

SO LONG, AND THANKS FOR ALL THE SECRETS:<sup>\*</sup>  
A RESPONSE TO PROFESSOR TELMAN

*Robert E. Barnsby*<sup>†‡</sup>

INTRODUCTION .....		670
I. TELMANIAN LOGIC .....		674
A. <i>Decision Does Not Equal Deference</i> .....		675
B. <i>The Same Result Under Two Different Doctrines Does Not Equal Conflation of the Two Doctrines</i> .....		677
II. OVERREACTION .....		678
A. <i>The Challenge of Invoking the SSP</i> .....		678
B. <i>These Are Non-Citizens in Civil Court</i> .....		680
C. <i>Overstatement of the Classification Argument</i> .....		681
III. NATIONAL SECURITY VS. CIVIL LIBERTIES .....		683

---

\* Douglas Adams fans will recognize a variation on this Article's title as a message left by the dolphins at the end of the world in Adams's book entitled *So Long, and Thanks for All the Fish*. The analogy here is that, taken to an admittedly unlikely extreme, Professor Telman's argument could lead to the enemies of the United States uttering this same phrase as they succeed in compromising U.S. national security as we know it. The Adams book is part of his *Hitchhiker's Guide to the Galaxy* "trilogy" (consisting of five books, naturally).

† Major and Judge Advocate, U.S. Army. Presently assigned as a student in the Command and General Staff College (Scholars Program), Fort Leavenworth, Kan. Most recently assigned as Professor, Int'l & Operational Law Dep't, The Judge Advocate General's (JAG) Legal Ctr. & Sch., U.S. Army, Charlottesville, Va. Member of the bars of Virginia, the U.S. Court of Appeals for the Armed Forces, the U.S. District Court for the Northern District of New York, and the U.S. Supreme Court. LL.M., 2009, The JAG Legal Ctr. & Sch., Charlottesville, Va.; J.D., 2004, The College of William & Mary, Williamsburg, Va.; B.S., 1996, United States Military Academy, West Point, N.Y.

I am greatly indebted to: Professor Geoffrey Corn, South Texas College of Law, Professor Bobby Chesney, Univ. of Texas School of Law, and Colonel Jeff Bovarnick, U.S. Army, Staff Judge Advocate for the 101st Airborne Division (Air Assault), for their unwavering support in the pursuit of scholarship by military attorneys; Gabriel Park, Brooklyn Law School, for his invaluable efforts, hard work, and skill in researching this topic; Charles W. Prueter, Editor in Chief, *Alabama Law Review*, for his great patience and magnanimity throughout the production of this piece (Roll Tide), and Major Shane Reeves, U.S. Army, Professor of Law at the United States Military Academy, West Point, N.Y., for his overall brilliance and willingness to discuss this topic anytime, day or night.

Above all, I would like to thank Lieutenant Colonel (Ret.) Angel I. Pabon, U.S. Army, for his tremendously insightful input throughout the article process—and for being the best father-in-law, too—as well as Alisha Barnsby, the greatest wife for whom I could ever ask (who has gracefully and patiently waited through literally fifteen years' worth of her husband saying, "Don't worry, only a couple more days before the schedule really clears up").

‡ The views expressed in this Article do not necessarily reflect the official policy or position of the United States Army, Department of Defense, or the United States Government.

A. <i>The Impossibility of Un-Ringing the Bell</i> .....	684
B. <i>Intelligence Under the Law</i> .....	686
CONCLUSION.....	688

In the most recent issue of this esteemed publication, Professor Jeremy Telman examines State Secrets Privilege (SSP) jurisprudence in his article, *Intolerable Abuses: Rendition for Torture and the State Secrets Privilege*.<sup>1</sup> In his piece, Telman argues that courts—including the Ninth Circuit in *Mohamed v. Jeppesen Dataplan, Inc.*<sup>2</sup>—too often abandon their constitutional duty to properly check executive claims of the SSP.<sup>3</sup> In turn, according to Telman, this judicial abandonment allows for “intolerable abuses” of the SSP by the government.<sup>4</sup> Yet, a thorough examination of the Ninth Circuit’s opinion in *Jeppesen Dataplan* reveals that the court did not abandon its duties to serve as a check on the Executive. Rather, the court, after conducting an exhaustive review of all the evidence underlying the government’s well-prepared, agency head-approved, and lawfully asserted invocation of the SSP,<sup>5</sup> simply decided the case *in favor of* the Executive. Though neither Telman nor the dissent in *Jeppesen Dataplan*<sup>6</sup> particularly likes this result,<sup>7</sup> an unfavorable outcome must not be confused with a judicial abdication of responsibilities. Such logic is analogous to a baseball team asking for a highly qualified umpire to stand behind home plate, then arguing that the umpire is not doing his job when he calls a strike on that team.

Notwithstanding this significant point, and several others on which I will disagree with him throughout this response, Professor Telman has written an important piece—albeit one characterized by a self-admitted “radical position”<sup>8</sup> using multiple “radical” arguments.<sup>9</sup> Telman’s article

1. D. A. Jeremy Telman, *Intolerable Abuses: Rendition for Torture and the State Secrets Privilege*, 63 ALA. L. REV. 429 (2012).

2. 614 F.3d 1070 (9th Cir. 2010) (en banc), cert. denied, 131 S. Ct. 2442 (2011). Specifically, Telman states that the “result [in *Jeppesen Dataplan*] is the product of precisely the sort of intolerable abuses of the privilege about which the Supreme Court expressed concern in [*United States v. Reynolds*].” Telman, *supra* note 1, at 436.

3. Telman, *supra* note 1, at 437.

4. *Id.* at 430.

5. See *infra* Part I.A (describing the court’s exhaustive search into the facts underlying the lawful assertion of the privilege in *Jeppesen Dataplan*).

6. Nor the majority, for that matter. See *Jeppesen Dataplan*, 614 F.3d at 1092–93.

7. Presumably due to the fact that the foreign national plaintiffs in the case were alleged victims of torture by various governments as part of the CIA’s extraordinary rendition program. See *infra* note 16 and accompanying text.

8. Telman, *supra* note 1, at 439. Nevertheless, as Bruce Ackerman suggests, it may be “the role of the academy to expose the Washington Consensus to critical scrutiny.” Bruce Ackerman, *Lost Inside the Beltway: A Reply to Professor Morrison*, HARV. L. REV. F., May 2011, at 13, 14, available at [http://www.harvardlawreview.org/media/pdf/vol124forum\\_ackerman.pdf](http://www.harvardlawreview.org/media/pdf/vol124forum_ackerman.pdf).

9. Telman, *supra* note 1, at 439.

excellently depicts state secrets doctrine jurisprudence and scholarship, including the evolution of the two applications within the doctrine, the *Reynolds* SSP (“a rule of evidentiary privilege”)<sup>10</sup> and the *Totten* Bar (“a rule of non-justiciability”).<sup>11</sup> Therefore, in lieu of rehashing this literature or, for that matter, responding to every aspect of Telman’s nine-point decision tree, I believe it is of more value to describe here the “government” perspective through which the state secrets doctrine, in general, and the Ninth Circuit’s *Jeppesen Dataplan* opinion, in particular, is more typically understood. In contrasting Telman’s views with my experiences as a military/legal practitioner,<sup>12</sup> I will illustrate key aspects of divergence between our contradictory viewpoints, including areas in which I believe Telman has not only overstated the significance of the *Jeppesen Dataplan* result but also neglected to engage in meaningful discussion regarding the real-world implications of the possible exposure of national security information in an era of persistent armed conflict.

