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THE "MOSAIC THEORY" IN INDIVIDUAL RIGHTS LITIGATION: ON THE GENEALOGY AND EXPANSION OF A CONCEPT

Robert M. Pallitto[***]

ABSTRACT

This article explores the use of the concept of "mosaics" in individual rights litigation, a topic that has received virtually no scholarly attention. Originally a construct used in analysis of intelligence data, the mosaic theory has been transposed to the litigation context and applied in a range of recent case law. Here, the article examines the theory's use in two settings that have important implications for individual liberties: to support the state secrets privilege as a form of information control, and to defeat habeas petitions filed by "war on terror" detainees. In these areas, the mosaic concept is used in two distinct ways: restrictively, to inhibit information development by the public, and expansively, to enhance information development by the government. These uses of the "mosaic theory" threaten civil liberties and thwart processes of ensuring executive accountability. Within the discussed contexts, courts can and should limit the use of the mosaic theory. Mosaics will likely remain part of the narrative structure of legal claims and defenses, but the absorption of "mosaic" into the grammar of executive power should be resisted.

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INTRODUCTION

When used as a metaphorical or descriptive device,[1] the term "mosaic" connotes an intricate, patterned appearance in an artwork or another object.[2] Yet, words migrate continually from everyday discourse to the legal lexicon, as judges and litigants grasp for ways to articulate new problems or phenomena.[3] Thus, in the legal context, "mosaic" is sometimes used to describe a complex body of circumstantial evidence.[4] This descriptive usage evokes an interdependent set of facts, a sum of disparate parts that must be viewed as a whole in order to make sense. Characterized this way, a plaintiff's case presentation might benefit from certain evidentiary rulings that construe relevancy in a liberal manner. Evidence that seems, on cursory examination, to lack a nexus with the facts in dispute might be ruled admissible when a court considers its "fit" within a larger mosaic.[5] Meant in this sense, a "mosaic" enables understanding of a legal narrative that might otherwise remain elusive. However, there is a danger here. There is always the risk of slippage in this discursive transposition from the everyday to legal discourse.

Such slippage is evident in another legal usage of "mosaic" that has developed over the past three decades in disputes between individuals and the federal government.[6] The image of a mosaic is deployed by government attorneys to rebuff challenges to executive power.[7] Mosaics are used to defend two varieties of state power: the power to keep information secret[8] and the power to detain individuals.[9] In both cases, the mosaic concept implicates national security: disclosure of information would endanger national security,[10] or the release of a detainee would do so.[11] Information control

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1 *See, e.g.*, Michael P. Goodwin, *A National Security Puzzle: Mosaic Theory and the First Amendment Right of Access in the Federal Courts*, 32 HASTINGS COMM. & ENT. L.J. 179, 185 (2010) (using a mosaic metaphor to describe the government's ability to piece together puzzle pieces).

2 WEBSTER'S NEW INTERNATIONAL DICTIONARY 1778 (3rd ed. 1993).

3 *See, e.g.*, Arnett v. Dal Cielo, 923 P.2d 1, 14 (Cal. 1996) (discussing the general and legal meaning of "discovery").

4 *See* Troupe v. May Dep't Stores Co., 20 F.3d 734, 737 (7th Cir. 1994).

5 *See* McGhee v. Casey, 718 F.2d 1137, 1149 (D.C. Cir. 1983).

6 *See* Goodwin, *supra* note 1, at 180–81.

7 *See generally* Ahmed v. Obama, 613 F. Supp. 2d 51, 55–56 (D.D.C. 2009).

8 *See* Kendall W. Harrison, *The Evolving Judicial Response to the War on Terrorism*, 75 WIS. LAWYER. 14, 17 (Dec. 2002).

9 *See* Al-Adahi v. Obama, 692 F. Supp. 2d 85, 91–92 (D.D.C. 2010).

10 David E. Pozen, *The Mosaic Theory, National Security, and the Freedom of Information Act*, 115 YALE L.J. 628, 630 (2005).

and detention involve different uses of the mosaic concept. In the case of information control, mosaics are used *restrictively*: plaintiffs cannot obtain the information they seek because it might be part of a larger whole that ought not be revealed.[12] The goal is to restrict someone – the plaintiff, the public, potential enemies – from developing a body of information.[13] In detention (*i.e.*, habeas corpus) cases, by contrast, the mosaic concept is used *expansively*.[14] The government seeks to show that certain seemingly mundane bits of information might take on a more sinister cast if imbricated within a larger mosaic.[15] Here, the government itself is the builder of the mosaic;[16] they *want* to connect the dots, rather than preventing someone else from doing it. These two deployments have one very important thing in common: they both function as a shield against challenges to state power that is being exercised in fundamentally devastating ways.[17] An unsuccessful habeas petition results in continued detention at Guantanamo Bay or in a federal prison.[18] A ruling denying access to information about government activities can mean the courthouse doors are shut to the plaintiff.[19] In one particular case, such a ruling meant that the plaintiff could not have lifesaving medical information;[20] in another, it meant that the plaintiffs were denied knowledge about how their loved ones died;[21] in a third, a torture victim was left without recourse after being mistakenly seized as a terror suspect, rendered to a secret location, and tortured for months.[22] Given these high stakes, it is worth asking whether the mosaic concept may have expanded past manageable or appropriate boundaries.

As a theoretical matter, the problem resulting from the development of

11 *Ahmed*, 613 F. Supp. 2d at 55–56.

12 *See* C.I.A. v. Simms, 471 U.S. 159, 179 (1985).

13 *See* Harrison, *supra* note 8, at 18 (discussing the government's withholding of defendant names and locations from the public and courts).

14 *See* Christina E. Wells, *CIA v. Sims: Mosaic Theory and Government Attitude*, 58 ADMIN. L. REV. 845, 864 (2006).

15 *Cf.* Donald F. Rumsfeld, Sec. of Defense, Cable to RUHH subscribers (Jan. 14, 2003), available at http://www.fas.org/sgp/news/2003/01/dodweb.html (describing al-Qaeda use of government web sites to gather information).

16 *See* Walter E. Kuhn, *The Terrorist Detention Review Reform Act: Detention Policy and Political Reality*, 35 SETON HALL LEGIS. J. 221, 243 (2011).

17 Goodwin, *supra* note 1, at 206–07.

18 *See* Al-Adahi v. Obama, 692 F. Supp. 2d 85, 86 (D.D.C. 2010) (denying the defendant's habeas appeal and continuing imprisonment).

19 *See, e.g.*, Weston v. Lockheed Missiles & Space Co., 881 F.2d 814, 816 (9th Cir. 1989).

20 Kasza v. Browner, 133 F.3d 1159, 1166 (9th Cir. 1998).

21 U.S. v. Reynolds, 345 U.S. 1, 11 (1953).

22 *See* El-Marsi v. U.S., 479 F.3d 296, 296 (4th Cir. 2007).

the mosaic concept in secrecy and detention cases is one of *limits*.[23] How tightly should the mosaic be constructed, or, in a topographical sense, over what terrain should it extend? Is there any connection that is too remote to be meaningful? Is there any potential relationship between two facts that is too attenuated? Once the federal courts accept the mosaic theory as a valid legal doctrine (as they have),[24] they must manage it by setting out the parameters of what constitutes a mosaic. Somewhere between the proposition that all data points are related (even on some extremely general level) and the claim that only very closely associated phenomena can be grouped together, courts must locate their conception of a mosaic.

In addition to these theoretical concerns, there is also a practical problem: how to limit executive overreach in the face of clear incentives for abuse. With national security purportedly at issue, courts may see a compelling reason to defer to the executive.[25] As courts accept mosaic claims,[26] there is more and more reason to assert them. Success in asserting mosaic claims makes them more attractive; moreover, there is nothing to lose by raising them.[27] To some extent, the mosaic theory tracks the state secrets privilege, an evidentiary rule created to protect the executive against disclosure, in litigation, of information related to national security.[28] Mosaic theory is actually a subset of state secrets claims; not every state secrets assertion relies on the mosaic theory.[29] However, in recent years, the mosaic theory has been used to buttress state secrets claims when the sensitive nature of a particular piece of information is not immediately evident.[30] The argument goes something like this: "It may not be a secret standing alone, but it is part of a larger mosaic that ought not be revealed."[31]

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[23] *See* Adam Liptak et al., *After Sept. 11, A Legal Battle on the Limits of Civil Liberty*, N.Y. TIMES, Aug. 4, 2002, at A1.

[24] *See* Halkin v. Helms, 598 F.2d 1, 8 (D.C. Cir. 1978) (showing how to use the mosaic concept in state secrets cases).

[25] Justice Thomas has stated repeatedly that the courts in general, and the Supreme Court in particular, lack the institutional competence to evaluate the executive's conduct in foreign affairs, and the waging of war in particular. *See, e.g.*, Hamdi v. Rumsfeld, 542 U.S. 507, 579–80 (2004) (Thomas, J. dissenting); Boumediene v. Bush, 553 U.S. 723, 841 (Scalia, J. dissenting).

[26] *See* Pozen, *supra* note 10, at 651–52.

[27] *See* id. at 633.

[28] *See* U.S. v. Reynolds, 345 U.S. 1, 8 (1953) (discussing the "state secret privilege" which will be discussed in greater detail in Part 2 of this article).

[29] *See* Michael H. Page, Note, *Judging Without the Facts: A Schematic for Reviewing State Secrets Privilege Claims*, 93 CORNELL L. REV. 1243, 1252–53 (2008).

[30] *See* N. Jersey Media Grp. v. Ashcroft, 308 F.3d 198, 219 (3d Cir. 2002) (stating we should not depend on the judicial view to determine the classification).

[31] *E.g.*, Donald F. Rumsfeld, Sec. of Defense, Cable to RUHH subscribers (Jan. 14, 2003), available at

Part 1 of this article discusses mosaics in three contexts outside of individual rights litigation against the federal government. The first of these is intelligence analysis. The mosaic concept is a heuristic for understanding the interrelationship of pieces of intelligence.[32] To be sure, intelligence-gathering is related to information control and detention; state secrets are often embedded in intelligence,[33] and detention is sometimes justified by reference to intelligence data, particularly post-9/11.[34]

The mosaic theory is also relevant in the context of Freedom of Information Act ("FOIA") litigation. Here, the mosaic theory is used by the federal government to build a rationale for withholding documents based on, but expanding, the statutory exemption categories.[35]

This section will also describe and survey the use of mosaics in Title VII litigation. There, the admittedly difficult task of proving discriminatory animus is made easier by allowing proofs based on circumstantial evidence to be structured under a mosaic theory.[36] This usage bears similarities to the secrecy and detention cases,[37] but it is distinct because state power is not facilitated by the use of the mosaic concept. Instead, the private litigant benefits from its use.[38]

Part 2 of this article is a discussion of the state secrets privilege as a means of information control by the executive branch. First, the article provides a brief overview of the state secrets privilege from its origin in the

http://www.fas.org/sgp/news/2003/01/dodweb.html (describing al-Qaeda use of government web sites to gather information).

32 *See* Halkin v. Helms, 598 F.2d 1, 8 (D.C. Cir. 1978).

33 *See* Anderson Evan Thomas, Note, *Remaining Covered By the "Near Blanket" of Deference: Berman v. Central Intelligence Agency and the CIA's Continual Use of Exemption 3 to Deny FOIA Requests*, 28 MISS. C. L. REV 497, 508 (2009).

34 *See* Al-Adahi v. Obama, 692 F. Supp. 2d 85, 91 (D.D.C. 2010).

35 The Freedom of Information Act and the right of access to the federal courts are the only contexts in which mosaics have been discussed at length by other commentators. *See* Goodwin, *supra* note 1, at 180; Pozen, *supra* note 10, at 630; *see also* ROBERT M. PALLITTO & WILLIAM G. WEAVER, PRESIDENTIAL SECRECY AND THE LAW 133–34 (2007); BENJAMIN WITTES, THE EMERGING LAW OF DETENTION 104 (2011); Bahzer Azmy, *Executive Detention,* Boumediene, *and the New Common Law of Habeas,* 95 IOWA L. REV. 445, 523 (2010).

36 *See* Sylvester v. SOS Children's Vills. Ill., Inc., 453 F.3d 900, 903 (7th Cir. 2006).

37 *Compare* Sylvester, 453 F.3d at 903 (allowing "a convincing mosaic of circumstantial evidence" as proof of a prima facie case), *with* Al-Haramain Islamic Found., Inc. v. Bush, 451 F. Supp. 2d 1215, 1220 (D. Or. 2006) (employing mosaic theory as a means of understanding intelligence for decision purposes), *and* Mohammed v. Obama, 704 F. Supp. 2d 1, 7–8 (D.C. Cir. 2009) (discussing application of mosaic theory to a detention case generally).

38 *See, e.g.*, Walker v. Bd. of Regents of Univ. of Wisc. Sys., 410 F.3d 387, 394 (7th Cir. 2005) (discussing the plaintiff's circumstantial evidence under the mosaic theory).

1953 case of *United States v. Reynolds*[39] through the subsequent half-century of its development, including the important state secrets rulings following 9/11. Finally, I will explore the use of the mosaic theory in the state secrets context, showing how it makes that concept even more susceptible to overuse than it already was. I will detail the sense in which the use of mosaics in state secrets cases is *restrictive*: it limits the available information from which a mosaic could be constructed.[40]

Part 3 is a discussion of mosaics in detention cases. All of the cases discussed arose post-9/11 in the context of the war on terror.[41] Once the Supreme Court ruled in *Boumediene v. Bush* that Guantanamo detainees had the right to petition the federal courts for writs of habeas corpus,[42] the number of these petitions multiplied, as did the use of the mosaic theory as a means of defeating such petitions.[43] This was, as suggested above, an *expansive* use of the mosaic concept, as it involved the construction of mosaics by the government to justify continued detention. The article will explain in more detail the meaning of "expansive" use and will survey the case law on this point.

Part 4 elaborates on restrictive/expansive mosaic building and draws a contrast between them. There, some of the implications of the use of mosaics are considered in contexts where the phenomenon of "probability neglect" is observable. The mosaic theory is also related to recent scholarly debates on emergency powers and the "state of exception."

The article concludes with a plea to limit the use of mosaics in individual rights litigation against the government. Having explained the dangers inherent in their use, the article suggests a way out of the dilemmas mosaics pose. As a creature of case law, mosaic theory can also be tamed by case law. Judges have, on occasion, recognized that mosaics have very different

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[39] 345 U.S. 1, 10 (1953).

[40] *See, e.g.*, Kasza, 133 F.3d at 1162–63 (affirming a case dismissed after all evidence was deemed subject to state secrets privilege).

[41] *See, e.g.*, Boumediene v. Bush, 553 U.S. 723, 733–36 (2008) (discussing generally the post-9/11 basis of multiple cases).

[42] *Id.* at 798.

[43] Tyler L. Sparrow, Note, *Indefinite Detention After Boumediene: Judicial Trailblazing in Uncharted and Unfamiliar Territory*, 44 SUFFOLK U. L. REV. 261, 264 (2011) ("In the wake of Boumediene, there has been a flood of litigation in which detainees seek the writ of habeas corpus challenging their detention as unlawful.").

implications depending on the contexts in which they are deployed.[44] When mindful of the threat mosaics pose to individual rights, judges can perform a crucial limiting role against excessive executive power.

