.[75]

The Court confirmed that the question of whether a claim for public interest immunity is or is not justified is ultimately a question of law. The Court agreed with the special advocates, who had seen the sensitive documents in question, that the disclosure of redacted documents to Mohamed was both relevant and necessary to his claims of torture.[76] The Court also found that the public interest immunity certificate failed to address the gravity of the concerns related to torture and cruel treatment, which were relevant to the public interest immunity balance.[77] The Court adjourned the hearing and gave the Foreign Secretary a week to deliver a further certificate that would address the concerns raised in the judgment. In the second certificate, the Foreign Secretary gave clearer consideration to the abhorrence of torture, but also relied on the control principle; the US government had given the UK government sensitive intelligence information with the expectation that it would retain control over its use and dissemination. A breach of the control principle would have dire implications for the two countries' intelligence-sharing relationship.[78]

The UK judgment forced the Americans' hand. Shortly after the first open judgment was issued, a US District Court judge ordered the US government to disclose all exculpatory evidence to Mohamed in the context of *habeas corpus* proceedings.[79] On the eve of the UK Court's third judgment in October 2008, which the

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74. *Mohamed v. Secretary of State for Foreign and Commonwealth Affairs*, [2008] EWHC 2100 (Admin); [2008] WLR (D) 300 (Q.B.D.).
75. *Ibid.* at para. 7.
76. *Ibid.*
77. *Ibid.* at para. 22.
78. For a detailed chronology of events and summary of the six Divisional Court judgments in Mohamed's case, see *Mohamed v. Secretary of State for Foreign and Commonwealth Affairs*, [2010] EWCA Civ 65 [*Mohamed C.A.*], in particular Sir May's reasons at paras. 210–259.
79. *Mohamed 2008*, *supra* note 70 at para. 16. The US government ultimately disclosed Mohamed's written confession as well as Criminal Investigation Taskforce Reports. It did not, however, produce the majority of the 42 documents that had been the subject of the *Norwich* proceedings in the UK. Moreover, the seven documents provided to Mohamed's counsel in the *habeas* proceedings were heavily redacted, beyond the concealment of officials' names and locations of intelligence facilities.

Court had previously notified the government would contain its decision on the public interest immunity claim over the 42 documents, the convening authority dismissed the charges before the Military Commission against Mohamed without prejudice, and the government withdrew the allegations of a dirty bomb plot in the *habeas* proceedings. The position taken by the UK government in the *Norwich* proceedings, therefore, was that production of the requested documents was no longer necessary.

The UK Court was clearly scandalized by the US government's conduct. It found that there was a "clear evidential basis" for Mohamed's counsel's submissions that:

> [A]ssurances given by the United States Government could not be relied upon to disclose the documents in a timely manner and that the United States Government would do all it could to avoid disclosure.
>
> It was also submitted that, given what the United States Government was doing and given that their conduct underlined the overall submission that torturers do not readily hand over evidence of their conduct . . . this court had to order the immediate provision of the documents to [Mohamad's] lawyers, including Lieutenant Colonel Bradley, who had top secret clearance on terms as to their use. [80]

Despite their concerns, however, the judges ordered a stay of the proceeding pending the case conference to be held in the *habeas* proceedings the following week.

The contemporaneous proceedings in the US and England in respect of Binyam Mohamed afford a unique insight into the operation of state secret privilege. The English court reviewed 42 classified documents *in camera* and came to the conclusion that all were relevant and exculpatory with respect to the terrorism allegations. The Court also believed that only limited redactions were necessary to safeguard national security; it could not make any sense of the need for vast redactions and stated that the failure to disclose all 42 documents formed "the basis of a powerful contention that the prosecutors were not acting in good faith in discharging their duties to the Court."[81] The only conclusion to be drawn from the Court's observations and barely restrained outrage is that the US government was abusing its claim of state secret privilege to avoid scrutiny of, and liability for, its conduct, including acts of torture. As one American law professor put it, "'state secrets' has become a sort of 'talismanic phrase' uttered by government officials who want to dispose of inconvenient or troubling challenges to their authority."[82] Ultimately, despite being

80. *Ibid.* at paras. 29–30.

81. *Ibid.* at para. 43.

82. Carrie Johnson, "Handling of 'State Secrets' at Issue: Like Predecessor, New Justice Dept. Claiming Privilege" *The Washington Post* (25 March 2009) A1.

"deeply disturbed" by the conduct of US officials, the UK Court deferred to the judge in the *habeas* proceedings, who was better placed to determine the "mechanics" of disclosure of the 42 documents.[83]

The operation of the state secrets privilege impacted not only the US proceedings in which Mohamed was engaged, but, in the end, also frustrated the UK *Norwich* application and the openness of the UK judgment itself. In February 2009, the Court released a decision[84] on the question of whether previously redacted paragraphs of their October 2008 judgment could be restored. The redacted paragraphs referred to a summary of reports regarding the detention and treatment of Mohamed while in American custody at an undisclosed location for two years. The summary referred to evidence of Mohamed's torture, as conveyed by US authorities in reports to MI5.[85] The Foreign Secretary filed a certificate in October 2008 objecting to the public release of those paragraphs of the judgment.