To be exact, my view is that the government should continue to be allowed to use the SSP to put an end to litigation that might expose national security information. In light of this argument, I conclude that the existing protections against possible government abuse are more than adequate and need not be changed in the civil court arena. While mindful of the critical need to balance civil liberties with national security, I assert that the Ninth Circuit got it right when it dismissed the plaintiffs’ cases against the government in *Jeppesen Dataplan*. As Telman admits, “[t]he general operative principle informing these decisions is that it is often impossible to separate classified and unclassified information that might arise in the course of litigation.”<sup>13</sup> It is this inability to extricate the unclassified portions of a matter central to trial which underscores the importance of the SSP.

Serving as an active duty Army officer with a TOP SECRET-level clearance for well over fifteen years, I have experienced first-hand the urgency of preventing national security information from falling into the hands of existing or potential adversaries.<sup>14</sup> I absolutely agree with the

---

10. *Al-Haramain Islamic Found. v. Bush*, 507 F.3d 1190, 1197 (9th Cir. 2007).

11. *Id.* The *Totten* Bar applies to “any case in which the ‘very subject matter of the action’ is ‘a matter of state secret,’” and derives from *Totten v. United States*, 92 U.S. 105 (1876). *Jeppesen Dataplan*, 614 F.3d at 1096 (Hawkins, C.J., dissenting). When the *Totten* Bar is combined with the *Reynolds* SSP, the two principles comprise state secrets doctrine. *Id.* At 1077.

12. As a former military intelligence officer and current attorney (judge advocate) in the United States Army, I have the privilege of serving simultaneously in both the profession of law and the profession of arms.

13. Telman, *supra* note 1, at 475.

14. Fortunately, the Supreme Court “has recognized the Government’s ‘compelling interest’ in withholding national security information from unauthorized persons in the course of executive business.” *Dep’t of Navy v. Egan*, 484 U.S. 518, 527 (1988) (quoting *Snepp v. United States*, 444 U.S.

maxim that “the more people who have access to secret information, the less secret the information becomes.”<sup>15</sup> At the same time, I fundamentally agree with the premise that courts may err in applying doctrine in certain specific, unique cases (though this is not one of those times). Above all, because of my appreciation for the ongoing and compelling struggle to balance national security with civil liberties, I am honored to have an opportunity to respond to Professor Telman.

#### INTRODUCTION

Though many have undoubtedly read Telman’s *Alabama Law Review* article, a quick summary of the case on which it is based is worthwhile. In *Mohamed v. Jeppesen Dataplan, Inc.*, the “[p]laintiffs allege[d] that the Central Intelligence Agency . . . operated an extraordinary rendition program to gather intelligence by apprehending foreign nationals suspected of involvement in terrorist activities and transferring them in secret to foreign countries for detention and interrogation by United States or foreign officials.”<sup>16</sup> Prior to trial, the government moved to intervene and to dismiss the plaintiffs’ complaint under the state secrets doctrine.<sup>17</sup> The then-Director of the CIA, General Michael Hayden, filed two declarations in support of the motion to dismiss, stating that “disclosure of the information covered by this privilege assertion reasonably could be expected to cause serious—and in some instances, exceptionally grave—damage” to the United States.<sup>18</sup> Thus, according to Hayden’s declaration, this case should be dismissed.

In deciding the case, the Ninth Circuit held that the foreign nationals’ action would be dismissed pursuant to the state secrets privilege under *Reynolds*,<sup>19</sup> a Supreme Court case from 1953 in which the Court held that the government may assert the SSP to prevent the disclosure of sensitive, national security-related information.<sup>20</sup> Essentially, the Ninth Circuit agreed with the government and Hayden’s declaration, finding that the

---

507, 509 n.3 (1980)); see also Daniel L. Pines, *The Continuing Viability of the 1875 Supreme Court Case of Totten v. United States*, 53 ADMIN. L. REV. 1273, 1276–77 (2001).

15. Telman, *supra* note 1, at 497 (discussing *Tilden v. Tenet*, 140 F. Supp. 2d 623 (E.D. Va. 2000)).

16. *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1073 (9th Cir. 2010) (en banc). The plaintiffs included Ahmed Agiza, an Egyptian national, Abou Elkassim Britel, an “Italian citizen of Moroccan origin,” Binyam Mohamed, an “Ethiopian citizen and legal resident of the United Kingdom,” Bisher al-Rawi, an “Iraqi citizen and legal resident of the United Kingdom,” and Farag Ahmand Bashmilih, a Yemeni citizen. *Id.* at 1074–75.

17. *Id.* at 1076.

18. *Id.*

19. *Id.* at 1085–89.

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

facts underlying the foreign nationals' claims were "so infused with state secrets that the risk of disclosing them is both apparent and inevitable."<sup>21</sup> Significantly, the court noted that even a change in administrations did not affect the view of the United States Government on this matter, as "the 'highest levels of the Department of Justice' of the [Obama] Administration had reviewed the assertion of privilege in this case and determined that it was appropriate" even under newly announced Department of Justice policies ostensibly restricting the government's ability to invoke the SSP.<sup>22</sup>

The *Reynolds* precedent in this area of the law is clear<sup>23</sup> and, in fact, has not been disturbed for nearly sixty years. Namely, the *Reynolds* standard requires that if "there is a reasonable danger that [disclosure of information] will expose military matters which, in the interest of national security, should not be divulged,"<sup>24</sup> the government may prevent the disclosure of the information through assertion of the SSP by following certain, clearly prescribed procedures.<sup>25</sup> Courts obviously should perform an inquiry into the evidence of a particular case in order to ensure that grounds truly exist for assertion of the privilege. Though once assured of the legitimacy of the SSP assertion, courts should dismiss the case even if "the most compelling necessity" exists on the merits of the case.<sup>26</sup> Here, the Ninth Circuit in fact performed a searching inquiry into the underlying evidence;<sup>27</sup> this comprehensive inquiry—resulting in its finding of support for the government's assertion—provided incontrovertible grounds to put an end to the litigation, even prior to the discovery phase.

In Part I, I respond to Telman's article by tackling certain logical flaws that exist in his reasoning. As described in the opening, I first argue that a decision in favor of the Executive does not equal deference to the Executive in the constitutional sense. I address this at length and include a discussion of the *Jeppesen Dataplan* court's impressively thorough inquiry into the underlying facts of the government's assertion of the privilege.<sup>28</sup> Most importantly for our purposes, this independent inquiry does not

---

21. *Jeppesen Dataplan*, 614 F.3d at 1089.

22. *Id.* at 1077.

23. *See Reynolds*, 345 U.S. 1.

24. *Id.* at 10.

25. *Id.* at 7–8. *See infra* Part II.A for a discussion of the procedures required by *Reynolds*.

26. *Id.* at 11.

27. *Jeppesen Dataplan*, 614 F.3d at 1086. The Ninth Circuit had previously imposed a high standard on itself in a 2007 case, *Al-Haramain Islamic Foundation v. Bush*, requiring the court "to review the [government's claim] with a very careful, indeed a skeptical, eye, and not to accept at face value the government's claim or justification of privilege." *Al-Haramain Islamic Found. v. Bush*, 507 F.3d 1190, 1203 (9th Cir. 2007).