PART I. THE MOSAIC CONCEPT IN LEGAL DISCOURSE: ORIGINS AND CONTEXTS

A. Codifications of the Standard

The transposition of mosaics into law was facilitated by several regulatory developments. In 1982, President Ronald Reagan issued an executive order regarding document classification that stated the mosaic theory in almost precisely the form in which it is typically applied in case law.[45] Additionally, the Navy's federal regulations for FOIA cases state the theory.[46] Herbert Foerstel notes that, in addition to Reagan's 1982 Executive Order, the mosaic theory was codified in Reagan's 1984 National Security Directive as well as a 1986 Air Force Report on information gathering.[47] It bears noting that each of these standards governs information *control* rather than information analysis. A rationale for why information must be kept secret tells little about how intelligence conclusions are drawn. As this article will reiterate, the *building* of mosaics and *restricting* the building of mosaics are very different enterprises. Moreover, the determination that information should be assembled in a certain form, and the decision to allocate intelligence resources in accordance with that form, can be pursued with less certainty than court proceedings require.[48] Security and intelligence agencies on the one hand, and courts on the other, obviously have very different institutional mandates, norms, and objectives.[49]

The role of probability analysis in intelligence gathering, as compared to evidentiary law, is quite different. What suffices for one purpose does not necessarily satisfy the other. Addressing this difference in the course of ruling on a habeas corpus petition, Judge Kessler of the D.C. District Court

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[44] *See, e.g.*, Ahmed v. Obama, 613 F. Supp. 2d 51, 56 (D.C. Cir. 2009) (distinguishing appropriate standards of proof in intelligence from standards in the courtroom).

[45] Exec. Order No. 12,356, § 1.3(b), 3 C.F.R. 166, 169 (1982) (emphasis added), *reprinted in* 50 U.S.C. § 401 (1982).

[46] 32 C.F.R. § 701.31 (2011).

[47] HERBERT FOERSTEL, FREE EXPRESSION AND CENSORSHIP IN AMERICA 148 (1997).

[48] *See, e.g.*, McGehee v. Casey, 718 F.2d 1137, 1149 (D.C. Cir. 1983) (distinguishing the standards in intelligence gathering from the standards in judicial protection of individual rights).

[49] *See Ahmed*, 613 F. Supp. at 56.

distinguished mosaic use in intelligence gathering from its use on the courtroom.[50] "The kind and amount of evidence," she wrote, "which satisfies the intelligence community in reaching final conclusions about the value of information it obtains may be very different, and certainly cannot govern the Court's ruling."[51]

B. The Freedom of Information Act

In a thorough and excellent discussion of the mosaic theory in Freedom of Information Act ("FOIA")[52] cases, David Pozen has explored many of the dilemmas, theoretical and practical, arising from use of the mosaic as a jurisprudential concept.[53] For the treatment of FOIA cases in which the mosaic theory has been raised, this article will refer to Pozen's analysis. This section will survey contexts in which mosaics have been used, with the intention merely to indicate the wide-ranging use of the concept rather than to undertake an exhaustive study of every application. Thus, in addition to FOIA, this article touches on Title VII[54] cases.

There is inevitably some overlap between the state secrets doctrine[55] (discussed in Part 2) and FOIA. Both provide a legal basis for government denial of information to members of the public, and as such they are often cited as alternative grounds for denial in the same case.[56] FOIA, of course, is a statutory creature,[57] while state secrets is a common-law evidentiary privilege,[58] and this difference accounts for their somewhat separate history and development. Nonetheless, they are both addressed in some of the

[50] *Id.*

[51] *Id.*

[52] 5 U.S.C. § 552 (2006).

[53] *See* Pozen, *supra* note 10, at 668–75.

[54] 42 U.S.C. § 2000e (2006).

[55] Stated most broadly in *Totten v. United States*: "It may be stated as a general principle, that public policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential, and respecting which it will not allow the confidence to be violated." 92 U.S. 105, 107 (1875).

[56] *See, e.g.*, Weinberger v. Catholic Action of Hawaii/Peace Educ. Project, 454 U.S. 139, 144–47 (1981) (discussing FOIA and state secret rationales for dismissing a case against the Navy).

[57] FOIA's "Exemption 7" protects classified documents from disclosure and is the basis, for example, for the denial of information in The National Security Studies case. Ctr. for Nat'l Sec. Studies v. U.S. Dep't of Justice, 215 F. Supp. 2d 94, 98 (D.D.C. 2002), *aff'd in part and rev'd in part*, 331 F.3d 918 (D.C. Cir. 2003).

[58] *See* U.S. v. Reynolds, 345 U.S. 1, 6–7 (1953) (discussing the privilege as "well established in the law of evidence.").

same cases.[59]

Pozen delineates three categories of judicial behavior when courts uphold FOIA denials: delegation, abdication, and deference.[60] In delegation mode, courts leave agency oversight to the agencies themselves,[61] while abdication leads the courts to decline to review secrecy claims at all.[62] Finally, deference aligns FOIA review with other national security-related litigation in which the courts prefer to leave the executive to deal with matters uniquely within its expertise – if the courts are going to review, it will not be a searching or substantive review.[63] All of these categories move courts away from a scrutinizing role in FOIA challenges, and therefore they encourage overuse of the mosaic rationale for denying information to the public.[64]

The Bush administration's more aggressive approach to information control[65] led it to deny more FOIA requests, and in turn to use the mosaic theory more frequently as a means to do so.[66] This development was part of a general trend of increased secrecy during the Bush years.[67] This trend included not only increased document classification and FOIA denials, but also anti-terror programs, the state secrets privilege, executive privilege and national security surveillance.[68] Viewed together, these secrecy-related techniques can be seen to afford the executive greater institutional power in combination than they do separately:[69] for instance, anti-terror programs can operate in greater secrecy because of the state secrets privilege. The secrecy-power nexus will be discussed in greater detail in Part 2.

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59 *See, e.g.*, Am. Friends Serv. Comm. v. Dept. of Def. Through Def. Logistics Agency, 831 F.2d 441, 445 (3d Cir. 1987) (discussing Department of Defense mosaic theory argument as a FOIA request).

60 Pozen, *supra* note 10, at 652.

61 *Id.*

62 *Id.*

63 *Id.* Justice Thomas' *Hamdan* dissent articulates this "deference" rationale. Hamdan v. Rumsfeld, 548 U.S. 557, 678 (2006) (Thomas, J., Dissenting) ("The plurality's evident belief that *it* is qualified to pass on the "military necessity" . . . of the Commander in Chief's decision to employ a particular form of force against our enemies is so antithetical to our constitutional structure that it simply cannot go unanswered. I respectfully dissent.").

64 *See* Pozen, *supra* note 10, at 654.

65 *See id.* at 631.

66 *Id.*

67 *Id.*

68 PALLITTO & WEAVER, *supra* note 35, at 81–82.

69 *See id.* at 83.

C. Title VII Cases

The mosaic concept has been used to evaluate plaintiffs' evidentiary presentations in Title VII employment discrimination cases.[70] In *Walker v. Board of Regents*, for example, the Seventh Circuit explained,

> [c]ircumstantial evidence, by contrast, does not directly demonstrate discriminatory intent but supports an inference of such intent under the circumstances. We have identified three types of circumstantial evidence relevant to Title VII discrimination cases. The first is "suspicious timing, ambiguous statements oral or written, behavior toward or comments directed at other employees in the protected group, and other bits and pieces from which an inference of discriminatory intent might be drawn" The key consideration is the totality of these "pieces of evidence[,] none conclusive in itself but together composing a convincing mosaic of discrimination against the plaintiff."[71]

The *Walker* case involved a university administrator who alleged that she was dismissed from her position for discriminatory reasons.[72] The jury found in her favor on the gender discrimination claim, but the trial judge overturned the verdict.[73] The court used the mosaic concept there to evaluate whether, in the absence of direct evidence of discriminatory conduct, "bits and pieces" of evidence might establish discrimination.[74] The material from which this mosaic would be constructed was "alleged inconsistencies in Markee's statements and meeting notes."[75] However, the reviewing court found this evidence to amount to nothing more than a "litany of factual quibbles."[76] Thus, the Seventh Circuit affirmed the trial court's judgment in favor of the employer.[77]

In *Petts v. Rockledge Furniture*,[78] the Seventh Circuit elaborated further on the precise way in which the mosaic concept could be used in employ-

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[70] *See, e.g.*, Kozuszek v. Brewer, 546 F.3d 485, 488 (7th Cir. 2008); Jamerson v. Milwaukee Cnty. Procurement Div., 2006 U.S. Dist. LEXIS 42245, at *26 (E.D. Wis. 2006), *aff'd sub nom* Jamerson v. Ryan, 2006 U.S. App. LEXIS 28495 (7th Cir. Wis., Nov. 15, 2006); Walker v. Bd. of Regents, 410 F.3d 387, 394 (7th Circuit 2005).

[71] *Walker*, 410 F.3d at 394.

[72] *Id.* at 389.

[73] *Id.*

[74] *Id.* at 394.

[75] *Id.* at 396–97.

[76] *Id.*

[77] *Walker*, 410 F.3d at 396–97.

[78] Petts v. Rockledge Furniture LLC, 534 F.3d. 715 (7th Cir. 2008).

ment discrimination cases.[79] Plaintiff alleged gender discrimination,[80] but the trial judge granted summary judgment to the defendant.[81] Though the terminology is somewhat confusing, the evidentiary standard allows proof of discriminatory intent through various forms of circumstantial evidence.[82] For instance, Petts reported certain remarks made by two male managers that, she claimed, revealed those managers' negative attitudes toward women.[83] The Seventh Circuit disagreed with Plaintiff regarding the significance of the managers' remarks, indicating that they were at least ambiguous with regard to their meaning.[84] Thus, the court ruled, there had indeed been insufficient evidence to put the case before a jury, and therefore summary judgment was appropriate.[85]

These two cases from the employment discrimination context show the courts' willingness to consider a mosaic-type presentation of evidence as a means of proving plaintiff's case.[86] The place of the "mosaic" in the case law evidentiary standard is clear as well: intent can be proven through a composite of circumstantial evidence.[87] In both *Walker* and *Petts*, the reviewing court and the trial court agreed that such a composite had not been successfully constructed; *i.e.*, that the plaintiff failed to carry the burden.[88] The court was willing to consider the evidence, but found it lacking in materiality.[89] Though the competent nature of the evidence and the standard were clear, the court was not persuaded as to its import.[90]

To a lesser extent, the mosaic construct appears in the criminal context as well, particularly in appeals of sentencing and post-conviction review;[91]

79 *Id.* at 720–21.

80 *Id.* at 717.

81 *Id.*

82 *Id.* at 720–21.

83 *Id.* at 719–20.

84 *Petts*, 534 F.3d. at 721–23.

85 *Id.* at 727.

86 *Walker*, 410 F.3d at 394; *Petts*, 534 F.3d at 720.

87 *Walker*, 410 F.3d at 394; *Petts*, 534 F.3d at 720.

88 *Walker*, 410 F.3d at 389; *Petts*, 534 F.3d at 717.

89 *Walker*, 410 F.3d at 396–97; *Petts*, 534 F.3d at 727.

90 *Walker*, 410 F.3d at 396–97; *Petts*, 534 F.3d. 715, 727. For other Title VII cases using the mosaic theory, *see* Harris v. Warrick Cnty. Sheriff's Dept., 666 F. 3d 444, 447 (7th Cir. 2012) (summary judgment for employer); Coleman v. Donahoe, 667 F.3d 835, 860 (7th Cir. 2012) (reversing summary judgment for employer); Makowski v. SmithAmundsen LLC, 662 F.3d 818, 824 (7th Cir. 2011) (reversing summary judgment for employer); Smith v. Lockheed-Martin Corp., 644 F.3d 1321, 1328 (11th Cir. 2011).

91 *See, e.g.*, United States v. Faulkenberry, 461 Fed. App'x 496, 502–03 (6th Cir. 2012) (sentencing analysis described as mosaic); United States v. Rigas, 583 F.3d 108, 118–19 (2d Cir. 2009) (sentencing analysis described as mosaic); United States v. Hertular, 562 F.3d 433, 446 (2d Cir. 2009) (sentencing

however, because this usage pertains specifically to the sentencing judge's weighing of sentencing factors,[92] it is difficult to generalize about how the mosaic concept is applied there.

II. THE MOSAIC THEORY IN STATE SECRETS LITIGATION

A. An Overview of the State Secrets Privilege

The state secrets privilege is a common-law doctrine that the federal courts apply when the government claims that a litigant's demand for a particular piece of information would endanger national security if granted.[93] An assertion of the state secrets privilege virtually always leads to the denial of the demand for information.[94] Additionally, the privilege can be used to gain dismissal of an entire case.[95] In an increasing number of cases, the government seeks dismissal of a lawsuit outright on state secrets grounds, asserting that the very subject-matter of the lawsuit is a state secret, and therefore allowing the suit to go forward would threaten national security, irrespective of the privileged status of any particular document.[96]

Although there are antecedents in English law[97] and in earlier legal disputes in the United States,[98] the first explicit pronouncement of the modern state secrets privilege was made in the 1953 case of *United States v. Reynolds*.[99] *Reynolds* involved the crash of a military plane in which several U.S. military service members were killed.[100] The victims' families sought information from the Air Force regarding the crash; specifically, they wanted accident reports filed as a matter of course following any such accident

analysis described as mosaic); United States v. Bourgeois, 2011 U.S. Dist. LEXIS 55859 (S.D. Tex. 2011) (post-conviction review analyzes defendant's social history as mosaic).

92 *See, e.g.*, *Rigas*, 583 F. 3d at 118–19.

93 *See* PALLITTO & WEAVER, *supra* note 35, at 86.

94 *Id.* at 87.

95 *See id.*

96 *See id.* at 89.

97 *See* William G. Weaver & Robert M. Pallitto, *State Secrets and Executive Power,* 120 POL. SCI. Q. 85, 97 (2005).

98 *Id.* at 94

99 United States v. Reynolds, 345 U.S. 1, 10–11 (1953). For a discussion of the state secrets privilege and its origins in English law, *see* Weaver & Pallitto, *supra* note 97, at 97–101 (2005). On the state secrets privilege generally, *see* D.A. Jeremy Telman, *Our Very Privileged Executive: Why the Courts Can (and Should) Fix the State Secrets Privilege,* 80 TEMPLE L. REV. 499 (2007); Robert M. Chesney, *State Secrets and the Limits of National Security Litigation,* 75 GEO. WASH. L. REV. 1249 (2007); Amanda Frost, *The State Secrets Privilege and the Separation of Powers,* 75 FORDHAM L. REV. 1931 (2007).

100 *Reynolds*, 345 U.S. at 3.

.[101] The government denied this request and the families filed suit.[102] When the case reached the United States Supreme Court, the Court ruled in favor of the government,[103] and declared that the state secrets privilege is available to the executive to prevent disclosure of information to a private litigant when "there is a reasonable danger that compulsion of the evidence will expose matters which, in the interest of national security, should not be divulged."[104]

This ruling was extremely consequential. Once *Reynolds* was handed down, it provided an explicit Supreme Court precedent stating that the state secrets privilege was available to the executive branch, along with instructive language from the Court indicating that deference must be shown to the executive once the privilege is asserted.[105] Executive privilege, which applies in non-national security matters, was already available,[106] but the state secrets privilege went further.[107] A new, separate and very powerful tool for protecting executive branch information stood ready for use with little, if any, limitation.

In a troubling and ironic postscript to the *Reynolds* decision, the formerly "secret" information surfaced on the internet decades later.[108] The accident report, as it turned out, contained nothing sensitive or national security-related, but instead was a rather mundane listing of the facts of the crash.[109] Thus, the case that founded the modern state secrets doctrine in the United States did not actually contain any state secrets. An attempt to correct the record in *Reynolds*, via a writ of error in *coram nobis*, was unavailing.[110] The state secrets doctrine, then, has been tainted by government misconduct from its very birth.

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101 *See* LOUIS FISHER, IN THE NAME OF NATIONAL SECURITY: UNCHECKED PRESIDENTIAL POWER AND THE REYNOLDS CASE 3 (2006). Louis Fisher has traced the *Reynolds* case from its beginnings through the 1990s and has shown that the state secrets privilege was improperly used there. *See generally id.*

102 *Id.*

103 *Reynolds*, 345 U.S. at 5, 12.