Thus, the Court was faced with another public interest immunity claim, this time over the contents of its own reasons for decision. It engaged again in the balancing of competing public interests, stating that:

> There was a general public interest in the exposure of evidence of any serious criminality by the State. It would therefore be *contrary to the public interest to claim public interest immunity to conceal evidence of such criminality*, as the rule of law demanded the investigation of such wrongdoing and the open and public adjudication of it. A claim to conceal evidence of cruel, inhuman or degrading treatment or torture under the guise of public interest immunity could not be countenanced as it was incompatible with international law and values relating to the prohibition of torture and cruel, inhuman or degrading treatment. . . .[86]

The Court made clear that there was nothing in the redacted paragraphs which constituted sensitive intelligence information. Indeed, the Court clearly disagreed with the US government's assessment of the risk of injury to national security:

> [I]n the light of the long history of the common law and democracy which we share with the United States, it was, in our view difficult to conceive that a democratically elected and accountable government could possibly have any rational objection to placing into the public domain such a summary of what its own officials reported as to how a detainee was treated by them and which made no disclosure of sensitive intelligence matters. Indeed we did not consider that a democracy governed by the rule of law would expect a court in another democracy to suppress a summary of the evidence contained in reports by its own officials or officials of another State where the evidence was relevant to allegations of torture and cruel, inhuman or degrading treatment, politically embarrassing though it might be.[87]

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83. *Mohamed 2008*, *supra* note 70 at paras. 34, 55.
84. *Mohamed v. Secretary of State for Foreign and Commonwealth Affairs*, [2009] EWHC 152 (Admin) (Q.B.D.) [*Mohamed 2009*].
85. *Ibid.* at para. 14.
86. *Ibid.* at para. 26 [emphasis added].
87. *Ibid.* at para. 69.

In balancing the competing public interests, the Court thus assessed the importance of the public interest in the disclosure of the redacted paragraphs as very high: "the requirements of open justice, the rule of law and democratic accountability demonstrate the very considerable public interest in making the redacted paragraphs public, particularly given the constitutional importance of the prohibition against torture and its historic link from the seventeenth century in this jurisdiction to the necessity of open justice."[88] On the other hand, there was a serious public interest in keeping the paragraphs out of the public domain on the basis that they would harm international relations and national security; the Foreign Secretary's certificate made clear that the United States Government had threatened to re-evaluate its intelligence sharing relationship with the United Kingdom if the redacted paragraphs were made public. The Foreign Secretary found the risk to be real, and that, if realized, it would result in a reduction of the intelligence provided, thereby seriously prejudicing the national security of the UK.[89]

Lord Justice Thomas subsequently described the US threat as not based in law, but "an exercise of naked political power."[90] Despite the illegitimacy of the American invocation of state secrets privilege, the Foreign Secretary was found to have been reasonable in his assessment that the UK's intelligence-sharing relationship with the US would be very much harmed if disclosure was made. Applying *Conway*, therefore, the Court determined that a reasonable substitute to disclosure was unavailable, and concluded that, on balance, the public interest favoured the continued redaction of the paragraphs in question.[91] The Court strongly hinted, however, that there were

88. *Ibid.* at para. 54.

89. *Ibid.* at para. 64.

90. Clive Stafford Smith, "Bowing to US's 'naked political power'" *The Guardian* (3 August 2009), online: Guardian.co.uk <http://www.guardian.co.uk/commentisfree/cifamerica/2009/aug/03/torture-binyam-mohamed-miliband> (quoting Lord Justice Thomas in the hearing of an application by Mohamed, where The Guardian and other media groups has asked for disclosure of a seven-paragraph CIA document summarizing the treatment of Mohamed in custody).

91. In a subsequent decision, two additional paragraphs that had originally been redacted from the judgment were released, as a consequence of what the Court perceived was a lesser risk to England's national security interest. The Court concluded that, while the Bush Administration had been unequivocal in its position that the information-sharing relationship with the United Kingdom *would* be affected, the Obama Administration had stated only that the United States *may* reconsider its relationship with the United Kingdom: see generally *Mohamed v. Secretary of State for Foreign and Commonwealth Affairs (Rev 1)*, [2009] EWHC 2549 (Admin) at para. 49 (Q.B.D.). Litigation over the remaining redacted paragraphs continued, culminating in the February 2010 decision of the Court of Appeal to release all seven paragraphs: *Mohamed C.A.*, *supra* note 78. The Court of Appeal maintained the general approach of deference to a Foreign Secretary's assessment of potential injuries to national security, but held that in this case, the US District Court's finding in *Mohammed v. Obama*, *supra* note 27, that Mohamed had, in fact, been tortured by American agents, tipped the scales in favour of releasing the seven paragraphs. The US government had participated in the District Court proceedings but had not challenged the allegations of torture, and the material at issue in the redacted seven paragraphs was now public. The application for disclosure of the paragraphs, therefore, was "one of those very rare cases where the court cannot accept a minister's view [. . .] that national security would be at risk if the material in issue were published against the wishes of the US" (*Mohamed C.A.*, *supra* note 78 at para. 139).

other means by which investigation of the treatment of detainees like Mohamed, and possible English complicity in their torture, could be achieved, thus ensuring that the public interest in accountability for torture could still be met.[92]

Binyam Mohamed was released from Guantanamo Bay following a plea bargain, and was returned to the UK on February 23, 2009. The English Attorney General referred Mohamed's allegations of torture to the Director of Public Prosecutions,[93] and, in July 2009, the Metropolitan Police launched an investigation.[94] In August 2009, the opposition shadow Foreign Secretary called for a public inquiry into allegations that English intelligence agencies colluded in Mohamed's torture.[95] The 42 documents that were the subject of the UK proceedings have never been publicly disclosed.