28. *Jeppesen Dataplan*, 614 F.3d at 1086. The court explains how it has "independently and critically confirmed that [the disclosure of the secrets] could be expected to cause significant harm to national security." *Id.*

suggest an abdication of judiciary responsibilities, as Telman argues; on the contrary, it suggests a court very much engaged in its proper role as a co-equal branch of government.<sup>29</sup>

A second major logical flaw is seen in Telman's argument that the Ninth Circuit conflates the SSP with the *Totten* Bar, which requires dismissal of an action ("without . . . reaching the question of evidence"),<sup>30</sup> in cases in which "the very subject matter of a lawsuit is a matter of state secret."<sup>31</sup> This analysis is flawed, as the court goes out of its way to declare that it bases its opinion to dismiss on *Reynolds* (not *Totten*).<sup>32</sup> The court understands that it is dismissing the case at a very early stage of the proceedings, yet is very clear that it is *not* doing so on the basis of *Totten*. The court even anticipates the conflation criticism in its opinion, stating emphatically that the SSP "may be asserted at any time, even at the pleading stage."<sup>33</sup> Moreover, the court states that the two applications merely converge in time and result with one another.<sup>34</sup> Were the court not to address the issue at all, we might conclude differently; however, with the court addressing the issue head on, and specifically disaggregating the two applications, we must conclude that the court did not conflate.<sup>35</sup>

In Part II, I argue that Telman's work represents an overreaction to the *Jeppesen Dataplan* result in several ways. First, I note that the significant challenge of securing agency head approval for any assertion of the privilege makes the government's work in asserting the privilege both more time-consuming and less likely to occur than readers of Telman's article may initially recognize. Even more importantly for our purposes, two agency heads (the CIA Director and the Attorney General)<sup>36</sup> approved the assertion of the privilege in *Jeppesen Dataplan*. These facts underscore the importance of the national security information intertwined throughout the *Jeppesen Dataplan* litigation. Notably, a 2009 Department of Justice policy

---

29. This suggests proper judicial oversight of a matter in the Executive realm. Many argue that the "authority to protect such information falls on the President as head of the Executive Branch and as Commander in Chief. . . . Thus, unless Congress specifically has provided otherwise, courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs." Pines, *supra* note 14, at 1277 (citing *Dep't of Navy v. Egan*, 484 U.S. 518, 527-30 (1988)). While I agree, the courts overseeing the assertion of the SSP, by ensuring that the proper requirements have been met before assertion of the privilege, constitute a proper amount of judicial oversight. For a fantastic article on the proper role of the Judiciary in national security litigation, see Robert M. Chesney, *National Security Fact Deference*, 95 VA. L. REV. 1361 (2009).

30. Pines, *supra* note 14, at 1279 (citing *United States v. Reynolds*, 345 U.S. 1, 11 n.26 (1953)).

31. *Jeppesen Dataplan*, 614 F.3d at 1079.

32. *Id.* at 1084.

33. *Id.* at 1080.

34. *Id.* at 1083.

35. Moreover, coverage at the discovery phase is an implied part of exactly the scenario the SSP was designed to protect. See *infra* Part I.B for a complete discussion of this point.

36. See *Jeppesen Dataplan*, 614 F.3d at 1076-77.

memorandum imposes stringent requirements on any attempted assertion of the privilege, as discussed in detail in Part II.A. In light of the significant procedural requirements imposed on government agencies seeking to assert the privilege, any implication that the SSP is invoked without tremendous coordination and effort is an overstatement.

The persuasiveness of Telman's argument is also undermined both by the vast deference he accords to plaintiffs, none of whom are United States citizens,<sup>37</sup> and the fact that this is a civil, rather than criminal, case. As Telman admits, "civil and criminal contexts are fundamentally different."<sup>38</sup> In the civil context, as here, the current procedures in place—requiring nothing short of approval by the head of various several thousand-member agencies<sup>39</sup>—are more than adequate. Relatedly, I suggest that the classification section of Telman's article is overstated as well. While I agree that overclassification can be a problem within the government,<sup>40</sup> the fact that information does not have to be classified in order to support an invocation of the SSP militates against the implication that if the government would only stop classifying so much, we would know everything we'd like to know. Additionally in this Part, I challenge Telman's assertion that members of the government have an incentive to overclassify by arguing that, because of the significant administrative burdens of storing and handling classified information, service members and their civilian colleagues in a deployed environment actually have a general disincentive to overclassify.<sup>41</sup>

Finally, and perhaps most relevantly to those interested in such matters, in Part III, I discuss Telman's downplaying of the important role current state secrets doctrine plays in safeguarding our national security. I conclude that such minimization undermines the efficacy of Telman's overall work as, from a practitioner's perspective, the construct Professor Telman proposes could have major unanticipated consequences for both the security of the nation and the warfighter on the ground. The chilling effect on sources,<sup>42</sup> and the governments or intelligence agencies for whom they

---

37. See *supra* note 16.

38. Telman, *supra* note 1, at 489.

39. See *infra* Part II.A.

40. See *infra* Part II.C for a discussion of the fact that the vast majority of military members would agree that it is far too administratively burdensome to have any number of classified documents beyond that which is necessary, particularly in a deployed environment. Therefore, soldiers do not truly have an incentive to overclassify.

41. See *infra* Part II.C.

42. For an example of this, one need not look much further than the case of Aldrich Ames, the infamous CIA agent who told Soviets "the names of U.S. operatives and agents, a number of whom died as a result." 9/11 COMMISSION, THE 9/11 COMMISSION REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES 91 (2004), available at <http://www.911commission.gov/report/911Report.pdf>.

work, resulting from Telman's recommended overhaul of existing state secrets doctrine would undermine the vital need to protect national security information in today's world. Once source names or other sensitive information are released through the litigation process (even as early as the discovery stage), that critical bell cannot be un-rung.<sup>43</sup> For this reason, state secrets doctrine is a very powerful, but necessary, tool in the government's otherwise modest national security litigation toolbox.

As recent events—including the tenth anniversary of the tragic 9/11 attacks—remind us, serious consequences exist when the United States Government is unable to safeguard vital national security information. We accept this inability to safeguard all information as an essential part of our public trial system—even when, as was the case “when the Southern District of New York tried the ‘blind sheik’ Omar Abdel Rahman for his participation in the 1993 World Trade Center bombing,”<sup>44</sup> terrorists such as Osama bin Laden learn critical intelligence information through open discovery provided by the government to the defense legal team.<sup>45</sup> But in civil trials involving non-citizens, in particular, we do not have to accept such an inability to truly safeguard national security information.

In light of this entire discussion, I am left only to conclude that the Ninth Circuit correctly decided *Jeppesen Dataplan* and that the government must continue to be allowed to use state secrets doctrine to put an end to litigation that might expose national security information. Above all, in spite of the flaws in *Reynolds*,<sup>46</sup> the Supreme Court's opinion in that particular case must be remembered for the still-valid point that, in national security cases, “courts should not police the SSP in a way that would defeat its purpose by revealing state secrets.”<sup>47</sup> It is this important conversation regarding the Judiciary's separation of powers role in national security cases to which I now turn.