104 *Id.* at 10.

105 *Id.* at 10–11.

106 LOUIS FISHER, THE POLITICS OF EXECUTIVE PRIVILEGE 3 (2004). Executive privilege is a separate doctrine that protects the confidential nature of presidential communications. It is qualified privilege, while state secrets privilege is absolute. In *United States v. Nixon*, the Supreme Court distinguished these two distinct privileges. 418 U.S. 683, 706 (1974). For additional commentary on executive privilege, *see generally id.*; MARK ROZELL, EXECUTIVE PRIVILEGE (2002).

107 FISHER, *supra* note 106, at 167

108 *Id.*

109 *Id.* at 177.

110 *In re* Herring, 539 U.S. 940 (2003).

In the 1974 case of *United States v. Nixon*,[111] the Court clarified the difference between the more limited executive privilege (which protects confidential communications between the president and advisors)[112] and the state secrets privilege. Nixon had tried unsuccessfully to conflate the two, claiming an unlimited privilege for all presidential communications.[113] On one hand, the Court's disentanglement of the two privilege doctrines was an important limitation of presidential power: it brought down a president.[114] Yet, as Louis Fisher pointed out, *United States v. Nixon* also facilitated state secrets claims by suggesting that a case involving military secrets might be treated with much greater deference.[115]

The overbroad and ill-advised doctrine imported in *Reynolds* has grown up to cause problems for litigants and the federal courts themselves for more than fifty years.[116] Commentators' claims of inherent and/or unreviewable executive power in the national security or foreign policy context compound the error, for they create an appearance of legitimacy for the exercise of a powerful tool of executive secrecy.[117] Problems arise as courts struggle to adjudicate an ever-expanding variety of state secrets claims,[118] and these problems have been compounded by the acceptance and development of mosaic-type arguments in this context.[119] This section will explain briefly some of the main components of the state secrets privilege as it is applied in the federal courts today, and will highlight some of the case law developments that have sometimes made the doctrine unmanageable. Finally, it will indicate the ways in which the mosaic theory is used in the state secrets context and outline the further problems that mosaics have posed for state secrets jurisprudence.

B. The Three Applications of the Privilege

By the late 1990s, federal courts were applying a three-part analysis in state secrets cases,[120] or more accurately, they were applying the privilege

111 United States v. Nixon, 418 U.S. 683 (1974).
112 *Id.* at 706.
113 *Id.* at 686.
114 ROZELL, *supra* note 106, at 70.
115 *See, e.g.*, Louis Fisher, *Invoking Executive Privilege: Navigating Ticklish Political Waters,* 8 WM. & MARY BILL OF RTS. J. 583, 602 (2000).
116 *See* FISHER, *supra* note 106, at 254.
117 John Yoo, *Courts at War*, 91 CORNELL L. REV. 573, 591 (2006)
118 *See* FISHER, *supra* note 106, at 245
119 *See, e.g.*, Kasza v. Browner, 133 F.3d 1159, 1166 (9th Cir. 1998) (embracing a mosaic argument).
120 *See* Jared Perkins, *The State Secrets Privilege and the Abdication of Oversight*, 21 BYU J. PUB. L. 235, 243 (2007).

in one of three ways.[121] Of course, government defendants modified their motion practice accordingly by seeking relief via summary judgment or dismissal as appropriate.[122] There are three potential avenues by which the federal government can apply the state secrets doctrine to end a lawsuit.[123]

In the first class of cases ("Alternative One"), the privileged material is removed from the case, and the matter goes forward without it.[124] If the plaintiff cannot make out a prima facie case because the necessary evidence is unavailable due to privilege, the case will be dismissed.[125] The second class of cases ("Alternative Two") arises when the defendant (usually the federal government) cannot present a valid defense without the protected material.[126] Perceiving that the defendant is caught between the need to guard state secrets on the one hand and the need to avoid legal liability on the other, courts will grant summary judgment to the defendant in such instances.[127] In both Alternative One and Alternative Two, termination by dismissal or summary judgment is appropriate, but some discovery is often necessary in order for the court to determine that the plaintiff or defendant lacks the necessary evidence to prove the case or defend itself.[128] The third variety of state secrets case ("Alternative Three") occurs when the very subject matter of the case is a state secret, so that it is impossible even to discuss the allegations in the complaint without implicating protected (*i.e.*, privileged) material.[129] In such cases, the appropriate disposition is to dismiss the case at the outset.[130]

A related but distinct means of terminating state secrets-related litigation involves the so-called "*Totten* bar," which was recently utilized in *Tenet v. Doe*.[131] *Totten* applies in cases where a claim against the United States is based on a secret relationship between plaintiff and government.[132] In such

[121] The steps to be followed in all state secrets cases are the same initially. The court must first determine whether the privilege has been properly asserted by the correct person in the right way, and once that inquiry is satisfied it is appropriate to move on to evaluating the actual substantive content of the assertion. *El-Masri v. United States*, 437 F. Supp. 2d 530, 536 (E.D. Va. 2006).

[122] FISHER, *supra* note 106, at 245.

[123] *See Kasza*, 133 F.3d at 1166.

[124] *Id.*

[125] *Id.*

[126] *Id.*

[127] *See, e.g.*, Molerio v. F.B.I., 749 F.2d 815, 825 (D.C. Cir. 1984).

[128] *See Kasza*, 133 F.3d at 1166.

[129] *Id.*

[130] *See* Hepting v. AT&T, 439 F. Supp. 2d 974, 984 (N.D. Cal. 2006) (citing Kasza v. Browner, 133 F.3d 1159, 1166 (9th Cir. 1998)).

[131] Tenet v. Doe, 544 U.S. 1, 10 (2005).

[132] *Id.* at 7–8.

cases, an implied covenant of silence applies between the parties.[133] *Totten* creates a categorical bar to suit: the plaintiff is barred from recovery because of the nature of the relationship between the parties, and the case is dismissed.[134] The result is the same as that of Alternative Three – dismissal at the outset – but *Totten* encompasses a specific type of dispute based on a confidential contractual relationship.[135]

i. NSA Wiretapping

Of course, the question of what test applies to a certain case is often determinative of the ultimate outcome of that case. Often, the government presents the state secrets' tests in the alternative.[136] National Security Administration ("NSA") wiretapping litigation is an area in which the U.S. government has advanced all three alternatives of the state secrets privilege, arguing that each one by itself constituted a reason to dismiss the action.[137]

The cases arose when the New York Times published a story late in 2005 describing a program of warrantless government wiretapping of certain overseas telephone calls.[138] The Bush administration admitted publicly that it had, in fact, been monitoring some overseas telephone calls since 2002.[139] Allegations also arose concerning a second eavesdropping program, which involved telephone record collection via a diversion of call data as calls passed through telecommunications facilities.[140] This second program was not publicly acknowledged by the government.[141]

In applying the state secrets doctrine after the privilege has been asserted, courts exercise discretion to say which alternative of the privilege, if any, applies.[142] In *Hepting v. AT&T Corp.*, the trial court decided that the sub-

133 *See id.* at 7.

134 *See id.*

135 *See generally* Totten v. U.S., 92 U.S. 105 (1875).

136 *See, e.g.*, *El-Masri*, 437 F. Supp. 2d at 538–39.

137 *See, e.g.*, Transcript of Hearing on Motion to Dismiss, Hepting v. AT&T Corp., at 18, 437 F. Supp. 2d 970 (N.D. Cal. 2006) (No. C-06-0672-VRW).

138 James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 15, 2005, at A1.

139 *Id.*

140 *See* Leslie Cauley, *NSA Has Massive Database of Americans' Phone Calls,* USATODAY, May 11, 2006, at 1A.

141 *Id.*

142 *See* Hepting v. AT&T Corp., 439 F. Supp. 2d 974, 984 (N.D. Cal. 2006) (discussing cases dismissed under the state secrets privilege).

ject matter of the case, *i.e.*, the question of "whether AT&T intercepted and disclosed communications or communications records to the government," was not a "secret."[143] At this initial stage, the court looked to the public record, and specifically to statements made by governmental sources,[144] reasoning that secrecy protection need not be applied to facts once the government itself had already publicly acknowledged them.[145] The government argued that the subject matter of the case was, in fact, a secret, and it characterized the subject matter (in a somewhat circular fashion) as a secret government program or programs.[146] Yet, the court shifted its focus to consider what was already publicly known and therefore *not* secret, carving out an area of non-secret facts that could be litigated without secrecy limitations.[147]

The *Hepting* opinion came at an early stage in the litigation, and of course it left open the possibility that dismissal at a later point based on state secrets might be ordered.[148] The ruling is significant, however, as an attempt to think through and apply limits to the secrecy power that flows from the state secrets doctrine.

The NSA wiretapping litigation has produced a number of court opinions.[149] In *Terkel v. AT&T*, the plaintiffs focused on only one of the two alleged wiretapping activities widely reported in the media: the collection of massive amounts of caller records.[150] In *Hepting*, by contrast, both surveillance programs described above were at issue.[151] In addition to the collections of customer records by AT&T, *Hepting* challenged the *content* monitoring of overseas phone calls,[152] which the court found was publicly known and therefore not a secret.[153] In reaching this conclusion, Judge Walker relied on the president's acknowledgement that the NSA had in fact, monitored overseas calls.[154] Although Judge Walker declined to dismiss the case on state secrets grounds, he noted that the record-collecting program, in

[143] *Id.* at 994.
[144] *Id.* at 986.
[145] *Id.* at 988–89.
[146] *Id.* at 994.
[147] *Id.* at 994.
[148] *See Hepting*, 439 F. Supp. 2d at 995.
[149] *See generally* Am. Civil Liberties Union v. Nat'l Sec. Agency, 438 F. Supp. 2d 754 (E.D. Mich. 2006); Terkel v. AT&T Corp., 441 F. Supp. 2d 899 (N.D. Ill. 2006); *Hepting*, 439 F. Supp. 2d 974.
[150] *Terkel*, 441 F. Supp. 2d at 900.
[151] *Hepting*, 974 F. Supp. 2d at 986.
[152] *Id.* at 992.
[153] *Id.* at 994.
[154] *Id.* at 996.

contrast to the content-monitoring program, had not been publicly acknowledged by the government or by AT&T, and therefore it was still a secret whose disclosure could possibly harm national security.[155]

Seizing on this distinction between content monitoring and record collection, the trial judge in *Terkel* concluded that since the case before him concerned only record collecting – a program whose existence was still unacknowledged – he was compelled to dismiss the case under Alternative Three of the state secrets doctrine,[156] as described above; *i.e.*, the court could not go forward at all in a case where the very subject matter involved state secrets. No discovery could be allowed, the court concluded, without endangering national security.[157] In reaching this conclusion, the trial judge viewed classified declarations and other information as well, which was not disclosed to the plaintiffs.[158] The court also produced a "secret" opinion as part of its ruling, but only the government attorneys were permitted to see this classified memorandum.[159]

The court considered other possible means of proceeding with discovery,[160] but it rejected those alternatives, finding that because "the information at issue is unavailable in its entirety," there was no way to separate releasable from non-releasable information.[161] Thus, the *Terkel* court took the harshest route available under state secrets law and dismissed the case at the pleadings stage.[162]

In *ACLU v. National Security Agency*, filed in federal court in Detroit, a different result was reached at the motion to dismiss/summary judgment stage.[163] There, the named plaintiffs claimed they were hampered in their work and incurred additional expense as a result of the NSA content monitoring of overseas telephone communications.[164] Thus, the complaint focused on the content-based wiretapping, determined by the court in *Hepting* to be publicly acknowledged and therefore not a secret. The trial judge granted partial summary judgment to the plaintiffs on the content-

155 *Id.* at 997.
156 *Terkel*, 411 F. Supp. 2d at 901.
157 *Id.* at 915–16.
158 *Id.* at 917.
159 *Id.* at 902.
160 *Id.* at 917–18.
161 *Id.* at 918.
162 *Terkel*, 411 F. Supp. 2d at 920.
163 Am. Civil Liberties Union v. Nat'l Sec. Agency, 438 F. Supp. 2d 754, 782 (E.D. Mich. 2006).
164 *Id.* at 765.

monitoring claim,[165] but dismissed the record-monitoring claim (which she termed "data-mining") on state-secrets grounds, just as the court in *Terkel* had done.[166] All three opinions produced in the NSA wiretapping litigation grapple with the problem of evaluating plaintiffs' claims in the face of forceful and comprehensive invocation of the state secrets privilege.[167] The courts reviewed classified declarations, and to differing extents, actual substantive evidence, and found that some claims would likely be dismissed because they risked revealing state secrets.[168] *Hepting* and *ACLU*, though decided provisionally in the plaintiffs' favor, nonetheless suggested that the subject matter of some claims constituted a state secret.[169] The broad definition of state secrets set forth in *Reynolds* constrained the courts in their attempts to adjudicate the plaintiffs' substantive claims of government misconduct.[170]

The Foreign Intelligence Surveillance Act of 1978 Amendments Act of 2008 ("Telecom Immunities Act") unsettled the legal ground under the NSA wiretapping suits by protecting telecom companies from suit and authorizing warrantless wiretapping that had been prohibited by the previous FISA law.[171] *Al-Haramain Islamic Foundation v. Bush*[172] was one of the many lawsuits[173] brought against the Bush administration warrantless surveillance activities conducted by the NSA in cooperation with various telecommunications providers.[174] *Al-Haramain* continued beyond the passage of the telecom immunities law.[175] In response to the suit, the Bush administration sought dismissal, arguing that the very "subject matter" of the suit – the domestic spying program – was a state secret.[176] Working through its analysis of the state secrets doctrine as applied to the case, the district court stated that "[c]ourts have recognized that there are inherent limitations in

165 *Id.* at 782.

166 *Id.*

167 *See generally Am. Civil Liberties Union*, 438 F. Supp. 2d 754; *Hepting* 439 F. Supp. 2d 974; *Terkel*, 441 F. Supp. 2d 899.

168 *See generally Am. Civil Liberties Union*, 438 F. Supp. 2d 754; *Hepting* 439 F. Supp. 2d 974; *Terkel*, 441 F. Supp. 2d 899.

169 *See Am. Civil Liberties Union*, 438 F. Supp. 2d at 782; *Hepting*, 439 F. Supp. 2d at 996–97.

170 *See* United States v. Reynolds, 345 U.S. 1, 9–10 (1953).

171 50 U.S.C. § 1885–85c. The ACLU challenged the law and their case was dismissed, then reinstated in Amnesty Int'l USA v. Clapper, 667 F.3d 163 (2d Cir. 2011).

172 Al-Haramain Islamic Found., Inc. v. Bush, 451 F. Supp. 2d. 1215 (D. Or. 2006).

173 *See, e.g.*, *In re* Nat'l Sec. Agency Telecomm. Records Litigation, 671 F.3d 881, 890 (9th Cir. 2011).