IV. Canada and Section 38

A. Nature and Origin

Like the United States, Canada inherited national security privilege from England. At common law, Crown privilege (as it was then called) gave absolute protection to national security, national defence or international relations based merely on a certificate by a Minister of the Crown.[96] This position was codified in the *Federal Court Act*,[97] before being amended in 1982. In that year, the Crown privilege provisions were repealed and replaced by section 36.2 [now section 38] of the *Canada Evidence Act*, which permitted judicial oversight by the Federal Court.[98] It was observed a few years later that the amendments were politically necessary as "[t]he executive had been unable to sustain the credibility of the system of absolute privilege codified in subsection 41(2)."[99]

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92. *Mohamed C.A.*, *supra* note 78 at paras. 85–100 (the options included an investigation by the English equivalent of the Security Intelligence Review Committee, and a referral to the Attorney General for a criminal prosecution).
93. Clive Stafford Smith, "Who Knew About the Torture of Binyam Mohamed?" *The Guardian* (26 March 2009), online: Guardian.co.uk <http://www.guardian.co.uk/commentisfree/2009/mar/26/binyam-mohamed-torture>.
94. James Sturcke, "Police Launch Investigation into Binyam Mohamed Torture Allegations" *The Guardian* (10 July 2009), online: Guardian.co.uk <http://www.guardian.co.uk/world/2009/jul/10/binyam-mohamed-torture-investigation-police>.
95. Richard Norton-Taylor & Andrew Sparrow, "Tories Could Hold Independent Inquiry into Torture, Says Hague" *The Guardian* (4 August 2009), online: guardian.co.uk. <http://www.guardian.co.uk/world/2009/aug/04/torture-complicity-cover-up>.
96. *Commission des Droits de la Personne v. Canada (A.G.)*, [1982] 1 S.C.R. 215, 134 D.L.R. (3d) 17.
97. S.C. 1970–71–72, c. 1, s. 41(2).
98. *Canada Evidence Act*, R.S.C. 1970, c. E-10, s. 36 as am. by S.C. 1980–81–82–83, c. 111, s. 4. Note that the scheme for determining privilege claims, insofar as it vests jurisdiction in the Federal Court to determine them in respect of criminal trials, has been declared unconstitutional: see *F.A.*, *supra* note 5.
99. *Gold v. Canada*, [1986] 2 F.C. 129 at 138, 25 D.L.R. (4th) 285 (C.A.) [*Gold* cited to F.C.].

B. *Anti-Terrorism Act* Changes

The *Canada Evidence Act* was amended again in December 2001 with the passage of the *Anti-Terrorism Act*.[100] As Peter Rosenthal has pointed out, the amendments increase the kinds of information over which Crown privilege can be claimed and make opposition to such a claim more difficult.[101] The changes are essentially fourfold. First, there is an obligation on all participants to inform the Attorney General of possible disclosure of injurious or sensitive information.[102] Second, in addition to information that is potentially injurious to international relations, national defence or national security, "sensitive information"—that is, information that *relates* to (but is not *injurious* to) international relations, defence or security "of a type that the Government of Canada is taking measures to safeguard"—is also the subject of the privilege.[103] Third, the section 38 notice and subsequent hearing are in secret.[104] Fourth, the Attorney General has the authority to personally issue a certificate blocking disclosure even where an order is made to the contrary, subject to very limited judicial review.[105]

The introduction of a Section 38.13 Certificate by the Attorney General generated much debate in the House of Commons. Kent Roach has commented that "[t]he Parliamentary skirmishes . . . were more about symbolic struggles between the executive and the courts than real ones," since the government has always had the power to block disclosure by withdrawing a prosecution, and the courts can always stay proceedings if non-disclosure renders a fair trial impossible.[106]

Section 38.14 of the *Canada Evidence Act* codifies the position described by Roach. The section was introduced with the other amendments enacted pursuant to the *Anti-Terrorism Act* and provides that a judge presiding at a criminal proceeding "may make any order that he or she considers appropriate in the circumstances to protect the right of the accused to a fair trial." As the provision only refers to "criminal" proceedings, it is by no means clear that the court in a civil matter would have the authority to offer analogous relief, for example, by granting judgment in favour of a plaintiff whose action was thwarted by a successful section 38 privilege claim. It is with respect to this issue that the balancing of public interests is pivotal.

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100. S.C. 2001, c. 41 [*ATA*].

101. Peter Rosenthal, "Disclosure to the Defence After September 11: Sections 37 and 38 of the *Canada Evidence Act*" (2003) 48 Crim. L.Q. 186. Though Rosenthal makes the statement in the criminal law context, his observation is no less accurate with respect to civil cases.

102. *Canada Evidence Act*, R.S.C. 1985, c. C-5, s. 38.01 as am. by *Anti-terrorism Act*, S.C. 2001, c. C-41, ss. 43–44.

103. *Ibid.*, s. 38.

104. *Ibid.*, s. 38.02.

105. *Ibid.*, s. 38.13.

106. Kent Roach, "The Role and Capacities of Courts and Legislatures in Reviewing Canada's Anti-terrorism Law" (2008) 24 Windsor Rev. Legal Soc. Issues 5 at 34.

C. Balancing "Public Interests" in Civil Actions

The first occasion on which national security privilege came to be considered in the context of a civil action was *Gold v. Canada*.[107] The Federal Court of Appeal confirmed that the public interest in national security was to be balanced against other public interests, including the fundamental principles underlying the administration of justice:

> It is the very essence of any judicial system deserving of public confidence that, above all else, every litigant be given a fair chance and be seen to have been given it. Justice may not be done, and it is most unlikely that it will be seen to have been done, if a party, even by reason of compelling public interest, is prevented from fully making out its case or answering the opposing case.[108]

The Court further confirmed that as between the two public interests—national security and the administration of justice—there is not an "obvious imbalance between the two."[109] The Court considered *Duncan* and observed that the operation of absolute privilege to deny disclosure to the widows of the victims of the sunken submarine resulted in an injustice. The better approach was to consider the particulars of each claim of privilege and whether partial disclosure under conditions or restrictions could be ordered to best serve the overall public interest.[110]

In the same year *Gold* was decided, the Supreme Court of Canada released its judgment in *Carey v. Ontario*.[111] In this case, the Court was tasked with resolving the "conflict between the public interest that a person who asserts a legal claim be afforded access to all information relevant to prove that claim, and the public interest against disclosure of confidential communications of the executive branch of government."[112] Although the privilege at issue in *Carey* was a Cabinet confidence (under what is now section 39 of the *Canada Evidence Act*) and not national security privilege, the Court's approach to the competing public interests is instructive. The Court reiterated that the English *Duncan* decision was no longer good law in Canada, and that the government cannot be the arbiter of its own immunity. A court must weigh the facts in each particular case to determine whether the public interest in the administration of justice should prevail over the public interest in non-disclosure.[113] In this

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107. *Gold*, *supra* note 99. Although this case pre-dates the *ATA*, *supra* note 100, it remains good law. The same is true for *Carey v. Ontario*, [1986] 2 S.C.R. 637, 35 D.L.R. (4th) 161 [*Carey* cited to S.C.R].