### I. TELMANIAN LOGIC

Well-settled, and for many decades undisturbed, Supreme Court precedent in this area of the law requires the Ninth Circuit to decide *Jeppesen Dataplan* in favor of the Government.<sup>48</sup> When the government

---

43. See *infra* Part III.A.

44. GLENN SULMASY, *THE NATIONAL SECURITY COURT SYSTEM: A NATURAL EVOLUTION OF JUSTICE IN AN AGE OF TERROR* 185 (2009).

45. *Id.* Within days of the government's compliance with ordinary discovery rules, bin Laden and al Qaeda knew the names of over 200 co-conspirators and would-be targets of U.S. operations. *Id.*

46. See *infra* note 57 and accompanying text.

47. Telman, *supra* note 1, at 471 (citing *United States v. Reynolds*, 345 U.S. 1, 8 (1953)).

48. See *supra* note 20 and accompanying text. The Ninth Circuit simply follows this precedent, which “support[s] its decision to dismiss the claims in *Jeppesen Dataplan*.” Telman, *supra* note 1, at

properly invokes, and an agency head properly certifies, an assertion of the SSP, both of which occurred in this case,<sup>49</sup> a court should dismiss the case. As the majority states in its opinion, the court “reluctantly conclude[s] that] . . . the plaintiffs’ action must be dismissed.”<sup>50</sup> Obviously, the Ninth Circuit cannot “unilaterally overturn a longstanding Supreme Court precedent,”<sup>51</sup> as even Telman admits. Nevertheless, for the purposes (and remainder) of this response, I shall put aside the obvious *stare decisis* argument, and the plain correctness of the Ninth Circuit’s application of Supreme Court precedent, to focus exclusively on the arguments presented throughout Professor Telman’s article.

Unfortunately, these arguments suffer from certain critical flaws in logic. For example, Telman argues that “too many courts simply refuse to play the role Congress has delegated to them as a check on executive secrecy.”<sup>52</sup> This implies that courts do not want to get involved in the process. Yet, one of his article’s recurring themes is that lower courts have expanded the SSP through their decisions.<sup>53</sup> This is confusing, as the reader is left to wonder whether Telman truly believes that lower courts are going too far (by expanding the SSP through their involvement) or whether they are abdicating their responsibilities as a check on the Executive (by refusing to play their role). Most significantly, two potentially fatal flaws to Telman’s overall argument exist and are described next.

#### A. Decision Does Not Equal Deference

First and foremost, Telman argues that the Ninth Circuit is abdicating its responsibilities as a check on the Executive in *Jeppesen Dataplan* by allowing the Government to assert the SSP in this case. I cannot agree. A decision in favor of the Executive does not equate to deference to the Executive in the constitutional sense. The court makes so much effort to perform a searching inquiry into the underlying evidence to support the SSP assertion that both the majority and dissent go out of their way to mention this fact;<sup>54</sup> the dissent itself strongly disparages the lower court for not making the same exhaustive effort before the case rose to the United

---

437. Perhaps the Ninth Circuit is an anti-civil liberties appellate court? Not likely, particularly when compared to, for example, every other United States Court of Appeals.

49. In fact, two agency heads—the Director of the CIA and the Attorney General—essentially approved of this assertion of the privilege. See *supra* text accompanying note 36.

50. Mohamed v. Jeppesen Dataplan, Inc., 614 F.3d 1070, 1073 (9th Cir. 2010) (en banc).

51. Telman, *supra* note 1, at 440.

52. *Id.* at 447.

53. *Id. passim.*

54. See *Jeppesen Dataplan*, 614 F.3d 1070.

States Court of Appeals level.<sup>55</sup> So, it must be asked, how exactly does the court abdicate its responsibilities while at the same time performing this meticulous inquiry?

In *Reynolds*, the Supreme Court did not examine the evidence before upholding the Government's assertion of the SSP.<sup>56</sup> This failure to inquire into the underlying facts turned out to be problematic, as the information underlying the assertion of the privilege did not actually support the full claim made by the government in that particular case.<sup>57</sup> However, the precedent established in *Reynolds*, and described *supra* in the Introduction, remains good law.<sup>58</sup> Obviously, the failure of the Court to properly inquire into the underlying facts in *Reynolds* is easily distinguished from *Jeppesen Dataplan*, in which the court made a searching inquiry into the underlying facts before deciding in favor of the government.<sup>59</sup> As the *Jeppesen Dataplan* court states, "[w]e have thoroughly and critically reviewed the government's public and classified declarations and are convinced that at least some of the matters [at issue in the case] are valid state secrets, 'which, in the interest of national security, should not be divulged.'"<sup>60</sup>

The *Jeppesen Dataplan* court's explanation is as compelling as it is correct: after a searching inquiry of the evidence, the court determined that the litigation could not proceed because of the sensitive nature of the underlying facts. Perhaps Telman's argument would be stronger if the court did not engage in any inquiry of the underlying facts. However, given the Ninth Circuit's performance of a meaningful review prior to its arrival at the dismissal result, the *Reynolds* Court's mistake is not repeated.

By acting in this manner, the court is fulfilling its oversight role; in doing the same, courts will continue to exemplify the checks and balances envisioned by the framers of the Constitution. Here, the Executive asserts

---

55. *Id.* at 1095 ("[B]y failing to undertake an analysis of Jeppesen's ability to defend against [the plaintiffs'] claims, the district court forced every judge of the court of appeals to undertake that effort. This was no small undertaking.").

56. *See* Telman, *supra* note 1, at 470.

57. *Id.* I agree with Telman that *Reynolds* is a flawed and an unfortunate case with which to associate the otherwise-sound SSP. This is because, in that case, the government invoked the privilege in order to prevent the disclosure of an aircraft crash investigation on the grounds that it could not reveal "secret information relating to the electronic equipment aboard the aircraft." Telman, *supra* note 1, at 465. However, once the report was declassified, no evidence of secret information relating to electronic equipment existed. Indeed, it appeared as though maintenance negligence caused the crash, leading many to suspect that the government cited the supposed "secret information" to cover up for its possible (unrelated) negligence leading to the crash. *See id.* at 464-67.

58. *See, e.g., Jeppesen Dataplan*, 614 F.3d at 1079. Specifically, the Supreme Court precedent requires that the SSP "be upheld against any claim of need, even to the point of requiring dismissal of a suit." Robert M. Chesney, *State Secrets and the Limits of National Security Litigation*, 75 GEO. WASH. L. REV. 1249, 1286 (2007).

59. *See supra* Part I.A.

60. *Jeppesen Dataplan*, 614 F.3d at 1086 (citing *United States v. Reynolds*, 345 U.S. 1, 10 (1953)).

2012]

So Long, and Thanks for All the Secrets

677

the privilege, the “experts” (agency heads) validate the assertion, and the Judiciary oversees this assertion while ensuring that it is a valid use of executive power. This is not abdication of judicial oversight; rather, it is the very essence of it.

*B. The Same Result Under Two Different Doctrines Does Not Equal  
Conflation of the Two Doctrines*

According to Telman, the Ninth Circuit wrongly decided *Jeppesen Dataplan* by conflating the *Reynolds* SSP with the *Totten* Bar in an effort to achieve a particular result—namely, dismissal of the case prior to discovery. Telman argues that *Totten* is a limited contracts doctrine which “has no application where the government engages in tortious activity” of the type (presumably) found in extraordinary rendition cases such as *Jeppesen Dataplan*.<sup>61</sup> Thus, according to Telman, courts are improperly using *Totten* to dismiss cases prior to litigation in the national security arena, and even worse, he argues, courts have allowed *Totten* to “infect[] SSP jurisprudence and help[] transform an evidentiary privilege [i.e., SSP] into an immunity doctrine” for the government.<sup>62</sup> Put differently, Telman argues that courts, including the Ninth Circuit in *Jeppesen Dataplan*, have improperly conflated the two doctrines by allowing the SSP, vice *Totten*, to serve as a basis for dismissal of (even non-contracts) cases prior to discovery.<sup>63</sup>

Simply because the court *dismissed* the case to avoid revealing sensitive information (an SSP feature), *before discovery* (a *Totten* feature), this fact does NOT logically require one to conclude that the court has conflated the two doctrines. This is a fallacy. In other words, even if *Totten* and the SSP arrive at the same result—namely, dismissal—in a particular case, this does not mean that the two theories are *conflated*. They merely *result* in the same thing.<sup>64</sup>

The majority of judges on an en banc panel at the second highest level of court in the entire nation, very aware of the tenets of both principles, essentially declared that they were not conflating the two applications. I am not prepared to second-guess such a high court, which went out of its way

---

61. Telman, *supra* note 1, at 437. Telman argues that the “Ninth Circuit thus erred in a fundamental way in treating *Totten* as a sub-category of the SSP.” *Id.* at 441.