174 Risen & Lichtblau, *supra* note 138.

175 The Telecom Immunities Act was passed in 2008, and while *Al-Haramain* was filed in 2006, it continued through 2011.

176 *Al Haramain*, 451 F. Supp. 2d. at 1224–25.

trying to separate classified and unclassified information, comparing contemporary electronic intelligence gathering to the construction of a 'mosaic,' from which pieces of 'seemingly innocuous information' can be analyzed and cobbled together to reveal the full operational picture."[177] The district court (following the lead of other courts construing the mosaic theory)[178] considered the possibility that it would not be able to allow access to some evidence without implicating other pieces of evidence that should not be disclosed.[179] Here, the mosaic metaphor begins to break down, as the court talks simultaneously about the picture drawn by the intelligence (*i.e.* wiretapping) program and the possibility that others could build a mosaic once the information became available.[180] At its root, this argument is about restricting mosaic construction by the wider public, even though the court does not explicitly say so. Nonetheless, in the end the court did not find it impossible to disentangle the privileged from non-privileged information, at least at that early stage.[181] There was enough information about the surveillance program in the public domain that the program's existence was no longer a state secret.[182] Thus, the district court denied the government's motion to dismiss the plaintiffs' suit.[183]

The Ninth Circuit affirmed on appeal, declining to dismiss the suit based on the state secrets privilege.[184] As explained above, the privilege can affect a suit in one of several ways. If the *Totten* bar applies,[185] the suit is precluded. If the "very subject matter" is a state secret, the case must be dismissed at the outset.[186] Otherwise, discovery proceeds and the court must determine whether each side can present its case once the privileged evidence has been removed from the case. Here, then, the court left the application of the privilege to the discovery stage, leaving open the possibility that some evidence would be unavailable, or that the entire suit would be dismissed, as discovery proceeded.[187] But extensive public disclosures had vitiated the "secret" status of the surveillance program such that the entire

177 *Id.* at 1220.
178 *See, e.g.*, Kasza v. Browner, 133 F.3d 1159, 1166 (9th Cir. 1998).
179 *Al Haramain*, 451 F. Supp. 2d. at 1220.
180 *Id.* at 1220–21.
181 *Id.* at 1223.
182 *Id.* at 1222.
183 *Id.* at 1225.
184 Al-Haramain Islamic Found. v. Bush, 507 F. 3d 1190, 1197–98 (9th Cir. 2007).
185 *See* Part 2.B.
186 *Id.*
187 *Al-Haramain*, 507 F. 3d at 1204.

program could not be considered a secret *tout court*.[188]

Remarkably, the plaintiffs were ultimately able to successfully prove their case at the summary judgment stage in district court.[189] The Obama administration continued the Bush administration's posture in *Al-Haramain* and sought dismissal.[190] The case was consolidated with other related cases[191] and heard in the Northern District of California, where the trial judge held that the plaintiffs met their burden of proof on summary judgment by means of non-privileged evidence alone.[192] The Ninth Circuit reversed in part, finding Section 2 of the Telecom Immunities Act constitutional.[193] Nonetheless, the ruling is consequential because it demonstrates that a trial judge can segregate secret from non-secret material and allow a case to proceed (at least to summary judgment) on the non-secret evidence alone. Government arguments about the national security risks of disclosing secret information are always made *prospectively*:[194] "If we release X document, it could create Y security risk in the future." Similarly, the *prospective* argument about trial management would be: "We will not be able to separate the material in this case, so the trial cannot proceed." Once there *has been* a trial (or, in this case, a showing upon motion for summary judgment), those claims become more difficult to make, both now and in the future. The record is created; the disclosures are not potential but actual; the record can be assessed on its own terms. Though the government will fight this establishment of precedent vigorously, the turn of events by which the telecom records case reached the decision stage is highly significant for state secrets law.

ii. Extraordinary Rendition

Another set of cases arising out of the "war on terror"[195] has been affect-

188 *Id.* at 1197–98.

189 *In re* Nat'l Sec. Agency Telecomm. Records Litig., 633 F. Supp. 2d 892, 912 (N.D. Cal. 2007).

190 *In re* Nat'l Sec. Agency Telecomm. Records Litig., 595 F. Supp. 2d 1077, 1079 (N.D. Cal. 2009).

191 *See In re* Nat'l Sec. Agency Telecomm. Records Litig., 633 F. Supp. 2d 892, 896 (N.D. Cal. 2007).

192 *See In re* Nat'l Sec. Agency Telecomm. Records Litig., 700 F. Supp. 2d. 1182, 1194–1202 (N.D. Cal. 2010), *rev'd in part*, 671 F.3d 881 (9th Cir. 2011).

193 *See generally In re* Nat'l Sec. Agency Telecomm. Records Litig., 671 F.3d 881.

194 *See, e.g.*, Al-Haramain Islamic Found. v. Bush, 451 F. Supp. 2d. at 1220; Kasza v. Browner, 133 F.3d 1159, 1166 (9th Cir. 1998).

195 This term was originally coined by President George W. Bush shortly after the terrorist attacks of 9/11/2001. *See, e.g.*, Kenneth R. Bazinet, "A Fight Vs. Evil, Bush and Cabinet Tell U.S," DAILY NEWS WASHINGTON BUREAU (Sept. 17th, 2001), *available at* http://web.archive.org/web/20100505200651/http://www.nydailynews.com/archives/news/2001/09/17/2

ed by the state secrets privilege as well. In two recent lawsuits, litigants challenged the practice of "extraordinary rendition," by which the United States government apprehends individuals and sends them to other countries where they are interrogated and tortured.[196] Maher Arar, a Canadian national, alleged that United States officials detained him during a stopover in Kennedy Airport in New York, flew him to Syria on a secret, private jet, and delivered him to Syrian officials who interrogated and tortured him.[197] Similarly, Khaled El-Masri, a German national, claimed that he was seized at the Serbian/Macedonian border and sent to a CIA-run facility in Afghanistan, where he was held for four months in a case of mistaken identity, and finally released to a roadside in Albania.[198] Arar raised claims under the Torture Victim Protection Act ("TVPA")[199] as well as *Bivens*[200]-type due process claims. The court was able to dispose of the TVPA count without reference to state secrets by finding that there is no private cause of action under that law.[201] Similarly, the court dismissed the due process claims plaintiff raised pursuant to *Bivens*.[202] Because there were foreign affairs aspects of the alleged rendition program, the court found that it "should not, in the absence of explicit direction by Congress, hold officials who carry out such policies liable for damages even if such conduct violates our treaty obligations or customary international law."[203] That was a matter for the political branches to resolve.[204] Thus, the question of remedy was framed as a political question of separation of powers rather than a justiciable question of individual rights.[205] The fourth count, which involved government actions on U.S. soil, was dismissed without prejudice, so that Arar could replead it "without regard to any rendition claim."[206] Count Four could then

001-09-17_a_fight_vs__evil__bush_and_c.html.

[196] For a description and analysis of the "extraordinary rendition" program, *see generally* William Weaver & Robert Pallitto, *Extraordinary Rendition and Presidential Fiat*, 36 PRESIDENTIAL SUMMARIES Q. 102 (2006). *See also* N.Y. Univ. Sch. of Law Ctr. for Human Rights & Global Justice, TORTURE BY PROXY: INTERNATIONAL AND DOMESTIC LAW APPLICABLE TO "EXTRAORDINARY RENDITIONS" (2004), *available at* http://www.chrgj.org/docs/TortureByProxy.pdf; Jane Mayer, *Annals of Justice: Outsourcing Torture*, NEW YORKER (Feb. 14, 2005), *available at* http://www.newyorker.com/printables/fact/050214fa_fact6.

[197] Arar v. Ashcroft, 414 F. Supp. 2d 250, 253–54 (E.D.N.Y. 2006).

[198] El-Masri v. Tenet, 437 F. Supp. 2d 530, 532–34 (E.D. Va. 2006).

[199] 28 U.S.C. §1350 (2006).

[200] Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971).

[201] *Arar*, 414 F. Supp. 2d at 266.

[202] *Id.* at 283.

[203] *Id.*

[204] *Id.*

[205] *Id.*

[206] *Id.* at 287.

be litigated apart from state secrets, simply as a matter of the conduct of U.S. officials in the limited timeframe of Arar's airport detention.

El-Masri brought a *Bivens*-type claim for violation of due process as well as two claims under the Alien Tort Statute.[207] The government responded to his suit by asserting the state secrets privilege[208] and submitting an *ex parte* classified declaration in support of its claim of privilege (in addition to a public declaration).[209] The court did not, of course, disclose the contents of the government's secret declaration, but relied on the public declaration to say that "any admission or denial of these allegations by defendants in this case would reveal the means and methods employed pursuant to this clandestine program and such a revelation would present a grave risk of injury to national security."[210] Thus, the court concluded that the very subject matter of the suit was a state secret, and therefore it could not proceed.[211] Only dismissal could prevent public disclosure of the secrets involved.[212] The court also noted that even if there existed, as the plaintiffs claimed, "public affirmation of the existence of a rendition program"[213] by the government, the state secrets privilege would still operate with undiminished force because "operational details . . . are validly claimed as state secrets."[214] The court dismissed the complaint, finding that "well-established and controlling legal principles require that in the present circumstances, El-Masri's private interests must give way to the national interest in preserving state secrets."[215] In short, Alternative Three described above was applied to dismiss El Masri's complaint before any discovery could take place. Obviously, that avenue of resolution was best for the government defendants, as it always is, because it precluded all discovery. One striking feature of the court's articulation of the state secrets privilege in *El-Masri* is that the "national interest" trumps individual claims, and that the national interest is determined solely and unreviewably by the executive.[216]

The allegation that the United States operates an "extraordinary rendi-

207 *See* El-Masri v. Tenet, 437 F. Supp. 2d 530, 534–35 (E.D. Va. 2006).
208 *Id.* at 535.
209 *Id.* at 537.
210 *Id.*
211 *See id.* at 538–39 (citing Sterling v. Tenet, 416 F.3d 338, 348 (4th Cir. 2005)).
212 *See id.* at 539.
213 *El-Masri*, 437 F. Supp. 2d at 537.
214 *Id.* at 538.
215 *Id.* at 539.
216 *See id.* at 536.

tion" program[217] raises obvious questions about the extent of executive power. As alleged, the program operates without treaty support, in violation of international human rights standards, as well as outside the contours of constitutional rights in the United States legal system, and it therefore raises serious questions of legality.[218] Yet the courts confronting these allegations have assumed away the problem by stating, in a conclusory way, that the "national interest" requires extraordinary rendition, or that separation of powers precludes further review.[219] The invocation of state secrets becomes a substitute for analysis as to how government powers and functions are actually divided, and the question whether rights were violated goes begging. The dismissals of both *Arar*[220] and *El-Masri*[221] were affirmed on appeal.

C. Litigation Management Issues

When the Supreme Court handed down its *Reynolds* decision in 1953, changes loomed on the national political horizon that would soon affect the work of federal courts drastically. The Court could not realistically have foreseen the greatly increased involvement of the federal courts, both in numbers and complexity, that would come in the 1960s with the implementation of the landmark desegregation case, *Brown v. Board of Education.*[222] Federal lawsuits on the civil side "dramatically increased in the 1960s."[223] Massive resistance by southern states and municipalities,[224] as well as entrenched patterns of segregation, compelled the federal courts to remain involved in protracted litigation that lasted as long as fifty years in one desegregation case.[225] Class action suits became both more common and more complex in the second half of the twentieth century, and the courts' techniques of case management in turn grew more sophisticated.[226] As one

217 *See id.* at 538.

218 *See generally id.* at 538–39.

219 *El-Masri*, 437 F. Supp. 2d at 539.

220 *See* Arar v. Ashcroft, 585 F. 3d 559, 563–64 (2d Cir. 2009).

221 *See* El-Marsi v. United States, 479 F.3d 296, 300 (4th Cir. 2007).

222 *See generally* Brown v. Bd. of Ed. of Topeka, 347 U.S. 483 (1954).

223 *See* David. S. Clark, *From Administration to Adjudication: A Statistical Analysis of the Federal District Courts in the Twentieth Century*, 55 S. CAL. L. REV. 65, 93 (1981); *see also* Lawrence Friedman, *Litigation and Society*, 15 ANN. REV. SOCIOLOGY 17, 22 (1989).

224 *See generally* Steve Barnes, *Federal Supervision of Race in Little Rock Schools Ends*, N.Y. TIMES (Feb. 24, 2007), http://www.nytimes.com/2007/02/24/education/24deseg.html.

225 *See id.*

226 *See* Clark, *supra* note 223, at 92–93.

commentator puts it, "[p]ublic law litigation moves the trial judge into an active role in managing and shaping the typical class action suit."[227] *Reynolds* was decided a year before *Brown*, and in the ensuing years the state secrets privilege outstripped the form in which it arose in *Reynolds*. More than just a reason for terminating litigation through dismissal or summary judgment, it led courts into management decisions about how far litigation should proceed, and in what form.[228] Complex federal litigation over civil rights,[229] federal tort claims[230] and other disputes proliferated, spanning years, or decades in some cases. Discovery masters were used in some cases to manage discovery. The basic outlines of state secrets practice announced in *Reynolds* were inadequate to address the multiplicity of discovery issues that arose in the litigation explosion of the latter half of the century.

The *Reynolds* opinion contains an oft-cited statement on litigation management, specifically concerning the question of courts' power to order *in camera* examination of documents:

> 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.[231]

The practical result of this language in the foundational *Reynolds* opinion has been the instantiation of an unclear standard (which often amounts to no standard, really) for when and how courts should conduct *in camera* document inspection.[232] As of 2005, "[i]n less than one-third of the reported cases in which the privilege [had] been invoked [had] the courts required in camera inspection of documents, and they [had] only required such inspection five times out of the twenty-three reported cases since the presidency of George H.W. Bush."[233] To be sure, actual document inspection is still relatively unusual, but it has become common practice for trial courts to view classified government declarations in private, and then to accept the assertion of the state secrets privilege based on those classified statements

[227] *Id.* at 93.
[228] Weaver & Pallitto, *supra* note 97, at 103.
[229] *See* Goodwin, *supra* note 1, at 191–92.
[230] *See* Friedman, *supra* note 223, at 22–24.
[231] United States v. Reynolds, 345 U.S. 1, 9–10 (1953).
[232] Weaver & Pallitto, *supra* note 97, at 101.
[233] *Id.*

alone.[234] In effect, the declaration substitutes for more substantive evidence. In some instances, such as the *El-Masri* and *Terkel* cases, the government submits two declarations: one classified and the other unclassified.[235] When the court relies on the classified document, no details are provided, and judicial discretion has been employed in an unreviewable fashion. In 2006, Judge Walker issued an opinion in *Hepting v. AT&T* that permitted the litigation to proceed, over the government's motion for dismissal, but only provisionally.[236] The court left open the possibility that dismissal or summary judgment might be appropriate at a later stage. Walker also made suggestions regarding the handling of document inspection and other discovery issues.[237] His response to executive secrecy in litigation was appealed by the government, and the appeal relied, predictably, on *Reynolds*.[238] Litigation management issues create dilemmas (and appeals)[239] for trial judges seeking to do justice to the parties' claims in secrecy-related cases.

D. State Secrets in Private Litigation

Another issue not contemplated in *Reynolds* is the use of the state secrets privilege in private litigation. Given the contours of the modern state secrets privilege, it is typically envisioned as a defense raised by the federal government in federal lawsuits against government defendants.[240] Indeed, that was how the issue arose in *Reynolds*, and in subsequent, well-known cases such as *Kasza v. Browner*, *Halkin v. Helms*, and *Ellsberg v. Mitchell*.[241] However, the late twentieth and early twenty-first centuries have brought a new development in state secrets law: an increasing number of private suits in which the state secrets privilege is raised.[242] *Reynolds* clear-

234 *See id.* at 87.

235 *See generally* El-Masri v. Tenet, 437 F. Supp. 2d 530, 535 (E.D. Va. 2006); Terkel v. AT&T Corp., 441 F. Supp. 2d 899, 902 (N.D. Ill. 2006).

236 Hepting v. AT&T Corp., 439 F. Supp. 2d 974, 1010 (N.D. Cal. 2006).

237 *Id.*

238 *See* Brief for United States at 27–28, Hepting v. AT&T Corp., 539 F. 3d 1157 (9th Cir. 2007) (No. 06-17137) 2007 WL 2051826.

239 *See generally* Weaver & Pallitto, *supra* note 97, for an analysis of appeals generated by litigation management issues.

240 *See generally* Goodwin, *supra* note 1 (examining government-imposed secrecy with respect to documents filed in federal court).