108. *Gold*, *ibid.* at 135.

109. *Ibid.* at 137.

110. *Ibid.* at 137–138.

111. *Carey*, *supra* note 107.

112. *Ibid.* at 639.

113. *Ibid.* at 651–653, 668–669. The Court also distanced itself from modern English authority on the question of court inspection of the documents over which privilege was claimed, saying our courts should feel free to inspect the documents since "[t]here has, for a long period now, been a far more open and flexible attitude towards discovery in this country than in England." *Ibid.* at 681.

regard, the Court identified a further public interest to be served by disclosure beyond the oft-cited interests of the administration of justice:

> The appellant here alleges unconscionable behaviour on the part of the government. As I see it, it is important that this question be aired not only in the interests of the administration of justice but *also for the purpose for which it is sought to withhold the documents, namely, the proper functioning of the executive branch of government. For if there has been harsh or improper conduct in the dealings of the executive with the citizen, it ought to be revealed. The purpose of secrecy in government is to promote its proper functioning, not to facilitate improper conduct by the government.* This has been stated in relation to criminal accusations in *Whitlam*, and while the present case is of a civil nature, it is one where the behaviour of the government is alleged to have been tainted.[114]

More recently, the Federal Court has confirmed that public interest privilege should not be misappropriated for ulterior motives. Justice Noël affirmed that "the Court will not prohibit disclosure where the Government's sole or primordial purpose for seeking prohibition is to shield itself from criticism or embarrassment."[115] While the Federal Court has the jurisdiction to appoint an *amicus* to assist in vetting the government's claim of privilege,[116] the Court has had a mixed record in doing so.[117] As in the criminal or immigration process, a section 38 application for disclosure of confidential information in a civil action must also take place *in camera*. In no such case to date, however, has an *amicus* been appointed.

Absent a clear case of a claim of privilege over information that is embarrassing but not sensitive, courts are left with the difficult determination of whether disclosure would be injurious to international relations, national defence or national security. A judge will inspect the information at issue and consider submissions of the parties and their supporting evidence; he or she "must be satisfied that the executive opinions as to potential injury have a factual basis which has been established by evidence."[118] The

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114. *Ibid.* at 673 [emphasis added].

115. *Canada (A.G.) v. Canada (Arar Commission)*, 2007 FC 766, [2008] F.C.R. 248 at para. 58, 316 F.T.R. 279 [*Arar* cited to F.C.R.].

116. *Canada (Human Rights Commission) v. Canadian Liberty Net*, [1998] 1 S.C.R. 626, 157 D.L.R. (4th) 385 [*Canadian Liberty Net* cited to S.C.R.] (stating that the power to appoint *amici* is conferred by implication to the extent that the existence of such a power is necessary for the Court to properly and fully exercise the jurisdiction conferred upon it by a statutory provision).

117. See e.g. *amicus* requests refused in *Re Harkat*, 2004 FC 1717, [2005] 2 F.C.R. 416, 259 F.T.R. 98 and in *Re Jaballah*, 2006 FC 115, [2006] 4 F.C. 193, 278 F.T.R. 60. With the creation of the Special Advocate system in the security certificate regime, the need for an *amicus* is eliminated in those particular cases. Most recently, an *amicus* was appointed in *Re Khadr*, 2008 FC 46, [2008] 3 F.C.R. 306, 322 F.T.R. 256, although the Court held that, as a general rule, the balance between the need for protection of confidential information and the rights of the individual can and should be achieved without the appointment of an *amicus*: *ibid.* at para. 19.

118. *Canada (A.G.) v. Ribic*, 2003 FCA 246, [2005] 1 F.C.R. 33 at para. 18, 320 N.R. 275 [*Ribic* cited to F.C.R.].

judge is not, however, to second-guess or substitute his or her opinion for that of the executive.[119] Here again the high deference accorded to executive assessment of injury pervasive in the US and UK jurisprudence is apparent. Although the party opposing disclosure bears the burden of proof,[120] the existence of the "considerable" deference shown to the Attorney General's assessment of probable harm means a judge is likely to conclude the Attorney General's privilege claim is reasonable.

More problematic is the deference that is *de facto* granted wherever the information at issue originates with a third party. If, as occurred in Binyam Mohamed's *Norwich* application,[121] the third party claims privilege over the information, then disclosure of the information would almost inevitably be treated as potentially injurious to international relations, because the third party rule requires the originating state's consent.[122] The result, however, is that the third party rule subverts the role of the court in balancing interests—embarrassing evidence now becomes subject to the privilege only by virtue of the originating state's improper claim of state secrets. Given that intelligence sharing is now required by UN resolutions, and is a practical necessity for "net importers" of intelligence like Canada, the odds are very good that some of the evidence that is relevant to a civil claim is derived from third parties, who have every incentive to protect the information. Canadian courts are not in a position to assess the legitimacy of the claim by a foreign agency or state; they can merely assess the legitimacy of the Attorney General's concern about injury to the foreign relation, balanced against the public interest in disclosure.