62. *Id.* at 437.

63. *Id.*

64. Returning to our baseball analogy, a player can hit an inside-the-park home run or hit the ball out of the park, and in either case, it still counts as a home run, i.e., simply because both events are scored as “home runs” does not mean that they have merged into the same thing. In reality, they are very different events which are universally described differently when recounted, despite the fact that they both result in the same thing (namely, a run for the player’s team).

to state on the record that it properly disaggregated the two doctrines.<sup>65</sup> Moreover, to the extent that the court's decision simply moves the timeline for dismissal of these types of cases to prior to the discovery stage, it remains appropriate, as clearly coverage at the discovery phase is an implied part of exactly the scenario the SSP was designed to protect. Again, the entire purpose of the doctrine is to put an end to litigation that might expose national security information, a point I will amplify throughout the remainder of this response.

## II. OVERREACTION

With the above key points properly framing our analysis, the majority of my remaining criticisms of Telman's work fit neatly within an "overreaction" rubric. Without going so far as to say his entire piece is an overreaction to the court's opinion, I point to certain, specific areas where Telman exhibits an unmerited "sky is falling" mentality. For one, any suggestion that the SSP is invoked without significant effort on behalf of the government is an overstatement.<sup>66</sup> The recent Department of Justice policy ensures that invocation will remain a challenge for the foreseeable future, as it places very strict procedures on government agencies seeking to assert the privilege. Furthermore, the existing *Reynolds* requirement for agency head approval, described here, perseveres and provides another monumental hurdle for the vast majority of government practitioners to navigate in the event they believe assertion of the privilege is warranted. Finally, considering both the fact that *Jeppesen Dataplan* involves non-citizens in civil court and Telman's separate assertion that the government overclassifies, there exists significant overreactions in his work, as discussed below.

### A. *The Challenge of Invoking the SSP*

Telman asserts that, if "claims of secrecy [were] subject to scrupulous review, the government would be far more selective in asserting the SSP."<sup>67</sup> In theory, this sounds reasonable. In reality, however, the government is extremely selective in asserting the SSP (and the court, at least in *Jeppesen Dataplan*, absolutely did conduct a scrupulous review, but we shall not dwell on that point again). Beyond knowing the history of

---

65. *Jeppesen Dataplan*, 614 F.3d at 1083.

66. University of Texas School of Law Professor Bobby Chesney is perhaps the leading authority on cases involving SSP assertion in the country, having conducted a painstakingly thorough study of published opinions adjudicating assertions of the SSP after *Reynolds*. Chesney, *supra* note 58, *passim*; see *infra* Part II.A.

67. Telman, *supra* note 1, at 473.

the SSP and the similarities between administrations in terms of the number of times it is invoked, as University of Texas School of Law Professor Bobby Chesney painstakingly details in a comprehensive study of opinions adjudicating assertions of the SSP,<sup>68</sup> it is important to note the current, substantial requirements for assertion of the privilege within the government.

To understand the current state secrets doctrine landscape, it is above all necessary to note the September 2009 Department of Justice (DoJ) policy, signed by Attorney General Holder himself, which outlines the most recent policies and procedures on how the U.S. Government will assert the SSP in court.<sup>69</sup> Specifically, the privilege is only to be invoked in litigation “when a government department or agency seeking to assert the privilege makes a sufficient showing that assertion of the privilege is necessary to protect information the unauthorized disclosure of which reasonably could be expected to cause significant harm to the [national security] of the United States.”<sup>70</sup> Importantly, this policy mandates that the privilege not be invoked for the sole purpose of protecting an agency or individual from embarrassment.<sup>71</sup> The policy thus erases any lingering doubt over whether the privilege may be lawfully used to prevent the disclosure of information potentially embarrassing to the government. Aside from all of the typical reasons to assert the SSP, simply invoking the SSP to cover up unlawful acts is clearly wrong.

In addition, the Attorney General’s memorandum underscores the infrequency with which the SSP is to be asserted, as onerous requirements are placed on various levels both within the agency requesting assertion of the privilege and DoJ divisions actually asserting the privilege in the course of litigation.<sup>72</sup> For example, a “State Secrets Review Committee,” comprised of senior DoJ officials, will review any government agency’s proposed assertion of the privilege for the purpose of making a recommendation to the Attorney General as to whether to support the assertion.<sup>73</sup> Most importantly, the DoJ “will provide periodic reports to appropriate oversight committees of Congress with respect to *all* cases in

---

68. See *supra* note 66.

69. Memorandum from Eric Holder, Attorney Gen., to the Heads of Exec. Dep’ts & Agencies (Sept. 23, 2009), available at <http://www.justice.gov/opa/documents/state-secret-privileges.pdf>.

70. *Id.*

71. *Id.* This absence of any protection of individuals seeking to avoid embarrassment is critical since the underlying facts in the *Reynolds* case in which the Supreme Court first cited the SSP ultimately revealed that the government, in part, invoked the privilege to prevent itself from embarrassment. See *supra* note 57 and accompanying text.

72. Memorandum from the Attorney Gen., *supra* note 69.

73. *Id.*

which the Department invokes the privilege on behalf of departments or agencies in litigation, explaining the basis for invoking the privilege.”<sup>74</sup>

Another procedural component in this area results directly from the strict requirement for personal agency head recommendation. Specifically, “*Reynolds* requires that every assertion of the SSP be supported by a declaration based on personal knowledge from the head of the department tasked with safeguarding the secret information at issue.”<sup>75</sup> This is not an easy hurdle to clear. In *Jeppesen Dataplan*, the *Reynolds* requirement for agency head certification is met by the Hayden (CIA Director) declaration, while the DoJ policy intent is met by the Attorney General’s personal review of the assertion.<sup>76</sup>

It is hard to overstate the challenge of securing the personal approval of two agency heads, particularly when these individuals represent two vast and very different departments and are appointed by two different presidents, as occurred with the assertion of the privilege by the Government in *Jeppesen Dataplan*. When the *Reynolds* requirement for an agency head to personally certify the need to invoke SSP is combined with the DoJ memorandum’s use of a State Secrets Committee and reporting to Congress, it becomes clear that significant protections are built into the process prior to any invocation of the SSP. For this reason, perhaps Telman’s article would have been most useful prior to the 2009 release of the DoJ policy; since the publication of the memorandum, however, the need for Telman’s suggested overhaul of the state secrets doctrine as a whole seems highly debatable.

### *B. These Are Non-Citizens in Civil Court*

In addition to downplaying the significant challenge of invoking the SSP, Telman overreacts to the *Jeppesen Dataplan* result by demanding an unreasonable tipping of the scales in favor of civil liberties on behalf of non-citizens (as opposed to U.S. citizens) suing in civil court (as opposed to criminal court). For example, he argues for automatic judgment for the plaintiff if the government invokes the privilege, as a way of socializing the costs to the government of asserting the privilege.<sup>77</sup> This is ridiculous.<sup>78</sup> As it stands now, an adequate protection mechanism exists to guarantee citizens their rights; the Executive followed the dictates of the mechanism

---

74. *Id.* (emphasis added).