241 *See generally* Kasza v. Browner, 133 F.3d 1159 (9th Cir. 1998); Halkin v. Helms, 598 F.2d 1 (D.C. Cir. 1978); Ellsberg v. Mitchell, 709 F.2d 51 (D.C. Cir. 1983); *id.*

242 *See, e.g.*, Mohamed v. Jeppesen Dataplan, Inc., 614 F.3d 1070, 1079–80 (9th Cir. 2010).

ly says that the privilege "belongs to the government and must be asserted by it."[243] This means that in order for the privilege to arise in private litigation, typically the government as intervenor raises it in order to terminate the litigation,[244] but in at least one case discussed below it was a private party who raised the issue on its own.[245]

In some state secrets cases, the government acts as an intervenor. *Hepting v. AT&T* and *Terkel v. AT&T*, which challenged the Bush administration's warrantless wiretapping programs, initially took the form of suits by private parties or class plaintiffs against telecommunications carriers who allegedly assisted the government in carrying out wiretapping or records-gathering.[246] In both cases, however, the United States intervened and asserted the state secrets privilege.[247] One of the clearest articulations of the government's reason for doing so can be found in the transcript of the *Hepting* motion hearing.[248] It was incumbent on the attorney for the United States to explain why the suit could not proceed; it was not because the government stood to lose anything tangible by the discovery requests of the plaintiffs, but because any admission or denial by defendant AT&T might confer an advantage on terrorists seeking to utilize the communications networks owned by plaintiffs.[249] To understand the government's action here, the nature of an intervenor in a legal proceeding must be addressed: how does one gain access to an ongoing case and potentially affect the outcome?

"Intervenor" status is governed by Rule 24 of the Federal Rules of Civil Procedure, which stipulates the conditions for intervention both as of right and permissive.[250] The reason for regulating the entrance of intervenors into a lawsuit – the reason there is a standard that must be met to intervene – is to preserve the stake of the parties in the suit. F.R.C.P. 24(a) limits the

[243] United States v. Reynolds, 345 U.S. 1, 7 (1953).
[244] *Id.* at 7–8.
[245] *Id.*
[246] *See generally* Hepting v. AT&T Corp., 439 F. Supp. 2d 974 (N.D. Cal. 2006); Terkel v. AT&T Corp., 441 F. Supp. 2d 899 (N.D. Ill. 2006).
[247] *Hepting*, 439 F. Supp. 2d at 979; *Terkel*, 441 F. Supp. 2d at 901.
[248] *See generally* Transcript of Proceedings, Hepting v. AT&T Corp., 439 F. Supp. 2d 974 (N.D. Cal. 2006) (No. 06-cv-00672).
[249] *Id.* at 7–9.
[250] FED. R. CIV. P. 24.

right to intervene by allowing intervention as of right only when "the disposition of the action may as a practical matter impair or impede [an applicant's] ability to protect that interest, *unless the applicant's interest is adequately represented by existing parties*."[251] Similarly, F.R.C.P. 24 (b) limits permissive intervention by requiring the court to consider "whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties."[252] Thus, courts view a movant who wants to intervene in an ongoing action with at least some suspicion. Of course, the question in state secrets cases is not whether the federal government should be permitted to intervene in a matter involving national security, but rather what is the scope and nature of that intervention, and how does it complicate the litigation and affect the rights of the original parties? Given that the government in state secrets cases typically seeks dismissal or summary judgment, the effect on the original parties could not be more extreme.[253] In at least one case, the government raised an issue that would have been more appropriate for the defense to raise: that the case should be dismissed because the state secrets privilege would prevent the *private defendant* (*e.g.*, AT&T) from presenting an adequate defense.[254] This solicitude is unusual; the government's interest, presumably, is to keep certain information from entering the public domain via the discovery process.[255] Whether the defendant can effectively assert a defense is a separate question.[256] Information control could be accomplished even if the defendant lost the suit.[257] Dismissal on the pleadings is less risky in terms of information leaks than a suit that continues through discovery, but focusing on the defendant's strategic posture obfuscates the government's true concern. This is yet another procedural irregularity arising when the state secrets privilege is applied to private litigation. Of course, not all the wiretapping suits post-2005 were private.[258] *ACLU v. NSA* was a suit brought directly against the government, so the question of intervention did not arise in that case.[259]

In *Crater Corp. v. Lucent Technologies*, the United States intervened in

251 FED. R. CIV. P. 24(a) (emphasis added).
252 FED. R. CIV. P. 24(b).
253 *See, e.g.*, Mohamed v. Jeppesen Dataplan, Inc., 614 F.3d 1070 (9th Cir. 2010).
254 *See* Hepting v. AT&T Corp., 439 F. Supp. 2d 974, 985 (N.D. Cal. 2006).
255 *Id.*
256 *Id.*
257 *Id.*
258 *See, e.g.*, Am. Civil Liberties Union v. Nat'l Sec. Agency, 493 F.3d 644 (6th Cir. 2007).
259 *See generally id.*

what had originally been a patent infringement/trade secret dispute between two private entities.[260] Crater sued Lucent over an alleged patent infringement involving an underwater connecting device (a "coupler") for fiber optics.[261] The government intervened to prevent discovery related to the coupler, alleging that national security would be at risk if any information about the device were disclosed.[262] Potentially, this intervention would deprive Plaintiff Crater Corp. of its right of action, and predictably, Defendant Lucent tried to extricate itself from the suit by characterizing the main issue in the case as a dispute between Crater and the government that should be settled in the Court of Claims.[263] A fight over disclosure ensued in the trial court.[264] The government claimed it could not provide *any* of the 26,000 documents implicated by Crater's discovery request, but the trial judge examined those documents *in camera* and ordered the government to release some of them.[265] The government refused to do so, and submitted instead, at a show cause hearing, a classified declaration explaining its need for secrecy.[266] The trial court changed its position at that point and dismissed the complaint.[267] Crater disputed the secrecy of the documents, citing deposition testimony in which Lucent employees actually denied that the coupling device was, in fact, a classified government secret.[268] In the end, the Federal Circuit remanded for a more precise determination of the issues involved.[269] "[W]e do not believe," the court stated, "the record in the case . . . is sufficiently developed to enable a determination as to the effect of the government's assertion of the privilege on those claims."[270] This ruling did not resolve the dispute, but served simply to clarify the issues on the remand.

The dissenting judge agreed that further proceedings were needed, but took issue with the assertion of the state secrets privilege, noting that the appeals court had seen "only one of the 26,000 documents, which contain[ed] . . . only the general statement that (unidentified) documents were reviewed (by somebody unnamed) and claim[ed] the state secrets privilege

[260] Crater Corp. v. Lucent Tech., Inc, 423 F.3d 1260, 1263 (Fed. Cir. 2005).
[261] *Id.* at 1262.
[262] *Id.* at 1263.
[263] *Id.* at 1263–64.
[264] *Id.*
[265] *Id.* at 1264–65.
[266] *Crater Corp.*, 423 F.3d at 1265.
[267] *Id.*
[268] *Id.* at 1269.
[269] *Id.*
[270] *Id.* at 1268.

without limitation."[271] In the dissent's view, this did not constitute sufficient particularity for an assertion of the privilege, and such a broad assertion, if accepted, would create "obstacles . . . that may be insurmountable" for the plaintiffs on remand.[272]

The *Crater* case illustrates several troubling aspects of the current state secrets privilege as applied to private litigation. First, it shows that intervention by the government can easily bring an end to an ongoing dispute, as discovery can be completely blocked by the government intervenor.[273] Second, the government can effectively resist discovery rulings by a trial judge who has reviewed allegedly secret materials.[274] Thus, an *in camera* review is a crucial safeguard in state secrets cases, for it allows an independent judicial determination of secrecy apart from what the executive claims.[275] However, the court's ability to inspect documents and order that they be provided to opposing counsel must be clear and undisputed. Finally, the particularity requirement in the executive's review of purportedly secret information must be enforced, or private litigants risk losing the ability to litigate their claims as soon as the government simply asserts that secret documents are involved.[276] Here, Crater claimed to know that many of the documents had already been made public,[277] and yet the executive branch successfully asserted that the documents were secret, apparently without fully examining them.[278] Although the court in Crater did order a clarification of the issues before allowing the state secrets privilege to shut the case down,[279] it did not go far enough in ordering the government to make a particularized showing. The risk of injustice is clear, and it presents itself in other private litigation as well.

E. State Secrets Within the Secret Presidency

The significance of the state secrets privilege has also changed along

[271] *Id.* at 1270 (Newman, J., concurring in part and dissenting in part).
[272] *Crater Corp.*, 423 F.3d at 1269 (Newman, J. concurring in part and dissenting in part).
[273] *See id.*
[274] *See id.*
[275] *See id.* at 1264-65.
[276] *See id.* at 1265 (stating that the privilege is not to be lightly invoked).
[277] *Id.* at 1267.
[278] *Compare Crater Corp.*, 432 F.3d at 1264-65, *with Crater Corp.*, 423 F.3d at 1270 (Newman, J., dissenting).
[279] *Crater Corp.*, 423 F.3d at 1262 (stating that the case was remanded for reconsideration at the trial court level).

with institutional developments in presidential power.[280] The state secrets doctrine is but one weapon in an arsenal of techniques that began to take shape in the post-Watergate period, and the development of which was accelerated by the Bush administration.[281] The state secrets privilege in isolation is very different from the privilege as part of institutionalized secrecy. When the state secrets privilege is seen alongside expanded executive privilege, greater surveillance powers, increased classification authority, and the ability to search, seize, and detain pursuant to terror investigation, it becomes far more threatening. The state secrets privilege can be used after the fact to cover up executive overreaching and, in anticipation of its use, the executive can confidently keep its activities secret and engage in conduct that would bring criticism if the public learned about it. The flurry of state secrets-related litigation following 9/11 is a testament to the Bush administration's vigorous use of the privilege, and in fact many of the cases cited in this Part arose in that period.

Aggressive use of the privilege can be a double-edged sword, however, and may produce unintended effects. While the state secrets privilege has been invoked successfully many times since 9/11, it is also true that federal courts have generated more case law on the issue since then. Sometimes that case law has gone against the government (at least pending appeal, as in *Hepting*),[282] but regardless of the outcome of each individual case, it is undeniable that there are new issues, new questions, and new approaches to managing discovery disputes arising from courts around the country at both the trial and appellate levels. It is far from settled law.

Fifty years ago, the *Reynolds* court could not have foreseen the current controversy over anti-terror programs (their necessity and the threats such programs pose to civil liberties). Today, those very programs form the subject matter of many state secrets cases. It is clear that the doctrine has become unwieldy, and that the broad, unfettered protective rule that has governed these cases for over fifty years is inadequate to balance the compelling claims of national security on the one hand and government accountability for civil liberties violations (and other violations of law) on the other.

The state secrets doctrine is ripe for judicial rethinking. *Reynolds* has created numerous problems, and the Supreme Court would do well to over-

[280] *See* ROBERT M. PALLITTO & WILLIAM G. WEAVER, PRESIDENTIAL SECRECY AND THE LAW, 84–93 (2007).
[281] *Id.* at 42.
[282] Hepting v. AT&T Corp., 439 F. Supp. 2d 974 (N.D. Cal. 2006).

rule the decision. At the very least, the decision could be narrowed and applied in more flexible ways, emphasizing certain parts of the holding. For example, the increased use of *in camera* inspection noted above is discussed by the *Reynolds* court (albeit in contradictory ways);[283] more extensive use of that process would counteract overuse of the privilege because judges would review the purportedly secret material. Similarly, by focusing on the declaration that "judicial control over evidence in a case cannot be abandoned to the caprice of executive officers,"[284] federal courts could emphasize accountability rather than secrecy. Even if state secrets cases are unique and best treated on a case-by-case basis, there is still room for fashioning a larger role for the courts. Paramount in that role must be the courts' ability to secure compliance with discovery orders and to compel *in camera* submissions when such submissions are necessary to do justice. Self-serving declarations of why secrecy protection is appropriate are no substitute for reviewing actual documentary evidence alleged to contain state secrets. We must believe that the role of courts in protecting individuals against government abuse is just as important as the role of the executive in safeguarding national security.

F. Mosaics and State Secrets: A Brief History

Although mosaics have already been mentioned in this section, a brief review of their history in state secrets litigation is in order. The 1979 case of *Halkin v. Helms* saw the first use of the mosaic theory in the state secrets context.[285] *Halkin* involved warrantless surveillance of the communications of antiwar activists during the Vietnam War.[286] In discovery, the plaintiffs sought to know "whether international communications of the plaintiffs have been acquired by the NSA and disseminated to other federal agencies."[287] Here, the information sought by the plaintiffs was not substantive. This discovery request did not concern the content of intercepted communications. Nor did it involve what is called "sources and methods" of intelligence gathering. Rather, the discovery question at issue had to do with the *path* of information from one federal agency to others.[288] It is difficult to

283 United States v. Reynolds, 345 U.S. 1, 9-10 (1953).
284 *Id.*
285 Halkin v. Helms, 598 F.2d 1, 8-9 (D.C. Cir. 1978).
286 *Id.* at 3.
287 *Id.*
288 *Id.*

see how the simple confirmation or denial that information had been obtained and/or shared would endanger national security. To put this problem slightly differently, the government needed to articulate a nexus between the contested discovery request and its ability to safeguard national security in a case where that nexus would be far from obvious to the observer.[289] When that nexus was described by the government and accepted by the court, the D.C. Circuit articulated it as follows, in what would become the foundational use of the mosaic theory in state secrets cases:

> It requires little reflection to understand that the business of foreign intelligence gathering in this age of computer technology is more akin to the construction of a
> mosaic than it is to the management of a cloak and dagger affair. Thousands of bits and pieces of seemingly innocuous information can be analyzed and fitted into place to reveal with startling clarity how the unseen whole must operate.[290]

Thus, "[t]housands of bits and pieces of seemingly innocuous information" could now be shielded from disclosure on the grounds that they might help to construct a mosaic of intelligence operations at some later point.[291] As such, the state secrets privilege could be used to protect "innocuous" information that had no national security implications on its face. Moreover, the application of the mosaic concept here would require future plaintiffs to "prove a negative" once the government asserted state secrets privilege in mosaic form[292] – which the government had every reason to do, of course, given the all but boundless new parameters of the doctrine. In the face of a mosaic claim, plaintiffs would be required to demonstrate that the information at issue could *never* form even a small part of any narrative related to national security.[293] Of course, it is impossible to show that any particular piece of information could not be utilized to construct a mosaic with larger implications. In state secrets cases, then, to state the mosaic theory is to raise an insurmountable obstacle to proceeding with discovery.

The mosaic theory was applied once again in the case of *Kasza v. Browner*,[294] a suit arising out of injuries suffered by workers at the infamous "Area 51" site near Groom Lake in Nevada. Workers at the site had

289 *Id.* at 8.
290 *Id.*
291 Halkin v. Helms, 598 F.2d at 8.
292 *Id.* at 9 (stating that courts are to give government agency's claim's of privilege the "utmost deference").
293 *Id.* at 8–9.
294 Kasza v. Browner, 133 F.3d 1159, 1169–70 (9th Cir. 1998).

developed a skin disease and sought, among other things, information regarding the chemicals to which they had been exposed so that they could treat their illness properly.[295] These requests were denied, and counsel for the plaintiffs was subjected to searches and threats. A protective cloak of secrecy was thrown around the facility, its operations and every piece of information associated with it, including the facility's name. The court assisted in this coverture by invoking the mosaic theory:

> Protection through classification is required if the combination of unclassified items of information provides an added factor that warrants protection of the information taken as a whole. This theory of classification is commonly known as the mosaic or compilation theory. The mosaic theory of classification applies to some of the information associated with the operating location near Groom Lake. Although the operating location near Groom Lake has no official name, it is sometimes referred to by the name or names of programs that have been conducted there. The names of some programs are classified; all program names are classified when they are associated with the specific location or with other classified programs. Consequently, the release of any such names would disclose classified information.[296]

The *Kasza* opinion treats classification and state secrets as coextensive, eliminating the possibility that classified information could eventually become public knowledge.[297] It is striking that a place like "Area 51," well-known in the popular press[298] and the subject of television shows,[299] would require such a degree of secrecy that even its name could not be confirmed.[300]

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295 *Id.* at 1162.