Upon finding that releasing the information would result in injury, the judge must then determine whether the public interest in disclosure outweighs in importance the public interest in non-disclosure. The party seeking disclosure bears the burden at this stage of the inquiry.[123] In one of two civil judgments on a section 38 application reported after the events of September 11, 2001, the Federal Court of Appeal held that a more stringent test than the usual relevancy rule must be applied in balancing these

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119. *Ibid.* at para. 19 [citations omitted] ("the Attorney General's submissions regarding his assessment of the injury to national security, national defence or international relations, because of his access to special information and expertise, should be given considerable weight by the judge . . .").

120. *Arar*, *supra* note 115 at para. 49. The government must satisfy the reviewing judge that the injury alleged is probable, not simply a possibility or merely speculative.

121. While the English Court of Appeal ultimately released the previously redacted paragraphs of the Divisional Court's first judgment over the objections of the Foreign Secretary, it did so largely as a result of intervening events, most significantly the public confirmation by court in the US (the third party in question) of the very information contained in the disputed paragraphs.

122. *Canada (A.G.) v. Khawaja*, 2007 FC 490, [2008] 1 F.C.R. 547, 219 C.C.C. (3d) 305. The Court stated that so long as consent from the third party was sought and denied, and the information was not known to Canadian officials prior to having received it from the third party, non-disclosure of this type of information would be appropriate: *ibid.* at paras. 145–147. Forcing the government to ask third parties to amend caveats may, at times, lead to greater disclosure if the third party consents, as occurred in this case.

123. *Ribic*, *supra* note 118 at para. 21.

competing interests.[124] The more important the confidential information is to proving or defending a claim, the greater the weight accorded to the public interest in disclosure. On the other hand, when "the State secrecy privilege invoked in the case at bar aims at protecting the safety and security of a whole nation. . . . [T]he costs of failure can be high if matters of national security are ignored or taken lightly."[125]

The difficulty in overcoming the weight of the public interest in national security is arguably higher in the context of a civil claim for compensation by a victim of anti-terrorism practices than it is for an accused in a criminal proceeding, or a detainee in an immigration matter, because his or her life and liberty are not at issue. The Federal Court, in the second civil judgment reported since late 2001,[126] addressed the factors to be applied in the balancing exercise. After citing *Gold* and *Ribic* with approval, the Court stated that the public interest in disclosure in civil litigation, which concerns the fair administration of justice, depends upon the particular circumstances of each case. The case for disclosure is measured by factors such as whether the redacted information would provide evidence of a fact "crucial" to the plaintiff's claim; whether there exist alternative ways of proving the plaintiff's case without disclosing the injurious information; and how serious is the issue being litigated.[127] The case for disclosure must be "clear and compelling."[128]

Kempo involved a claim for damages resulting from an alleged conspiracy by the Crown, principally Canadian Security Intelligence Service (CSIS) agents, to harm the plaintiff by way of assault, defamation, deceit, trespass and other tortious acts.[129] The Court was satisfied that the Attorney General had met the burden to prove the redacted information was sensitive and, if disclosed, would injure national security, since the information would identify or tend to identify human sources, CSIS targets and methods of operation. With respect to the three factors listed in the consideration of the public interest in disclosure, the Court found that the redacted information would not help the plaintiff prove his claim as there was no evidence in the record of a conspiracy against him; the plaintiff had not demonstrated that he did not have reasonable ways to bring forward his own evidence to counter the redacted information; and the action was a civil suit brought for monetary damages—the plaintiff's life and liberty were not at stake.[130]

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124. Jose Pereira E Hijos, *S.A. v. Canada (A.G.)*, 2002 FCA 470, 299 N.R. 154 at paras. 17–18, 235 F.T.R. 158.

125. *Ribic*, *supra* note 118 at para. 26.

126. *Canada (A.G.) v. Kempo*, 2004 FC 1678, 294 F.T.R. 1, 151 A.C.W.S. (3d) 615 [*Kempo* cited to F.T.R.].

127. *Ibid.* at para. 111.

128. *Ibid.* at para. 110 [citation omitted].

129. *Ibid.* at para. 20. The plaintiff, who was self-represented, alleged that he was the target of a surveillance and long-term hypnosis operation designed to inflict mental and physical suffering on him, as well as to professionally destabilize him.

130. *Ibid.* at paras. 112–115.

While the conclusion in *Kempo* not to disclose can be distinguished on its facts, the reasoning employed could have a significant impact on a claim brought by a torture survivor or victim of other human rights violations. It is difficult to envision, for example, how a plaintiff can demonstrate "that he did not have reasonable ways to bring forward his own evidence to counter the redacted information" when the plaintiff is not given even a summary of the redacted information in question. Moreover, that life and liberty are not at stake in a civil suit should not be given much weight, let alone be determinative, if the Court is to give effect to the principle that section 38 does not contemplate "an obvious imbalance" between the public interest in national security and the public interest in the administration of justice.[131]

In arguing for disclosure in the civil cases contemplated in this article, plaintiffs could also invoke other public interests, beyond the interests in the administration of justice and political accountability previously discussed. When listing relevant factors for consideration, the Federal Court in the *Arar* case also referred briefly to "higher interests at stake, such as human rights issues."[132] Such higher interests are at play wherever a claimant seeks compensation for government involvement in human rights violations. States do, after all, have an obligation under international law to enact measures for the effective investigation of, and to provide effective remedies for, human rights violations. As the Special Rapporteur proclaimed in his February 2009 report:

> The human rights obligations of States, in particular the obligation to ensure an effective remedy, require that such legal provisions must not lead to a priori dismissal of investigations, or prevent disclosure of wrongdoing, in particular when there are reports of international crimes or gross human rights violations. The blanket invocation of State secrets privilege with reference to complete policies, such as the United States secret detention, interrogation and rendition programme or third-party intelligence (under the policy of "originator control" . . .) prevents effective investigation and renders the right to a remedy illusory. This is incompatible with article 2 of the International Covenant on Civil and Political Rights. It could also amount to a violation of the obligation of States to provide judicial assistance to investigations that deal with gross human rights violations and serious violations of international humanitarian law.[133]

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131. *Gold*, *supra* note 99 at 137. See also *Ribic*, *supra* note 118 at para. 22.