75. Telman, *supra* note 1, at 460 n.171 (citing *United States v. Reynolds*, 345 U.S. 1, 7–8 (1953)).

76. *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1076–77 (9th Cir. 2010) (en banc).

77. Telman, *supra* note 1, at 439.

78. Obviously, at the very minimum, automatic judgment for plaintiffs will incentivize frivolous lawsuits.

2012]

So Long, and Thanks for All the Secrets

681

correctly, even though the case involved *non*-citizens, and the court reviewed it and agreed the dictates were correctly followed.

My position would be different if the same case involved United States citizens, because foreign nationals, such as the plaintiffs in *Jeppesen Dataplan*, do not have the same protections under our Constitution. Our legal struggles as a nation often center on whether the mechanisms in place in a particular area of the law provide an adequate level of protection for United States citizens to the point that the state cannot unlawfully or arbitrarily infringe upon their liberties and rights. Since we are not dealing with citizens in the *Jeppesen Dataplan* case, we simply do not need to worry as much about this as we would if we were dealing with U.S. citizens. Indeed, the *Jeppesen Dataplan* plaintiffs are “all foreign nationals, [who] claim they were each processed through the extraordinary rendition program [used by the (CIA)]<sup>79</sup>. . . to gather intelligence by apprehending foreign nationals suspected of involvement in terrorist activities.”<sup>80</sup> Regardless of how one views foreign actors’ claims to protection under the Constitution, they certainly do not have a right to automatic judgment in a United States appeals court. For these reasons alone (and again, the fact that this is a civil case), there will invariably be significantly less deference to the plaintiffs than if they were the defendants in a criminal case where the difficult balancing between civil liberties and national security occurs. The significant real-world danger of revealing national security information must, in this situation, outweigh the non-liberty interests of private parties. While we may be able to live with the revelation of sensitive information for criminal trials which occur in an unclassified setting,<sup>81</sup> we need not live with this for civil cases.

### *C. Overstatement of the Classification Argument*

As stated in the Introduction, even unclassified information may warrant protection under the SSP because of the challenge of distinguishing between “classified and unclassified information that might arise in the course of litigation.”<sup>82</sup> Taking for the moment, however, just the classified information, I agree with Professor Telman that, as a very broad

---

79. *Jeppesen Dataplan*, 614 F.3d at 1074.

80. *Id.* at 1073.

81. Though we do have CIPA, the Classified Information Procedures Act, in place for criminal trials, a discussion of this significant topic is outside the scope of this response. For a discussion on the possible forms a national security court system might take, including an argument for a separate judicial system, overseen by civilian judges, that focuses exclusively on war-on-terror cases, see SULMASY, *supra* note 44, at 201.

82. Telman, *supra* note 1, at 475.

generalization, the government “tend[s] to overclassify.”<sup>83</sup> Though some would challenge these assertions and certainly might argue that overclassification is better than the alternative,<sup>84</sup> for our purposes, I will simply inject some important reference points into the discussion.

First, it is important to note that the vast majority of military and civilian government employees cannot classify at their level. Original Classification Authorities (OCAs) are, by regulation, the only individuals allowed to classify a document.<sup>85</sup> These individuals are typically high-level general officers or their civilian counterparts. Suffice it to say that it is extremely rare for a practitioner, at any level other than the highest of our government, to be able to classify a document.<sup>86</sup> Second, even if an individual does have classification authority, he does not *know* he is overclassifying a document at the moment he attaches a classification to an item. In fifteen years of dealing with both intelligence and legal products, in all types of security environments (from low to extremely high security), I have never once known of or seen even one person intentionally attach (or request) classification of an item when he did not, at the time, honestly believe the item needed to be classified.

In his discussion of this issue, Telman argues that there is no disincentive for individuals with access to government information to overclassify.<sup>87</sup> On this point, I disagree. This is because the vast majority of military members would agree that it is administratively burdensome to have too many classified documents; moreover, it is likely that the same individuals would be in favor of an overall reduction in the number of classified documents that currently exist, along the lines of that suggested by the recent (and excellent) Brennan Center for Justice report, *Reducing Overclassification Through Accountability*.<sup>88</sup> Significant burdens are placed upon busy individuals with limited resources (to include safes and

---

83. *Id.* at 442. Nevertheless, it is hard to know that certain information is *overclassified* at the time of classification.

84. Though within the government, this very much depends on whom you ask. Some would say we do not classify enough. Of course, no one wants to be the one who underclassifies something of critical intelligence value. The future of this arena is really uncertain in light of the Wikileaks/Bradley Manning revelations, which are much more about access and accountability than classification of materials, but which will undoubtedly cause some major corrections in how the Department of Defense chooses to grant access to individuals.

85. ELIZABETH GOITEIN & DAVID M. SHAPIRO, BRENNAN CTR. FOR JUSTICE, REDUCING OVERCLASSIFICATION THROUGH ACCOUNTABILITY 12 (2011), available at [http://brennan.3cdn.net/3cb5dc88d210b8558b\\_38m6b0ag0.pdf](http://brennan.3cdn.net/3cb5dc88d210b8558b_38m6b0ag0.pdf).

86. It is also important to note that, with compartmentalization of information, individuals will not have access to all aspects of a particular program. For example, I do not have access to many items, even with a “TS-SCI” (TOP SECRET – Sensitive Compartmentalized Information) clearance level, which is the highest possible level of clearance without having the need to know about special access programs.

87. Telman, *supra* note 1, at 445–46.

88. GOITEIN & SHAPIRO, *supra* note 85.

other storage devices) in a deployed environment once a document is marked CONFIDENTIAL, SECRET, or TOP SECRET, which are the three levels of classification.<sup>89</sup> For this reason alone, it is safe to say that those in the field—the vast majority of whom do not themselves have classification authority—distinctly do not have an incentive to overclassify.

### III. NATIONAL SECURITY VS. CIVIL LIBERTIES

The *Jeppesen Dataplan* case is clearly “one that implicates the tension between the executive branch’s responsibility for national defense and foreign affairs and the judiciary’s responsibility for vindicating individual rights.”<sup>90</sup> For readers perhaps not as familiar with the intelligence community and its importance in preserving national security, this section tackles the real-world implications of Telman’s recommendations.

When weighing civil liberties versus national security, “there are limits as to how much of the former the public is willing to trade in pursuit of the latter.”<sup>91</sup> These two guiding principles are not mutually exclusive and do not require individuals to be in one camp or another. Adherence to both principles serves the intelligence community and the nation best. However, in the rare cases when vital information may be exposed through the mere course of litigation, national security outweighs civil liberties. Particularly, in my view, national security and the government’s responsibility to protect its citizens outweigh the need to preserve the “rights” of non-U.S. citizens in civil court (as described in Part II.B *supra*). Thus, we do not necessarily need to conduct this balancing test in *Jeppesen Dataplan*, given the significant fact that this is a civil case brought by non-citizens, as described above.

Nevertheless, to engage in a complete discussion of the merits on both sides of the argument, we again must turn to the Ninth Circuit, which states in *Jeppesen Dataplan* that where there exists an “irreconcilable conflict” between national security and civil liberties, a court is “bound to follow the Supreme Court’s admonition that ‘even the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that [state] secrets are at stake.’”<sup>92</sup> As the court itself stated, even prior to

---

89. *Id.* at 14.

90. Chesney, *supra* note 58, at 1259–60.

91. Fred H. Cate, *Government Data Mining: The Need for a Legal Framework*, 43 HARV. C.R.-C.L. L. REV. 435, 484 (2008) (discussing privacy, in particular, as the civil liberty to which national security is “inherently linked” when the issue involves United States citizens).