296 *Id.* at 1181–82.

297 *Id.* at 1170.

298 *See, e.g.*, *Area 51 News Articles*, Dreamland Resort, http://www.dreamlandresort.com/area51/news_articles.html (last modified Oct. 16, 2012).

299 *See, e.g.*, *National Geographic Search*, National Geographic, http://www.nationalgeographic.com/search/?search=area+51 (last visited Nov. 9, 2012).

300 *Kasza*, 325 F. 3d at 1281–82 (Wood, J., concurring) ("After oral argument in the successive appeal, I initially indicated my approval of the draft submitted by Judge Rymer. However, while the case was still pending, I viewed a History Channel documentary entitled 'Area 51: Beyond Top Secret.' I have sent the other panel members copies of this documentary. Ordinarily I would not consider something that appeared on the television and was not a part of the record. I recognize that the information contained in the video has not been confirmed or denied by the government, and this concurrence is not intended to vouch one way or the other as to its truth. I do, however, believe this documentary is pertinent. In the documentary, counsel for plaintiffs, Professor Jonathan Turley of George Washington University, makes the point that all he wanted for his clients in these cases was to gain knowledge that would aid in their treatment, and not a big money judgment against the government. I write separately to urge the

After 9/11, the mosaic theory was offered with vigor in state secrets cases.[301] Whistleblower Sibel Edmonds, an FBI translator, was fired after complaining about malfeasance in her office, where translation of important terrorism-related documents took place.[302] Following her termination, she sued twice: once to contest her discharge[303] and once to compel production of certain documents related to her situation.[304] The government claimed the state secrets privilege in both cases.[305] In the FOIA case, the trial judge dismissed the suit based on the state secrets privilege and cited the mosaic theory to bar disclosure of a wide range of facts, including some facts that were under the control of the plaintiff herself.[306] In the termination suit, the trial judge opined that since the threat of global terrorism would not abate anytime soon, the rationale for barring plaintiff's suit from proceeding would be longstanding.[307] Accordingly, she should not expect the courts to examine evidence related to the "war on terror," in this or any other proceeding, for the foreseeable future.[308]

In *Doe v. Gonzales*,[309] the plaintiffs challenged the use of National Security Letters ("NSLs") to obtain library records under the PATRIOT Act. This challenge was based on the First Amendment's free speech clause;[310] the suit alleged that the prohibition on disclosure of NSLs was a content-based speech restriction and was therefore invalid.[311] In response to plaintiff's First Amendment challenge, the government's assertion of a compelling interest was based on national security concerns, and it implicated the mosaic theory by virtue of the attenuated and speculative national security harms that might result from disclosure of the existence of specific NSLs.[312] The court disagreed:

government, now that these cases are concluded, to strongly consider releasing any information possible which might aid plaintiffs. That is unless, of course, there is no information which might help them, or if the disclosure of any helpful information that may exist would still risk significant harm to national security under the mosaic theory.").

301 David Pozen, *The Mosaic Theory, National Security, and the Freedom of Information Act*, 115 YALE L. J. 628 (2005).

302 Edmonds v. U.S., 436 F. Supp. 2d 28, 30–31 (D.D.C. 2006).

303 *Id.* at 28-38.

304 Edmonds v. U.S. Dep't of Justice, 323 F. Supp. 2d 65 (D.D.C. 2004); Edmonds v. U.S. Dep't of Justice, 405 F. Supp. 2d 23 (D.D.C. 2005).

305 *Edmonds*, 323 F. Supp. 2d at 68.

306 *Edmonds*, 405 F. Supp. 2d at 32–33.

307 *Edmonds*, 323 F. Supp. 2d at 82.

308 *Id.* at 82 n. 7.

309 Doe v. Gonzales, 386 F. Supp. 2d 66 (D. Conn. 2005).

310 *Id.* at 69.

311 *Id.* at 73–74.

312 *Id.* at 75-76.

Thus, it does not appear that this "mosaic" argument has been used in this type of context. However, even if it were appropriate, the defendants' conclusory statements that the mosaic argument is applicable here, absent supporting facts, would not suffice to support a judicial finding to that effect. The court asked the defendants' counsel at oral argument if he could confirm there was a "mosaic" in this case: were there other bits of information which, when coupled with Doe's identity, would hinder this investigation. Counsel did not do so.[313]

By finding that the "compelling interest" in protecting national security asserted by the government as justification for its content-based speech restriction was insufficient, the district court rejected the mosaic theory in this initial trial court ruling.[314]

The litigation did not end there, however. The Reauthorization Act changed some of the requirements for NSLs,[315] and the case was remanded, going through several more rounds as the governing statutory law changed.[316] In the end, however, the *Doe* case stands as an example of a court probing beyond the mere assertion of the mosaic theory and requiring the government to explain what would comprise the mosaic by fleshing out its frame. To be sure, the First Amendment claim provided a unique doctrinal "hook" on which to hang this ruling limiting executive secrecy, but the court was willing to use it.

To some extent, what is at work in the state secrets-related use of the mosaic theory is simply an opportunistic move by the executive to increase power. If a legal doctrine has been offered in the past and accepted wholesale by the courts, why not take advantage of it? As has been pointed out elsewhere,[317] there is no downside to asserting the state secrets privilege generally and the mosaic theory in particular. There have been dissenting voices along the way (Judge Bazelon in *Halkin*, for example),[318] but too of-

313 *Id.* at 78.

314 *Id.*

315 USA Patriot Improvement & Reauthorization Act of 2005, Pub. L. No. 109-177, §§ 115- 119, 120 Stat. 211 (2005).

316 *See* Doe v. Mukasey, 549 F.3d 861, 885 (2d Cir. 2008).

317 *See* William G. Weaver & Robert M. Pallitto, *State Secrets and Executive Power*, 120 POL. SCI. Q. 85, 111 (2005)

318 *See* Halkin v. Helms, 598 F.2d 1, 11-12 (D.C. Cir. 1978) (Bazelon, J., commenting).

ten the majority of the appellate panel defers to the government's mosaic-based secrecy claim.[319]

Another protracted legal dispute arose out of the practice of "extraordinary rendition."[320] In addition to the *Arar* and *El-Masri* cases discussed above, there was an attempt to sue the Jeppesen company as a private defendant.[321] Jeppesen, a subsidiary of Boeing, was under contract with the CIA to provide flight planning and logistical support for rendition flights, and several rendition victims filed suit against Jeppesen.[322] The United States intervened in the suit and then attempted to shut it down, arguing that the very subject matter of the case – the rendition program, whose existence they would neither admit or deny – was a state secret and that therefore the case must be found barred by *Totten* or dismissed at the outset.[323] Though the district court initially agreed,[324] a panel of the Ninth Circuit did not.[325]

The Ninth Circuit voted to rehear the case *en banc*, and this time they found in favor of the government intervenor and Jeppesen.[326] It must be pointed out that this was not a formal invocation of mosaic, but the government's legal position was certainly inspired by the doctrine. The court considered the following information to require protection from disclosure:

Information that would tend to confirm or deny whether Jeppesen or any other private entity assisted the CIA with clandestine intelligence activities; information about whether any foreign government cooperated with the CIA in clandestine intelligence activities; information about the scope or operation of the CIA terrorist detention and interrogation program; any other information concerning CIA clandestine intelligence operations that would tend to reveal intelligence activities, sources, or methods.[327]

And once again, the court here faced the problem of disentangling non-

319 Weaver & Pallitto, *supra* note 97, at 86.

320 *See generally* Mohamed v. Jeppesen Dataplan, Inc., 539 F. Supp. 2d 1128 (N.D. Cal. 2008)

321 Arar v. Ashcroft, 414 F. Supp. 2d 250 (E.D.N.Y. 2006); El-Masri v. Tenet, 437 F. Supp. 2d 530 (E.D. Va. 2006); Mohamed v. Jeppesen Dataplan, Inc., 539 F. Supp. 2d 1128, 1130 (N.D. Cal. 2008).

322 *Mohamed*, 539 F. Supp. 2d at 1132.

323 *Id.* at 1132–33.

324 *Id.* at 1128.

325 Mohamed v. Jeppesen Dataplan, Inc., 563 F.3d 992, 993 (9th Cir. 2009).

326 Mohamed v. Jeppesen Dataplan, Inc. 614 F.3d 1070 (9th Cir. 2010).

327 *Id.* at 1086.

privileged evidence from privileged items.[328] Implicitly, then, this is a mosaic-type case, even if the government does not designate it as such. The aim is to prevent potential terrorists from assembling information about rendition into a mosaic that could facilitate future terror attacks.[329]

Though the Ninth Circuit sitting en banc ruled to dismiss the suit[330] (thus overturning the panel decision), their analysis was complex. First, the court held the *Totten* bar did not definitively apply to suits where, as here, the plaintiffs had no contractual relationship with the government and it was not clear that the "very subject matter of the case was a state secret."[331] Thus, the case would have to be decided under the *Reynolds* framework. Equally interesting, the court found that, as of 2010, the extraordinary rendition program was not a state secret.[332] Nonetheless, there was no way, the court felt, to proceed to discovery without implicating state secrets.[333]

In an impassioned dissent, several judges said, among other things, that dismissing the case at the pre-discovery stage sent the "wrong message" to the district court.[334] The lower court should be required and expected to engage in evidentiary review even though the case involved state secrets.[335] The dissent also appended to the opinion a long chart listing the public source documents and what factual propositions they established.[336] Reviewing the chart, one can see that all of the referenced documents are publicly available.[337]

At times, judicial impatience with overbroad assertions of state secrets shows through. Federal judge Royce Lamberth presided over a decade-long suit by a DEA employee alleging that the CIA had illegally wiretapped his residence.[338] Initially dismissed on state secrets grounds,[339] the case was reinstated when the court learned that the government lied, falsely asserting that a certain CIA employee was a covert operative when in fact it knew

328 *Id.* at 1082.
329 *Id.* at 1073.
330 *Id.* at 1093.
331 *Id.* at 1084 (finding that the court did not need to conclusively resolve those issues because state secrets compelled dismissal in any event).
332 *Mohamed*, 614 F.3d at 1090.
333 *Id.* at 1088–89.
334 *Id.* at 1095 (Hawkins, J., Schroeder, J., Canby, J., Thomas, J., and Paez, J., dissenting).
335 *Id.*
336 *Id.* at 1102-31.
337 *Id.*
338 Horn v. Huddle, 636 F. Supp. 2d 10, 13 (D.D.C. 2009).
339 *Id.*

that he was not.[340] "The deference generally granted the executive branch in matters of classification and national security must yield," Lamberth wrote, "when the Executive attempts to exert control over the courtroom."[341] Lamberth also sought sanctions against the officials who had made the false statements.[342] When the case resumed, the government continued to assert the state secrets privilege to cover a wide range of information.[343] Among other things, government lawyers argued that a government-issue coffee table, allegedly containing a listening device, was a state secret.[344] Judge Lamberth noted that this equipment could hardly be considered a state secret since a similar table stood on display at the Spy Museum in Washington, D.C.[345]

Horn v. Huddle did not involve a direct application of the mosaic theory. Two points are notable here, though. First, this case offered an opportunity to see how the privilege could be asserted to cover information whose disclosure could not realistically threaten harm to the United States.[346] As in *Jeppesen*[347] and *Al-Haramain*,[348] there were already alternative public sources of the same information.[349] In addition, though the mosaic theory was not explicit here, *Horn* shows how the mosaic concept loses explanatory force when relevant information is already in the public domain. The goal of state secrets protection and the goal of the government when advancing the mosaic theory in state secrets cases are similar: to keep someone – presumably, enemies of the United States – from using certain information to effect harm. Thus, the mosaic concept in its restrictive form is parasitic on the state secrets privilege. Its force and continued relevance are derived from the larger concept of state secrets protection.

III. THE MOSAIC THEORY IN POST-9/11 HABEAS CORPUS PROCEEDINGS

As part of its "war on terror," the Bush administration sought to detain individuals for an indefinite period of time when those individuals were

340 *Id.* at 15.
341 Horn v. Huddle, 647 F. Supp. 2d 55, 65–66 (D.D.C. 2009).
342 *Horn*, 636 F. Supp. 2d at 20.
343 *Id.* at 16.
344 *Id.* at 17 n. 9.
345 The case was subsequently settled and the opinions vacated by 699 F. Supp. 2d 236 (D.D.C. 2010).
346 *Horn*, 636 F. Supp. 2d at 16.
347 *Mohamed*, 539 F. Supp. 2d at 1135.
348 Al-Haramain Islamic Found., Inc. v. Bush, 507 F.3d 1190, 1193 (9th Cir. 2007).
349 *See, e.g.*, *Horn*, 636 F. Supp. 2d at 17 n. 9.

suspected of connections to terrorist groups.[350] Often these detainees were not charged with any crime, but were simply detained and, in most cases, interrogated.[351] In addition, the administration wanted to keep the detainees out of the federal courts. A struggle ensued between the administration and the Supreme Court over the extent to which these two objectives — indefinite detention and no access to the courts — could be pursued.[352] Between 2004 and 2008, the Court handed down four important decisions involving detainees' rights: *Hamdi v. Rumsfeld*,[353] *Rasul v. Bush*, [354] *Hamdan v. Rumsfeld*[355] and *Boumediene v. Bush*.[356] *Hamdi* concerned the ability of the executive to detain U.S. citizens in the course of the war on terror.[357] The Court acknowledged that the executive could, in fact, detain "enemy combatants" under the authority of the Authorization for Use of Military Force ("AUMF") for the duration of the conflict,[358] but insisted that certain procedural safeguards had to be provided to those detainees, including a hearing to determine whether they were properly classified as enemy combatants.[359] In *Rasul,* the Court ruled that detainees at Guantanamo fell under the federal habeas statute.[360] In the 2006 case of *Hamdan v. Rumsfeld*, the Court ruled that the military commissions being used to try some of the detainees were unlawful, as they violated the Uniform Code of Military Justice[361] and the international law standards of legal process codified therein.[362] Finally, in *Boumediene v. Bush*, the Court ruled in 2008 that detainees at the Guantanamo detention facility had the right to petition for habeas corpus in federal court.[363] Since Congress had not suspended the writ in accordance with Article One of the Constitution,[364] habeas corpus was available to challenge detention.[365]

350 *See* Norman C. Bay, *Executive Power and the War on Terror*, 83 DENV. L. REV. 335, 352 (2005).
351 *See, e.g.*, Hamdi v. Rumsfeld, 542 U.S. 507, 510–11 (2004).
352 *See* Boumediene v. Bush, 553 U.S. 723 (2008); Hamdi v. Rumsfeld, 542 U.S. 507 (2004); Hamdan v. Rumsfeld, 548 U.S. 557 (2006); Rasul v. Bush, 542 U.S. 466 (2004).
353 *Hamdi*, 542 U.S. 507.
354 *Rasul*, 542 U.S. 466.
355 *Hamdan*, 548 U.S. 557.
356 *Boumediene*, 553 U.S. 723.
357 *Hamdi*, 542 U.S. at 509 (2004).
358 Authorization for Use of Military Force, Pub. L. 107-40, 115 Stat. 224 (2001); *id.* at 517.
359 *Id.* at 532–33.
360 *Rasul*, 542 U.S. at 466–67.
361 *Hamdan*, 548 U.S. at 624–25.
362 *Id.*
363 *Boumediene*, 533 U.S. at 723–24.
364 *Id.*
365 *Id.*

Baher Azmy has shown that the *Boumediene* decision generated a "new common law of habeas."[366] Once the Supreme Court found in *Boumediene* that Guantanamo detainees were entitled to petition for habeas corpus, the number of those petitions lodged with the federal courts multiplied, and the courts needed to develop procedural and substantive decisional rules they could apply consistently as litigants presented habeas petitions for review.[367] There was a certain amount of novelty here. Federal courts review many habeas petitions each year,[368] of course, but there are obvious differences, as Azmy notes, between petitioners making collateral challenges to criminal convictions on the one hand, and suspected terrorists detained without charges and seeking release from executive detention on the other.[369] The most salient procedural difference is the type of determination being challenged. In criminal cases, a habeas petitioner typically has been convicted and has exhausted available appeals.[370] The habeas petition is a collateral challenge to the fact of confinement but it often (though not always) involves a claim of rights violation in the context of the criminal trial.[371] Post-9/11 executive detainees, by contrast, challenge their classification as enemy combatants.[372] When the Supreme Court ruled in *Hamdi* that the executive branch could detain enemy combatants as part of the war on terror, the Court also required that anyone detained as an "enemy combatant" be provided with a hearing before a Combatant Status Review Tribunal ("CSRT").[373] The CSRT hearing would produce a determination that each detainee had been properly classified as an enemy combatant.[374]

Both before and after the *Boumedien*e decision, the federal courts heard

366 *See* Robert M. Pallitto, *The Legacy of the Magna Carta in Recent Detainees' Rights Decisions,* 43 POL. SCI. & POL. 483, 483–86 (2010).