132. *Arar*, *supra* note 115 at para. 98.

133. *Report of the Special Rapporteur*, *supra* note 1 at para. 60 [footnotes omitted]. See generally *International Covenant on Civil and Political Rights*, 16 December 1966, 999 U.N.T.S. 171, art. 2, Can. T.S. 1976 No. 47, 6 I.L.M. 368 (entered into force 23 March 1976, accession by Canada 19 May 1976) (states are required to "ensure that any person whose rights or freedoms . . . are violated shall have an effective remedy": at para. 3(a)); and *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, 1465 U.N.T.S. 85, art. 14, Can. T.S. 1987 No. 36 (entered into force 26 June 1987, accession by Canada 24 June 1987).

In addition, the views of the UK court in the Binyam Mohamed case are apposite: "A claim to conceal evidence of cruel, inhuman or degrading treatment or torture under the guise of public interest immunity could not be countenanced as it was incompatible with international law and values relating to the prohibition of torture and cruel, inhuman or degrading treatment. . . ."[134] The 9th Circuit Court of Appeals decision, reversing the dismissal of Mohamed's civil action in *Jeppesen*, also alludes to the larger interests served by civil litigation in the anti-terrorism context:

> By excising secret evidence on an item-by-item basis, rather than foreclosing litigation altogether at the outset, however, *Reynolds* recognizes that the Executive's national security prerogatives are not the only weighty constitutional values at stake: while "[s]ecurity depends upon a sophisticated intelligence apparatus," it "subsists, too, in fidelity to freedom's first principles [including] freedom from arbitrary and unlawful restraint and the personal liberty that is secured by adherence to the separation of powers."[135]

Whether these various public interests—in the administration of justice, in political accountability, in fulfilling human rights obligations to provide an effective remedy for violations, and in preserving the rule of law—will overcome the public interest in maintaining state secrets, will necessarily turn on the facts of each case. As no civil action by a victim of anti-terrorism practices has yet gone to trial in Canada, the question of which interest tips the scales is, for the time being, of academic interest alone. Where the decision is to confirm the claim of privilege, reasonable substitutes must be provided. Despite the pronouncements of the 9th Circuit Court in *Jeppesen*, which effectively bring state secret privilege in line with Canadian and English law on national security privilege, claims can still be dismissed on the basis that the confidential evidence is indispensable to proving the plaintiff's claim.[136] Such a result can and should be avoided by Canadian courts. How this can be accomplished is the subject of the final part of this essay.

V. Proposals for Reform

None of the three regimes examined in this paper is satisfactory in its treatment of states secrets. All threaten the rights of litigants to proper disclosure of relevant evidence, and hence undermine the role of civil courts as venues where defendants might be held accountable for breaches of the law. What follows are modest propos-

134. *Mohamed 2009*, *supra* note 84 at para. 26.

135. *Jeppesen*, *supra* note 55 at 4938 [changes to quotation in original] [citation omitted].

136. *Ibid.* at 4942.

als for reform based largely on the Canadian legislative framework, as well as principles of common law inherent in all three systems. The reforms address how courts might approach determining the validity of the claim of privilege, as well as the consequences of successful claims for the plaintiff.

The rules of civil procedure in each province are a source of potential relief on both aspects of the problem. By virtue of Rule 30 of the Ontario *Rules of Civil Procedure*,[137] for example, litigants are required to disclose, by way of sworn affidavit, all documents in their power, possession or control that are relevant to any matter in issue in the action, whether or not privilege is claimed over the document.[138] All non-privileged documents must then be produced for inspection.[139] Where privilege is claimed over a document, the basis for the privilege must be provided in the affidavit of documents.[140] A plaintiff may obtain a court order compelling the defendant to provide a further and better affidavit of documents and ultimately to produce the relevant document. Failure to abide by the order may result in the statement of defence being struck.[141] As a result, in situations where the national security confidentiality claim has been rejected, the Crown is forced to choose either to produce relevant documents or to lose the case by default.

Judicial awareness of the challenges faced by plaintiffs in national security litigation may alter the overall approach to Rule 30. In one recent case involving a rendition victim's suit against the Canadian government, the Court ordered the defendant to produce relevant documents and swear a better affidavit of documents.[142] The plaintiff had learned of the existence of undisclosed government documents by way of an Access to Information request. Master Short joined Federal Court Justice Noël in expressing concern about an apparent Crown pattern of "filtering" or withholding relevant documents from litigants.[143] To ensure that CSIS agents and others were aware of their legal obligation to provide counsel for the Attorney General with all the appropriate documents for the purposes of Rule 30, Master Short ordered defence counsel to personally advise the Deputy Minister of each Federal Department implicated in the litigation of the disclosure responsibilities, and to certify that this had been done in the new affidavit of documents.[144] In this way, greater

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137. R.R.O. 1990, Reg. 194 [*Rules of Civil Procedure*].
138. *Ibid.*, r. 30.02(1).
139. *Ibid.*, r. 30.02(2).
140. *Ibid.*, rr. 30.03(1)-(2). See also *Carey*, *supra* note 107 at 655 (a claim of privilege over a class of documents will not suffice).
141. *Rules of Civil Procedure*, *supra* note 137, r. 30.08(2).
142. *Benatta*, *supra* note 10 at para. 162.
143. *Re Harkat*, 2009 FC 1050, [2009] F.C.J. No. 1242 at paras. 44–51 (QL) [*Harkat*] (failure by the Ministers to disclose information concerning the reliability of a human source to the Court and to the special advocates). *Cf. Benatta*, *ibid.* at paras. 107–117.
144. *Ibid.* at paras. 151–154.

attention to, and judicial scrutiny of, the government's Rule 30 obligations may lead to more complete disclosure, and to more detailed explanations of the grounds for the privilege claim.