92. *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1073 (9th Cir. 2010) (en banc) (citing *United States v. Reynolds*, 345 U.S. 1, 11 (1953)). Again, in the case, the court was satisfied that state secrets were at stake, and that the government properly followed the requirements for invoking the privilege. Therefore, it decided the case in favor of the government. *See supra* Part I.A.

9/11 in *Kasza v. Browner*,<sup>93</sup> “the results are harsh in either direction[,] and the state secrets doctrine finds the greater public good—ultimately the less harsh remedy—to be dismissal.”<sup>94</sup> Above all, supplanting the government’s ability to invoke the SSP in non-criminal litigation would severely cripple intelligence-gathering activities, as this response now discusses.

#### A. *The Impossibility of Un-Ringing the Bell*

Obviously, if discovery reveals state secrets, a result which the entire rule is designed to prevent, then discovery cannot proceed (i.e., if it does, and sensitive information is released, we cannot unring the bell). Indeed, “it would be absurd to accept an interpretation” of SSP that results in the government “possessing the legal authority” to assert the SSP during litigation “but lacking the legal authority” to assert the SSP during discovery in anticipation of the very same litigation.<sup>95</sup> Significant and critical intelligence vulnerabilities can result when “other critical, sensitive means of gathering intelligence,” including “specifics on the means and methods of intelligence collection, . . . [the list of] nations involved in supporting U.S. efforts at combating terrorism, [and the actual names] of informants,” are revealed in court.<sup>96</sup>

One needs to look no further than the first World Trade Center bombing case in the 1990s for a perfect example of the damage done to national security through the course of normal litigation. In that instance, trial discovery and the concomitant public airing of important intelligence information put al Qaeda on notice of United States intelligence on its network and, specifically, led Osama bin Laden to go into hiding.<sup>97</sup> Through normal discovery rules requiring the government to put defendants on notice regarding unindicted co-conspirators, “al Qaeda acquired valuable intelligence from the [conspiracy trial of ten al Qaeda terrorists in 1995].”<sup>98</sup> As former Attorney General Michael Mukasey stated

---

93. 133 F.3d 1159 (9th Cir. 1998).

94. *Id.* at 1167 (quoting *Bareford v. Gen. Dynamics Corp.*, 973 F.2d 1138, 1144 (5th Cir. 1992)).

95. Ryan Goodman, Editorial Comment, *The Detention of Civilians in Armed Conflict*, 103 AM. J. INT’L L. 48, 55 (2009) (discussing law of war detention, though in a logical construct particularly useful for our purposes here).

96. SULMASY, *supra* note 44, at 185–86. Leaks to the press in the course of trials will obviously exacerbate this problem, as when “al Qaeda’s senior leadership had stopped using a particular means of communication almost immediately after a leak to the *Washington Times*.” THE 9/11 COMMISSION REPORT, *supra* note 42, at 127.

97. James Taranto, *Two Decades of Pursuing al Qaeda*, WALL ST. J., Sept. 10, 2011, at A13 (interview with former Attorney General Michael Mukasey).

98. *Id.* As former Attorney General Michael Mukasey recently told the *Wall Street Journal*, intelligence from the public “trial over which he presided . . . found its way to Khartoum within 10 days [of the required service of a list of all unindicted co-conspirators about which the government knows]. . . . The Sudanese capital was then home to one of those unindicted co-conspirators, Osama bin

in a recent *Wall Street Journal* article, “bin Laden knew not only that [the United States] knew about him but also who else they knew about.”<sup>99</sup> In this way, al Qaeda gathered extremely valuable information from the 1995 trials; having access to this intelligence clearly did not hurt the terror group’s ability to inflict the devastating attacks of September 11, 2001. Again, this is something we may be willing to accept in our system—as the 1995 trials were public—but at the same time can clearly be a vulnerability to our national defense. If, however, the government is not allowed to protect national security-related information through the SSP in its current form, the situation will be exacerbated. In particular, bad actors and weak states can make up for deficiencies in their intelligence-gathering abilities by gaining “secrets” from the government’s inability to invoke the SSP.

In the current armed conflict, the adversary represents a significant threat to the United States and its citizens. Indications and warnings of hostile activity are huge aspects of intelligence. The 9/11 attacks were a U.S. intelligence failure in this regard. Put simply: when you advertise the subject matter at which you are looking, you will tip off to potential adversaries the importance of possessing this same knowledge.<sup>100</sup> Revealing information in open court can, therefore, risk the lives of those fighting in ongoing hostilities. Without getting into any classified areas of discussion, Foreign Intelligence Services (FIS) are continually monitoring our sources, methods, location, personnel, technology, scientific data, and economic information at all times.

As the landmark 1976 Senate Committee Report on Intelligence Activities and Rights of Americans, known as the Church Report, noted, “[a] tension between order and liberty is inevitable in any society. A Government must protect its citizens from those bent on engaging in violence and criminal behavior . . . and other hostile foreign intelligence activity.”<sup>101</sup> Perhaps we will be fortunate, and no information will be revealed during civil litigation. But there is no reason to take this chance, particularly during times of armed conflict when our nation’s security—and the safety of the individuals in this great nation—depends on it. As foremost academicians acknowledge, “the conflict with Al Qaeda and its affiliates may last decades.”<sup>102</sup> Several aspects of intelligence and, by

---

Laden.” *Id.* Perhaps al Qaeda could have been neutralized prior to 9/11 had the list of co-conspirators not been released. I do not mean to suggest that the government could necessarily have avoided the requirement to release the names. That particular trial was criminal in nature, whereas this case is civil. Again, this is a significant difference.

99. *Id.*

100. This can only be accomplished through diligence, awareness, and a clear understanding by every individual with knowledge of sensitive information of the ramifications of security compromises.

101. S. REP. NO 94-755, Book II, at 2 (1976), available at [http://www.intelligence.senate.gov/pdfs94th/94755\\_IL.pdf](http://www.intelligence.senate.gov/pdfs94th/94755_IL.pdf) (commonly known as the “Church Report”).

102. Goodman, *supra* note 95, at 65 n.88.

extension, warfighting, will be affected if the government is unable to put an end to litigation through the SSP. These effects include not only the actual information revealed in the litigation, which may help enemy efforts, but also several other less readily apparent effects, which may result without continued use of the SSP in its current form. It is these second- and third-order effects to which this paper now turns.

Any release of information of the sort involved in *Jeppesen Dataplan* will have a chilling effect on informants or the entities with whom they are cooperating. Neither they, nor other individuals or the countries for whom they work will want to work with us. Courts have themselves recognized that “[e]ven a small chance [of risked outing] . . . could . . . cause sources to ‘close up like a clam.’”<sup>103</sup> Relatedly, we need to protect those who do business with our intelligence agencies—particularly those who follow the laws and regulations overseeing their activities—or they will never have any incentive to do business with us. Additionally, coordination with host nation forces is increasingly required for our intelligence collection efforts. These efforts will be undermined if sources and techniques are revealed. Thankfully, to this point, the majority of these collaborative efforts with other nations and their intelligence agencies have generally worked, as evidenced by the astounding accomplishment of ultimately locating and killing Osama bin Laden in 2011.