367 *See* Azmy, *supra* note 35, at 448–50.

368 Joseph L. Hoffmann & Nancy J. King, Op-Ed., *Justice, Too Much and Too Expensive*, N.Y. TIMES, Apr. 16, 2011, www.nytimes.com/2011/04/17/opinion/17hoffmann.html.

369 Azmy, *supra* note 35, at 514.

370 *See* 28 U.S.C. § 2254(b)(1)(A); *see, e.g.*, Coleman v. Thompson, 501 U.S. 722, 731 (1991) ("This Court has long held that a state prisoner's federal habeas petition should be dismissed if the prisoner has not exhausted available state remedies as to any of his federal claims.").

371 *See* 28 U.S.C. § 2254(b)(1)(A); *see, e.g.*, Rose v. Lundy, 455 U.S. 509, 510–11 (1982) (considering petitioner's allegations that he had been denied the right to a fair trial on four grounds).

372 *See, e.g.*, Hamdi v. Rumsfeld, 542 U.S. 507, 510–11 (2004); *cf.* § 2241(e), *recognized as unconstitutional by* Noriega v. Pastrana, 564 F.3d 1290 (11th Cir. 2009).

373 *Hamdi*, 542 U.S. at 509.

374 *See id.* at 533–34.

detainee petitions alleging unlawful confinement.[375] Once again, the government asserted the mosaic theory as a means to defeat those petitions.[376] Here, the mosaic was offered by the government in an *expansive* sense: they sought to construct (or at least begin to construct in broad outline) a mosaic of interrelated facts that showed the necessity of continuing to detain a given individual.[377] In other words, the government invited the court to view the mosaic it had constructed so that the court would see why detention was necessary and release dangerous. Courts reviewing habeas petitions, however, have not always accepted the expansive conception of the mosaic theory the government offers.[378]

The case of *Ali Ahmed v. Obama*[379] is one instance where this judicial reluctance can be seen, at least at the trial level. Ali Ahmed's habeas petition was adjudicated in 2009, post-*Boumediene*.[380] The district judge undertook a searching review of the evidence and ultimately ruled in favor of the habeas petitioner, granting his petition.[381] The judge also discussed the mosaic theory at some length, suggesting in the process some limits to application of that theory in habeas cases. The government had sought to construct a mosaic of circumstantial evidence that would justify the petitioner's continued detention. The government presented a collection of bits of evidence that did not prove unlawful activity standing alone, but could allegedly be imbricated in a mosaic that could depict enemy combatant activity. It is important to keep in mind that the standard of proof in the detention cases is a preponderance of the evidence rather than reasonable doubt.[382] Nonetheless, the judge did not find the government's case sufficient to carry even that burden. Invoking mosaic imagery, the court said,

Even using the Government's theoretical model of a mosaic, it must be acknowledged that the mosaic theory is only as persuasive as the tiles which compose it and the glue which binds them together – just as a brick wall is only as strong as the individual bricks which support it and the cement that keeps the bricks in place. Therefore, if the individual pieces of a

375 *Compare* Hamdan v. Rumsfeld, 548 U.S. 557, 566-67 (2006), *with* Mohammed v. Obama, 704 F. Supp. 2d 1, 2–4 (D.D.C. 2009).

376 *See, e.g.*, *Mohammed*, 704 F. Supp. 2d at 7–8.

377 *See, e.g.*, *id.* at 7.

378 *See, e.g.*, Ahmed v. Obama, 613 F. Supp. 2d 51, 66 (D.D.C. 2009).

379 *Id.*; *see also* Azmy, *supra* note 35, at 523.

380 *Ahmed*, 613 F. Supp. 2d at 51.

381 *Id.* at 52.

382 *See, e.g.*, Al-Adahi v. Obama, No. 05-280(GK), 2009 WL 2584685, at *1, *2 (D.D.C. Aug. 21, 2009), *rev'd*, 613 F.3d. 1102 (D.C. Cir. 2010).

mosaic are inherently flawed or do not fit together, then the mosaic will split apart, just as the brick wall will collapse. [383]

Two of the most significant pieces of evidence offered alleged that Ali Ahmed received military training at a training camp in Afghanistan,[384] and the fact that he had adopted a *kunya*, or special name. It was alleged that terrorists often take on *kunyas* (in order to escape detection), but non-terrorists adopt them as well.[385] Also, there was evidence that petitioner stayed in a guesthouse in Faisalabad, which had been used at times by Al Qaeda members.[386] The opinion contains numerous redactions, which make it difficult for the reader to get a clear sense of the presentation, but what does come across clearly is the highly inferential nature of the evidence against the detainee.[387] In order to conclude that there was sufficient evidence to justify continued detention (that is, a preponderance tending to show that Ali Ahmed supported or took part in hostilities against the United States or its partners), the court would have to indulge a number of inferences from the established facts, such as there were. Petitioner had allegedly taken a *kunya* and stayed in a guesthouse in Afghanistan where Al Qaeda members had also stayed; taken together, the government claimed these facts should be used to infer that petitioner was an enemy combatant.[388] The judge was unwilling to make these inferences.[389]

Given the nature of the proceedings by which detainees were classified as enemy combatants in the first place,[390] it would be warranted to conclude that the mosaic theory is particularly inapt when applied to justify continued detention. The hearing process was so disadvantageous to detainees and so heavily weighted to favor the government that the mosaic-type evidence presentations made by the government at the habeas stage simply compounded the already-significant injustice of the initial classificatory process.

The post-*Boumediene* habeas proceedings involved petitioners who had been classified following hearings before a Combatant Status Review Tribunal ("CSRT").[391] Information obtained from the Department of Defense

383 *Id.* at *5.

384 *Ahmed*, 613 F. Supp. 2d at 59, 63.

385 *Id* at 63; *see also* Mohammed v. Obama, 704 F. Supp. 2d 1, 8–9 (D.C. Cir. 2009) (explaining traditional use of *kunyas* and alleged terrorist use to evade detection).

386 *Id.*

387 *See generally id.*

388 *Id.* at 59.

389 *Id.* at 66.

390 *See Ahmed*, 613 F. Supp. 2d at 53.

391 MARK DENBEAUX & JOSHUA DENBEAUX, NO-HEARING HEARINGS, 2 (2006), *available at*

through the Freedom of Information Act ("FOIA") requests and in the course of habeas proceedings depicts a hearing process that falls far short of fundamental procedural fairness.[392] In a report entitled *No-Hearing Hearings*, Mark and Joshua Denbeaux present statistics on 558 CSRT hearings.[393] Among many striking statistics, the authors report that in 96% of the cases for which information was available, "[t]he Government did not produce any witnesses in any hearing and did not present any documentary evidence to the detainee prior to the hearing."[394] Moreover, all defense requests to call witnesses from outside Guantanamo were denied,[395] and 74% of defense requests to call witnesses who were *inside* Guantanamo were also denied.[396] Although a personal representative (instead of a lawyer) was assigned to each detainee at the hearing, those individuals frequently failed to participate, and sometimes advocated for the government.[397] Thus, the subsequent habeas hearings entailed review of a record that was developed in conditions most unfavorable to the detainee. One might suspect that the procedural unfairness of the CSRT hearing would make the habeas proceeding easier to win, in the sense that the process violations could be shown to amount to detention in violation of the law. This has not been the case, however. Instead, government attorneys have tried to bootstrap the CSRT findings onto a defense of the detention at the habeas stage by using the mosaic theory.

Despite the difficulties facing the detainee at a CSRT hearing, three of the cases Denbeaux and Denbeaux surveyed did, in fact, result in a finding that the detainee was not, or was no longer, an enemy combatant.[398] Thus, three detainees were able to overcome the difficult procedural obstacles and establish that their detention was improper, even by the government's own standard.[399] However, two of the three victorious individuals were reexamined at a second CSRT and found to be enemy combatants.[400] The third victorious individual actually won a *second* hearing as well, at which point he was ordered adjudicated a third time.[401] The third time, he lost,

http://law.shu.edu/publications/guantanamoReports/final_no_hearing_hearings_report.pdf.

392 *See generally id.*

393 *Id.*

394 *Id.* at 2.

395 *Id.* at 2–3.

396 *Id.* at 3.

397 DENBEAUX, *supra* note 391, at 3.

398 *Id.*

399 *Id.*

400 *Id.*

401 *Id.*

and was declared an enemy combatant.[402]

Baher Azmy underscores the importance of the habeas remedy for detainees who have been classified as enemy combatants:

> Although the Government has often asserted that its enemy-combatant designations, even ones made for persons apprehended thousands of miles from any battlefield, are consistent with the laws of war and the Court's decision in *Hamdi*, it has not yet been meaningfully held to account for its numerous departures from the elementary limitations imposed by the laws of war on its authority to detain.[403]

In view of this executive branch activity, properly conducted habeas proceedings "might meaningfully constrict the Executive's expansive claims of detention authority."[404] Thus, there would seem to be a need for flexible applications of habeas rules and the development of standards infused with some skepticism for reviewing the government's justifications for detention. The court's rejection – on the theory's own terms – of the mosaic theory in *Ali Ahmed* is an example of such skepticism.[405]

The district judge in *Al-Adahi v. Obama*[406] also considered and rejected the mosaic theory.[407] There, the government did not offer the theory explicitly, but rather referred to it as a way of understanding the case.[408] The judge conceded that mosaic analysis is a "common and well-established mode of analysis in the intelligence community."[409] Considering it in a habeas proceeding, though, she had this to say:

Nonetheless, at this point in this long, drawn-out litigation the Court's obligation is to make findings of fact and conclusions of law which satisfy appropriate and relevant legal standards as to whether the Government has proven by a preponderance of the evidence that the Petitioner is justifiably detained. The kind and amount of evidence which satisfies the intelligence community in reaching final conclusions about the value of information it obtains may be very different from, and certainly cannot determine, this

402 *Id.*
403 Azmy, *supra* note 35, at 499.
404 *Id.*
405 *Id.* at 523.
406 Al-Adahi v. Obama, No. 05-280(GK), 2009 WL 2584685 (D.D.C. Aug. 21, 2009), *rev'd*, 613 F.3d. 1102 (D.C. Cir. 2010).
407 *Id.* at *16.
408 *Id.* at *5.
409 *Id.*

Court's ruling.[410]

As in *Ali Ahmed*, the district judge in *Al-Adahi* declined to link the speculative and highly inferential components of the government's case in a mosaic greater than the sum of its parts.[411] One reason she did not want to do this – and ruled for the petitioner instead – had to do with the nature of the evidence itself.[412] The admissibility of evidentiary material was

> hotly contested for a host of different reasons ranging from the fact that it contains second-level hearsay to allegations that it was obtained by torture to the fact that no statement purports to be a verbatim account of what was said.[413]

However, the D.C. Circuit reversed the district court's granting of the habeas petition in *Al-Adahi*.[414] Reviewing the decision, which was made under a "preponderance of the evidence" standard, the D.C. Circuit rejected the lower court's reading of the evidence,[415] essentially re-assembling the government's mosaic in place of the court's reading of the evidence. "Having tossed aside the government's evidence," the D.C. Circuit said, "one piece at a time, the court came to the manifestly incorrect — indeed startling — conclusion that 'there is no reliable evidence in the record that Petitioner was a member of al-Qaida and/or the Taliban.'"[416] Here, the reviewing court took issue with the interpretation of the facts in the proceeding below, reversing the district court because its evaluation of the facts was "manifestly incorrect."[417] In one sense, this unusually non-deferential approach to appellate review can be explained by the developing nature of this body of law; *i.e.*, "war on terror" detainee habeas proceedings. *Boumediene* was decided by the Supreme Court in 2008[418] and the *Al-Adahi* habeas petition was adjudicated in 2009.[419] The D.C. Circuit ruled on the *Al-Adahi* appeal in 2010, such that all of these events took place within a two-year span

410 *Id.*
411 *Id.* at *16.
412 *Al-Adahi*, 2009 WL 2584685 at *4.
413 *Id.*
414 Al-Adahi v. Obama, 613 F. 3d. 1102, 1103 (D.C. Cir. 2010).
415 *Id.* at 1104.
416 *Id.* at 1106 .
417 *Id.*
418 Boumediene v. Bush, 553 U.S. 723 (2008).
419 *Al-Adahi*, 2009 WL 2584685.

of time.[420]

However, the appellate ruling in this case indicates something else, as well. While the *Al-Adahi* court was surprisingly non-deferential to the trial court, its opinion evinces a striking deference to executive power. The court privileged the executive's institutional judgment over the normal standard of review for trial-level fact questions.[421] Further, the appellate ruling embarks on a discourse about statistical probabilities.[422] Of course, the importance of properly calculating statistical probabilities looms large in a case governed by a preponderance standard – a standard that turns on likelihoods rather than near-certainties.[423] In essence, the appellate panel chose to accept the government's "composite" view of the evidence over the lower court's validity judgments about each piece. This was a sort of "mosaic theory writ large," in the sense that it was not only about what the evidence in this case meant, but also about the proper way to review evidence in general.[424] Associated events raise probabilities, the court seemed to say: if X and Y are common characteristics of terrorists, then a suspect who exemplifies both X *and* Y is more likely to be terrorist than one who simply exhibits X *but not* Y. This approach may work well in intelligence analysis, as the lower court said,[425] but it certainly shortchanges concerns about the probity of the evidence. In the end, the trial and appellate opinions in *Al-Adahi* represent diametrically opposed understandings of the appropriate role of mosaic-type analysis in evidence law generally and in adjudicating detainee habeas petitions in particular.

A review of the existing case law in the D.C. Circuit clearly shows a change in the way the mosaic theory, by whatever name, is now being evaluated in the Circuit.[426] In addition to *Al-Adahi,* several other rulings that

420 *Al-Adahi*, 613 F.3d. 1102.

421 *Id.* at 1104.

422 *Id.* at 1105.

423 *Id.* at 1106.

424 *Id.* at 1104–05.

425 *Al-Adahi*, 2009 WL 2584685, at *5.