There remains, however, the difficulty of challenging the national security privilege claim. In the ordinary civil litigation context, a court may inspect the document to determine the validity of the asserted privilege.[145] Under the current regime prescribed by the *Canada Evidence Act*, however, the Federal Court, not the Superior Court judge with carriage of the civil action, inspects the documents over which national security privilege is claimed, and either confirms the claim or orders production of the document. The bifurcated process has been deemed unconstitutional in the criminal context: denying the trial judge access to the secret documents deprives him or her of the ability to assess whether the accused's section 7 *Charter*[146] right to a fair trial has been infringed by reason of the lack of disclosure, and to determine the appropriate remedy.[147] Although bifurcation of a civil trial does not have the same *Charter* ramifications, it does complicate the section 38 balancing exercise. Recall that, in assessing whether to confirm the privilege, the Federal Court must determine the importance of disclosure to the plaintiff by considering whether the redacted information is "crucial" to the plaintiff's claim; whether there exist alternative ways of proving the plaintiff's case; and how serious is the issue being litigated.[148] A Federal Court judge is not in the best position to assess the importance of the information to a civil tort claim; the case management judge or master, more familiar with the civil proceedings, however, lacks jurisdiction under section 38 to conduct the balancing exercise. If the Supreme Court of Canada upholds Justice Dawson's ruling that the bifurcated process is unconstitutional in criminal cases, it is not inconceivable that the Superior Courts may be vested with jurisdiction to adjudicate section 38 privilege claims in civil cases as well. With access to the documents in question, the trial judge would then be able to fashion and supervise an appropriate remedy, including the production of a minimally redacted document or a summary of the privileged information. Similar exercises are undertaken in other contexts, including medical records.[149]

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145. *Rules of Civil Procedure*, *supra* note 137, r. 30.04(6).

146. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

147. *F.A.*, *supra* note 5. At the time of writing, the trial judge's decision remained protected by a publication ban and the appeal to the Supreme Court of Canada had not yet been decided.

148. *Kempo*, *supra* note 126 at para. 102.

149. See e.g. *R. v. O'Connor*, [1995] 4 S.C.R. 411 at para. 163, 130 D.L.R. (4th) 235: "The court should not release classes of records, but rather should inspect each individual record for materiality. Records that are to be produced should be vetted with a view to protecting the witness's privacy, while nonetheless maintaining sufficient detail to make the contents meaningful to the reader."

Whether it is a judge of the Federal Court under the current section 38 regime or a Superior Court judge if the bifurcated process is struck down, additional assistance may be obtained from a court-appointed *amicus* to more critically vet the government's claim of privilege. The Federal Court has jurisdiction to make such an appointment, but has not done so in civil claims to date.[150] The presence of special advocates in the security certificate process has proven to be critical to the testing of secret evidence and discovery of undisclosed information.[151] The Supreme Court has acknowledged that a judge alone bears too heavy a burden in probing government's secret evidence in a vacuum;[152] the assistance of counsel representing the interests of the plaintiff may be necessary to probe the genuineness—and limit the breadth—of the national security confidentiality claim.

Should a privilege claim be accepted to the detriment of the litigant's rights to a fair process, the courts could fashion a remedy in the name of evolving evidentiary rules. The common law has developed in this way for other privileges and for the law of evidence generally; for example, the doctrine of spoliation creates an evidentiary adverse inference against the party who has destroyed evidence.[153] The spoliation doctrine operates as a rebuttable rule, requiring the spoliator to provide a reasonable explanation for the loss and nature of the evidence. Similarly, the defendant government who has successfully claimed public interest privilege over evidence relevant to the plaintiff's claim would have the persuasive burden to satisfy the trial judge (who would not have seen the confidential evidence) that the evidence is favourable to the defendant.

Legislative reform may also be needed. The *Canada Evidence Act* contemplates the potential frustration of litigation by reason of the national security privilege. Section 38.14 protects the accused in criminal matters in the event that non-disclosure of secret evidence frustrates his or her right to a fair trial. Importantly, however, the provision does not apply in the civil litigation context. In order to avoid the unfairness of either expressly or effectively defeating the plaintiff's claim, section 38.14 could be amended to address the consequences of the privilege in civil litigation. For example, the section could empower a judge to find in favour of the litigant on the issue to which the confidential evidence relates, as is envisioned by the *State Secrecy Protection* bill currently before the US Congress.[154]

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150. See text accompanying note 117.

151. See e.g. *Harkat*, *supra* note 143 at para. 48; see also *Re Almrei*, 2009 FC 1263, [2009] F.C.J. No. 1579 at paras. 112–113 (QL).

152. *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9, [2007] 1 S.C.R. 350 at para. 63, 276 D.L.R. (4th) 594.

153. *Dickson v. Broan-NuTone Canada Inc.*, [2007] O.J. No. 5114 at paras. 37–38 (Sup. Ct.), aff'd 2008 ONCA 734, [2008] O.J. No. 4197, 170 A.C.W.S. (3d) 430 (QL).

154. See text accompanying note 47.

Other legislative solutions have been offered in the academic literature. Steven Gardner has proposed a statutory amendment that would compensate people whose claims cannot go forward due to state secrecy,[155] while Robert Chesney has argued that the government should be obligated to choose between permitting a suit to go forward or having judgment rendered for the plaintiff. [156] Where an order of non-disclosure would effectively terminate a tort action, special legislation of the kind suggested by Gardner and Chesney may be the only mechanism for providing relief, but this would require tremendous political will.