### *B. Intelligence Under the Law*

*We know that our actions, and those of the agencies we support, will be held up in a quiet, dignified, well-lit room, where they can be viewed with the perfect, and brutally unfair, vision of hindsight. We know they will be reviewed in hearing rooms or courtrooms where it is impossible to capture even a piece of the urgency and exigency felt during a crisis. . . . [Nevertheless], in the long-run, intelligence under law is the only sustainable intelligence in this country.*<sup>104</sup>

Open Source Intelligence (OSINT) comprises the vast majority of all intelligence gained by intelligence services throughout the world. For example, unclassified news articles and other pieces that are available online, in the print media, or in the broadcast media, make up a significant percentage of the overall intelligence available to an individual or group. In this way, public trials can obviously result in additional OSINT for

---

103. *CIA v. Sims*, 471 U.S. 159, 175 (1985).

104. James B. Comey, *Intelligence Under the Law*, 10 GREEN BAG 2D 439, 443–44 (2007) (discussing the importance of intelligence community lawyers providing ethical and legal advice at all times to the agencies they support).

adversaries to discover. However, counterintuitively, it is perhaps more important for national security purposes to protect the small percentage of non-OSINT information. Like a puzzle, the missing pieces are ultimately more important than the pieces that are already together. Moreover, the inexact nature of the intelligence business does not allow for a clear, neat causal link between certain information being revealed in litigation and a particular result occurring on the battlefield. Therefore, it is never clear which piece of the puzzle is the last remaining for an adversary to put together the complete picture. In a similar way, the mosaic theory, which holds that “otherwise trivial or innocuous information . . . proves dangerous if combined with other information by a knowledgeable actor (especially a hostile intelligence agency),”<sup>105</sup> is often used to describe the need to safeguard information, whether the information is classified or not.<sup>106</sup>

As William Nolte, a Deputy Assistant Director for the CIA, suggests in an article about reform in the intelligence community, intelligence is increasingly “about information, and less about secrets.”<sup>107</sup> Nolte suggests that upwards of 85–90% of intelligence is derived from open source information. It is indeed safe to say that there already exists terabytes worth of data available to terrorists who pay attention to open source (or, generally, unclassified) information. It is the remaining small, but vital, segment of intelligence that may, one day, be the subject of litigation that the SSP is designed to protect.

As an additional note, intelligence law is a robust field, particularly as it affects United States citizens. The aforementioned Church Report, along with Executive Order 12333 and other intelligence law references, significantly constrains intelligence collection against United States citizens by members of the U.S. Intelligence Community. As such, those powerful references evince a strong deference to civil liberties, particularly because they are geared toward punishing those who violate the sanctity of U.S. person information. On the contrary, protections of non-U.S. person information (and, by extrapolation, rights) have never been a concern of Congress, which one presumes would not have carved out such extensive protections for U.S. citizens had it sought to apply the same protections to non-U.S. citizens.

Importantly, it must be noted that this intelligence business is not easy. As the opening quote of this section suggests, such work must be performed in accordance with the law. Similarly, as long as the SSP is not being used to defend criminal or willful conduct on behalf of the

---

105. Telman, *supra* note 1, at 477 (quoting Christina E. Wells, CIA v. Sims: *Mosaic Theory and Government Attitude*, 58 ADMIN. L. REV. 845, 846 (2006)) (emphasis removed).

106. Recall that even unclassified information can provide a basis for invoking SSP.

107. William Nolte, Commentary, *Thinking About Rethinking: Examples of Reform in Other Professions*, 52 STUD. IN INTELLIGENCE, no. 2, 2008, at 19, 23.

government or to protect someone from embarrassment, neither of which is the case in *Jeppesen Dataplan*, the privilege is being asserted lawfully. Above all, it must be remembered that

“[i]n the context of law enforcement, national security, and foreign policy the effect of disclosure” of sensitive information might prevent the government from acquiring critical intelligence, “endanger[ing] what has been said to be the basic function of any government, the protection of the security of the individual and his property.”<sup>108</sup>

### CONCLUSION

Although his work is thought-provoking and impassioned, Telman diverges from real-world practicality in certain key areas. While I agree with Telman that “[t]he courts have constitutional authority and a legislative mandate to inquire into executive claims of privilege and so they must do it,”<sup>109</sup> the *Jeppesen Dataplan* court is doing exactly the right thing with its searching review of the underlying evidence—only it cannot tell the world how the assertion is supported because doing so would reveal too much sensitive information. This inquiry is critical to the court’s decision. Therefore, the due diligence of this particular court should not be downplayed. More importantly, such an inquiry satisfies the judicial oversight aspect for which Telman argues<sup>110</sup> and properly strikes the balance between national security and civil liberties.

Again, when the government has followed the existing procedures, courts should continue to follow well-established Supreme Court precedent by dismissing the case. The *Jeppesen Dataplan* court did this and, furthermore, explained carefully the fact that it was not conflating the two doctrines. If the court erred, it was only with its (undeniably weak)

---

108. Chesney, *supra* note 58, at 1265 (quoting Edward Levi, Attorney General, Address to the Bar of the City of New York 18–21 (Apr. 28, 1975)).

109. Telman, *supra* note 1, at 448.

110. Even assuming, *arguendo*, that judicial oversight were lacking, as Chesney argues, the absence of judicial oversight has never been tantamount to an unchecked executive. Legislative oversight, advocacy campaigns, media reports, diplomatic pressures, electoral pressures, internal investigations by statutorily-independent inspectors general, internal legal review from general counsel office lawyers, and a host of other elements of internal executive branch cross-checking all play a significant role.

Robert Chesney, *Redoing the Human Rights First Scorecard III (State Secrets)*, LAWFARE (Jan. 11, 2011, 11:45 AM), <http://www.lawfareblog.com/2011/01/redoing-the-human-rights-first-scorecard-iii-state-secrets/>. *But see* Ackerman, *supra* note 8, at 26, 36 (arguing that “a significant proportion of the rising legal elite learning its law from presidentialist professors” and that “pro-executive precedents [will continue to be] written by [these presidentialist professors] . . . to justify more-and-more extraordinary acts of executive unilateralism”).

2012]

So Long, and Thanks for All the Secrets

689

recommendations on how the plaintiffs may seek alternative remedies, such as petitioning Congress for a private bill.<sup>111</sup> Nevertheless, to address the court's simple failure on these minor issues, a Telmanian nine-step overhaul of the rule is not necessary; nor is it necessary to fix a state secrets doctrine that operates as it was designed to. A radical change to the entire system is unreasonable and would exemplify the exact type of drastic correction based on one case so often disfavored by the law.

The logical shortcomings of certain key arguments, along with overreactions in important areas,<sup>112</sup> undermine Telman's arguments considerably. Moreover, a path of non-citizen, civil court litigation rights placed above vital national security in ways suggested by Telman may indeed become a significant liability for a nation at war. Again, national security outweighs the need to preserve the "rights" of *non-U.S.* citizens in civil court.

Ultimately, some of Telman's claims are not persuasive as he either goes too far, slightly misunderstands actual practice by the Executive Branch, or exhibits some flaw in logic that may not be immediately apparent but that is understood upon careful examination. Interestingly, Telman's "call[] for drastic revisions in the SSP [is not even] advocated for or sought by the [non-citizen] litigants in *Jeppesen Dataplan* and other recent SSP cases."<sup>113</sup> Thus, his approach is not necessary. Even without considering the obvious need for the court to follow Supreme Court precedent in this area,<sup>114</sup> the state secrets doctrine will continue to be a most important tool for the government and must continue to be used to put an end to litigation that might expose sensitive information.

---

111. *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1091–92 (9th Cir. 2010) (en banc).

112. *See supra* Part I.

113. Telman, *supra* note 1, at 439.

114. *See supra* Part I.