In the event the rules of civil procedure and evidence are incapable of addressing the problem of national security privilege, and absent legislative reform, special avenues of access to justice should also be explored. With respect to the wrongfully convicted, Archibald Kaiser has suggested that an Imprisonment Compensation Board be created, both to investigate claims of wrongful conviction and determine eligibility for, and quantum of, compensation.[157] A similar specialized body could be considered in the national security context. Unlike other specialized administrative bodies operating in the national security sphere, such as the Security Intelligence Review Committee, a "national security complaints tribunal" would have as its only priority the resolution of civilian complaints. Unlike the RCMP's Commission for Public Complaints, the new body would be empowered to view all privileged documents and summon witnesses. The new agency would also have access to all actors in the national security sphere, and not be limited in its jurisdiction to reviewing the actions of one government department or agency. Such an initiative would require political and popular support to be effective. It would require acceptance that miscarriages of justice populate the national security landscape, and that the state bears a responsibility to address these injustices.

VI. Conclusion

The track records of American, English and Canadian governments in over-claiming national security confidentiality in contexts other than civil litigation[158] raise the distinct possibility that Canadian Ministers and Attorneys General, and their American

155. Gardner, *supra* note 32 at 601–606.

156. Chesney, *supra* note 37 at 1312–1313.

157. H. Archibald Kaiser, "Wrongful Conviction and Imprisonment: Towards an End to the Compensatory Obstacle Course" (1989) 9 Windsor Y.B. Access Just. 96 at 143–145.

158. See e.g. Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, *Report of the Events Relating to Maher Arar: Analysis and Recommendations* (Ottawa: Public Works and Government Services, 2006) at 301–304; *Canada (A.G.) v. Khawaja*, 2007 FC 463, 280 D.L.R. (4th) 32, 219 C.C.C. (3d) 289 aff'd 2007 FCA 388, [2008] 4 F.C.R. 3, 289 D.L.R. (4th) 260; and *Arar*, *supra* note 115.

and English counterparts, might be willing to subordinate the personal interests of the plaintiff to the collective interest in national security by claiming national security confidentiality over significant portions of the evidence relevant to establishing a plaintiff's causes of action.[159] Even if the government is willing to withdraw a criminal prosecution in order to protect secrets, as has been suggested elsewhere,[160] the same rationale would not necessarily apply in the civil context where the government is a named defendant and has an incentive to resist liability. At the very least, a battle over what ought to be produced in discovery will be protracted, requiring adjudication by the court. This is particularly problematic in the Canadian context, as it results in a bifurcated trial between two different courts; the Federal Court is required to assess the validity of the privilege claim, but the Superior Court, where the civil trial is conducted and which arguably has greater expertise in adjudicating tort claims, would not be privy to the privileged information.

US courts have grappled with state secrets immunity on a number of occasions. In the aftermath of September 11, 2001, the invocation of the privilege has resulted in patent unfairness to the plaintiffs, who were all victims of torture or other serious human rights violations. In response, legislation has been drafted that would require courts to inspect the secret documents at issue, weigh the competing interests and craft non-sensitive substitutes where possible. In this way, the proposed legislation would largely bring American law in line with the Canadian and UK positions on national security privilege. While the law respecting this privilege in the UK and Canada is more egalitarian, in that judges are expressly empowered to be the final arbiters of the existence and scope of the privilege, the high degree of deference accorded to ministerial assessments of injury to international relations, national security or national defence creates a considerable barrier for the plaintiff seeking disclosure in the civil courts. In addition, the objection by third parties, like the United States, to disclosure will likely be sufficient to trigger the privilege, even if sensitive intelligence information is not at issue.

Once an anti-terrorism victim's case goes to trial, the final stage of the analysis for the court will be the determination of which public interest tips the scale. The public interest in protecting national security is extremely weighty. So, too, however, are the public interests in the equal and effective administration of justice,

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159. A similar calculus operates in the state secret jurisprudence; see e.g. *Fitzgerald v. Penthouse Int'l Ltd.*, 776 F.2d 1236 at 1238, 1985 U.S. App. LEXIS 23832 (4th Cir. 1985): "When the state secrets privilege is validly asserted, the result is unfairness to individual litigants—through the loss of important evidence or dismissal of a case—in order to protect a greater public value."

160. Roach, *supra* note 106 at 34.

accountability for egregious conduct and the protection of human rights. As the Supreme Court of Canada stated in *Carey*, in some cases, "the charge of misbehaviour in the conduct of government operations [makes] it important in the public interest that the documents be revealed."[161] In effect, disclosure would serve the very purpose that the immunity is intended to support: the proper functioning of government. At the very least, these concerns should force a court to provide a robust and meaningful substitute for the evidence that must remain secret "for the greater good."

At a systemic level, the problems created by national security privilege in the civil context can be cured in three ways: an amendment to section 38.14 of the *Canada Evidence Act*, the development of a rebuttable adverse inference against the government, or the creation of a specialized tribunal specifically empowered to consider claims for compensation by those harmed by Canada's national security apparatus. None of these solutions would be easy to implement. But the need for disclosure in situations where there are allegations of government complicity in torture is particularly compelling. Failing disclosure, the Canadian government must find its way towards a solution that does not compound the injustices of the government's imperfect anti-terrorism efforts.[162]

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161. *Carey*, *supra* note 107 at 664.

162. This article is current as of February 2010. In the rapidly developing area of national security privilege, readers should note that a number of other decisions have been released since early 2010. In particular, the Superior Court of Justice granted the plaintiff's constitutional challenge and held that section 38 does not preclude a judge of the Superior Court from reviewing a Crown claim of privilege at trial if the civil action involves a constitutional (ie: *Charter*) enforcement claim: *Abou-Elmaati v. Attorney General*, 2010 ONSC 2055. In *Canada (Attorney General) v. Almalki*, 2010 FC 1106, the Federal Court applied the *Ribic* test to an application for disclosure of documents over which the Crown claimed privilege, and engaged in a balancing exercise largely similar to the one forecasted in part IV.c. of this paper. *Amici* were appointed in both cases, and both cited decisions are now under appeal.