426 Benjamin Wittes notes that the pro-detainee rulings by the D.C. district court have provoked a sharp response over the past two years from the D.C. Circuit: "The law that is emerging from the D.C. Circuit's reaction is highly favorable to the government's position and represents a dramatic change in the landscape over a relatively short period of time. This change has affected the bottom line outcome in several habeas cases, in the sense that petitioners who prevailed under the standards the district judges were using at the time then saw the D.C. Circuit reevaluate the favorable result." BENJAMIN WITTES ET AL., THE EMERGING LAW OF DETENTION 2.0: THE GUANTÁNAMO HABEAS CASES AS LAWMAKING 112 (April 2012), *available at* http://www.brookings.edu/~/media/research/files/reports/2011/5/guantanamo%20wittes/05_guantanamo_wittes.pdf.

granted habeas relief initially were overturned on appeal in 2010 and 2011.[427] Thus, the D.C. Circuit does not share the district judges' skepticism toward mosaic-based habeas defenses. Of course, the reviewing court's stance may bring the lower courts to conform to it. In June of 2012, after the Supreme Court declined to review the D.C. Circuit's denial of habeas relief to seven Guantanamo detainees,[428] commentators speculated that the Court would weaken the effect of the *Boumediene* ruling by leaving the Circuit to formulate its own, restrictive standards for habeas cases.[429] As a result of these certiorari denials, the D.C. Circuit's endorsement of the government's mosaic approach may well be the final word on mosaics in the Guantanamo detainee context.

PART IV: THE MOSAIC AS A RESTRICTIVE AND AN EXPANSIVE DEVICE

What entered legal discourse as a heuristic device to describe circumstantial evidence has become a powerful executive branch weapon used to defeat individual rights claims. This article has considered, in the two preceding Parts, two types of cases where the mosaic theory has been deployed: state secrets and detainee habeas cases. In state secrets cases, the government deploys the theory restrictively by warning against the "mosaic-making," to use Pozen's phrase,[430] that could result from a disclosure of purportedly secret evidence.[431] In habeas cases, the government uses the mosaic concept expansively by urging a composite view of evidence that supports classification of detainees as enemy combatants.[432]

The following table illustrates the types of mosaic applications that can

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[427] Abdah v. Obama, 708 F. Supp. 2d 9 (D.D.C. 2010), *rev'd*, 637 F.3d 400 (D.C. Cir. 2011); Salahi v. Obama, 710 F. Supp. 2d 1 (D.D.C. 2010), *rev'd*, 625 F.3d 745 (D.C. Cir. 2010); Hatim v. Obama, 677 F. Supp. 2d 1 (D.D.C. 2009), *rev'd*, 632 F. 3d 720 (D.C. Cir. 2011); *see also* Latif v. Obama, 666 F.3d 746, 747, 760 (2011) (without mentioning "mosaics" explicitly, remands habeas case to district court for "holistic" rather than "atomized" evaluation of evidence).

[428] Al-Bihani v. Obama, 590 F.3d 866 (D.C. Cir. 2011), *cert. denied*, 132 S.Ct. 2739 (2012); Uthman v. Obama, 637 F.3d. 400 (D.C. Cir. 2011), *cert. denied*, 132 S.Ct. 2739 (2012); Al-Madhwani v. Obama, 642 F.3d 1071 (D.C. Cir. 2011), *cert. denied*, 132 S.Ct. 2739 (2012); Almerfedi v. Obama, 654 F.3d 1, (D.C. Cir. 2011), *cert. denied*, 132 S.Ct. 2739 (2012); Al Alwi v. Obama, 653 F.3d 11 (D.C. Cir. 2011), *cert. denied*, *132* S.Ct. 2739 (2012); Latif v. Obama, 666 F.3d 746 (D.C. Cir. 2011), *cert. denied*, 132 S.Ct. 2741 (2012); Al Kandari v. U.S., 462 F. App'x 1 (D.C. Cir. 2011), *cert. denied*, 132 S.Ct. 2741–42 (2012).

[429] Transcript of The Constitution Project & Covington & Burling LLP Discussion: *Boumediene*'s Legacy and the Fate of Guantanamo Detainees (July 17, 2012), *available at* http://www.constitutionproject.org/pdf/Transcript%20from%20Panel%20Discussion_Boumediene.pdf.

[430] Pozen, *supra* note 10, at 650.

[431] *Id.*

[432] *See, e.g.*, Hamdi v. Rumsfeld, 542 U.S. 507, 527 (2004); *see also* Azmy, *supra* note 35, at 532.

arise in litigation contexts. The mosaic theory can be restrictive, in the sense that the government's goal is to inhibit "mosaic-making."[433] Alternatively, mosaics can be expansive when they enable the government to offer a completed mosaic to the court. At the same time, mosaics can be employed in ways that favor an individual or in ways that favor the government. This article has discussed the "restrictive/pro-government" usage here by focusing on state secrets cases.[434] The government purportedly benefits by preventing someone from constructing a mosaic out of state secrets. The "expansive/pro-government" usage is represented by the government's pro-detention arguments, in which a composite of evidence is presented to justify continued detention. "Expansive/pro-individual" usage arises in Title VII cases, where an individual plaintiff is permitted to prove discrimination through a mosaic of circumstantial evidence. Finally, the "restrictive/pro-individual" usage, although not explicitly documented in this article, would arise in a case where an individual seeks to fight against data aggregation, or "knowledge discovery in databases," by which individual data points could be collected to construct a consumer profile, or suspect profile, more invasive than any of the individual disclosures standing alone.[435] This concern is documented in the electronic privacy and surveillance literature.[436]

Table: A Typology of Mosaic Applications

Expansive/Pro-Individual Context: Title VII litigation	*Expansive/Pro-Government* Context: detainee habeas litigation
Restrictive/Pro-Individual Context: Challenge to "knowledge discovery in database" ("KDD")	*Restrictive/Pro-Government* Context: state secrets litigation

433 *See, e.g.*, Ctr. for Nat'l Sec. Studies v. U.S. Dep't of Justice, 331 F.3d 918, 928–29 (D.C. Cir. 2003); Al-Haramain Islamic Found., Inc. v. Bush, 451 F. Supp. 2d 1215, 1221, 1226, 1228 (D. Or. 2006); David E. Posen, *The Mosaic Theory, National Security, and the Freedom of Information Act*, 115 YALE L.J. 628, 643 (2005) (quoting Cent. Intelligence Agency v. Sims, 471 U.S. 159, 178–79 (1985)).

434 *See generally* United States v. Reynolds, 345 U.S. 1 (1953); Crater Corp. v. Lucent Technologies, Inc., 423 F.3d 1260 (Fed. Cir. 2005); Kasza v. Browner, 133 F.3d 1159 (9th Cir. 1998); Halkin v. Helms, 598 F.2d 1 (D.C. Cir.1978); Hepting v. AT&T Corp., 439 F. Supp. 2d 974 (N.D. Cal. 2006); Terkel v. AT&T Corp., 441 F. Supp. 2d 899 (N.D. Ill. 2006); ACLU v. Nat'l Sec. Agency, 438 F. Supp. 2d 754 (E.D. Mich. 2006); *Al-Haramain*, 451 F. Supp. 2d 1215; Arar v. Ashcroft, 414 F. Supp. 2d 250 (E.D. N.Y. 2006); El-Masri v. Tenet, 437 F. Supp. 2d 530 (E.D. Va. 2006); Doe v. Gonzales, 386 F. Supp. 2d 66 (D. Conn. 2005).

435 *See generally* OSCAR H. GANDY, JR., THE PANOPTIC SORT: A POLITICAL ECONOMY OF PERSONAL INFORMATION (1993); MARTIN KUHN, FEDERAL DATAVEILLANCE: IMPLICATIONS FOR CONSTITUTIONAL PRIVACY PROTECTIONS (2007); TORIN MONAHAN, ED., SURVEILLANCE AND SECURITY: TECHNOLOGICAL POLITICS AND POWER IN EVERYDAY LIFE (2006).

436 *See generally* GANDY, *supra* note 435; KUHN, *supra* note 435; MONAHAN, *supra* note 435.

practices	

One issue that arises repeatedly in the mosaic-related cases surveyed here is the quality, or more precisely, the *probity* of the evidence from which a given mosaic would be constructed.[437] In the expansive/pro-government scenario, the mosaic is only as valid as the pieces of evidence that comprise it. If that evidence is flawed – because it is uncorroborated hearsay, or because it was produced by torture – then it ought not be used to help construct the larger evidentiary picture. This is seemingly what the judge in the *El Gharani* case was concerned about when he questioned the validity of the pieces comprising the government's mosaic.[438] Courts have indicated that such a limitation would be important;[439] they need to make those statements with greater frequency and specificity. To look at a mosaic without regard for these genetic characteristics is to misuse the concept and invite illegitimate development of precedent.

Pozen notes that when FOIA denials raise the mosaic theory as part of their justification, "[t]he mosaic, not the document, becomes the appropriate unit of risk assessment."[440] This shift of focus is as worrisome in state secrets and detention cases as it is in FOIA cases, and perhaps even more so. Instead of asking whether a particular document was properly denied (even though FOIA has a presumption of openness)[441], the Bush administration's approach asked whether a document might undergo changes in character when viewed through an aggregating prism.[442] Attorney General Ashcroft's directive, departing from the requirement that a "reasonable basis for classification" was sufficient to justify FOIA denial, both tracks and reflects this shift in focus from the particular to the aggregate.[443] Also, the mosaic-level focus changes whatever probability analysis the court was using, explicitly or tacitly.[444]

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[437] *See* Al-Adahi v. Obama, No. 05-280 (GK), 2009 WL 2584685, at *4 (D.D.C. Aug. 21, 2009); Ahmed v. Obama, 613 F. Supp. 2d 51, 55–56 (D.D.C. 2009).

[438] El Gharani v. Bush, 593 F. Supp. 2d 144, 148 (D.D.C. 2009).

[439] *See, e.g., id.* at 148–49.

[440] Pozen, *supra* note 10, at 633.

[441] *See id.* at 635.

[442] *See* Ctr. For Nat'l Sec. Studies v. U.S. Dep't of Justice, 331 F.3d 918, 924 (D.C. Cir. 2003); *id.* at 631.

[443] *See* Memorandum from John Ashcroft, Attorney Gen., to Heads of all Fed. Dep'ts and Agencies (Oct. 12, 2001), *available at* http://www.doi.gov/foia/foia.pdf; *see also* Pozen, *supra* note 10, at 647.

[444] Pozen criticizes the *CNSS* case, in particular, for misapprehending the probabilities in the case: "*CNSS*'s blanket no-disclosure holding therefore vindicated an extreme application of the mosaic theory: Through the court's delegation, the government prevailed on a mosaic claim with low plausibility, very

In the two contexts discussed in this article, the move to the "big picture" might entail additional risks. The fact that a statement is compound hearsay,[445] for example, renders it virtually useless as probative evidence; however, when viewed from a distance, as part of a pattern, its unreliability fades.[446] It is part of a picture the government offers; it is a detail in a story that helps to sell the case to the factfinder.

A. Mosaics, Probability Neglect, and the Availability Heuristic

It is, of course, possible that a detainee released following habeas adjudication could one day harm others through a terrorist act. It is also possible that a seemingly innocuous piece of information released by the government could be used as part of a plan to harm others. Both of these potential events could reasonably be called low-probability outcomes. However, both of them are vivid and frightening. People will therefore pay more to avoid them, notwithstanding the low probability of their occurrence (thus, the public ignores or miscalculates probability).[447] In addition, people will be more aware of the potential occurrence because representative images of the events are so readily available.[448] The former phenomenon is called "probability neglect;"[449] the latter is the "availability heuristic."[450] Cass Sunstein has described and analyzed both in the context of terrorism.[451] It requires little reflection to see how both phenomena would be experienced by people in the United States (or anywhere else in the world) after 9/11. These effects can influence governmental behavior in a number of ways. First, government actors take public fears into account when designing and implementing policies.[452] When the public demands action, state officials cannot afford to ignore those demands. Also, state officials can heighten fear by emphasizing certain risks.[453] Finally, officials can be susceptible to

little support, and even less specificity. Essentially, the court ruled that because the plaintiffs requested too much information – all of the detainees' names and records – they were not entitled to any information, lest disclosure enable adversarial mosaic-making." Pozen, *supra* note 10, at 660.

445 Al-Adahi v. Obama, No. 05-280 (GK), 2009 WL 2584685, at *4 (D.D.C. Aug. 21, 2009).

446 *See* Azmy, *supra* note 35, at 523.

447 Cass R. Sunstein, *Terrorism and Probability Neglect*, 26 J. RISK & UNCERTAINTY 121, 124 (2003).

448 *Id.* at 127–28.

449 *Id.* at 122, 124.

450 *Id.* at 121, 128.

451 *Id.* at 121.

452 *Id.* at 129–30 .

453 *See, e.g.*, Sunstein, *supra* note 447, at 130–31.

the same phenomena that are experienced by the general public.[454] Both state secrets cases and detainee cases involve a certain iconography of fear that shapes decisions in a way that does not reflect the actual probabilities involved. First of all, no probability calculation is given or required in state secrets cases. Though *Reynolds* mentions a "reasonable" probability of danger to national security,[455] the mosaic theory renders any probability calculation very fuzzy or replaces "probability" with "abstract possibility."[456] This substitution works because the prospect of national security risk is so frightening (before 9/11, and so much more now).

With regard to detention of suspected terrorists, there is a probability calculation embedded in the habeas process: a greater-than-equal probability of combatant status is required to defeat a habeas petition and keep a petitioner detained.[457] However, this calculation is quite different from calculating the chance that a released detainee will cause harm; in fact, it is several causal steps removed from such a calculation.[458] Nonetheless, judges are still influenced by the vivid and traumatic representation of potential terrorist attacks.[459] Government attorneys can be the ones who evoke those fears.[460] Judges also exhibit another phenomenon associated with probability neglect as Sunstein describes it.[461] A person who fears flying will avoid air travel despite the fact that a plane crash is unlikely.[462] That person might even know that a crash is unlikely. Nonetheless, a second-order consideration leads the person to avoid flying as well: the wish to avoid *feeling* frightened.[463] Thus, air travel is avoided both because there is a (low) probability of a crash and because the traveler does not want to feel afraid. Similarly, judges could refrain from ruling against the government in habeas and state secrets cases because they feel the fear generated by the government's presentation *or* they do not want to face the public's (fear-based) negative reaction to an anti-government decision. The vague and speculative nature of mosaic-type claims facilitates these first- and second-order reactions, thereby helping to produce decisions shaped by probability ne-

454 *See id.* at 123.
455 United States v. Reynolds, 345 U.S. 1, 10 (1953).
456 *See* Ahmed v. Obama, 613 F. Supp. 2d 51, 56 (D.D.C. 2009); *see also* Pozen, *supra* note 10, at 672.
457 *See* Azmy, *supra* note 35, at 518.
458 *Id.* at 519–20.
459 Pozen *supra* note 10, at 631, 646, 652, 678.
460 *See id.* at 658–660.
461 Sunstein, *supra* note 447, at 122.
462 *Id.*
463 *Id.* at 132.

glect and the availability heuristic.[464]

B. States of Exception and the Emergency Constitution

In considering mosaics as they are used in information control and preventive detention, I focused on two types of cases with obvious implications for individual liberties. Of course, these case types are linked in the sense that both of them have become crucial and recurring sites of contestation over the precise location of the dividing line between state power and individual rights. As aspects of the war on terror, they invite questions about the normative status of certain state practices within our political life and constitutional tradition.

Since 9/11, commentators frequently turn to the notion of the "state of exception," which originates with the political theorist Carl Schmitt, to articulate the problem of emergency powers.[465] This pertains to claims by the sovereign to act outside the constraints of the existing law in exceptional situations.[466] Often, the exception claim is provoked by an unusual state of affairs that threatens the very existence of the polity itself.[467] The problem, of course, is how to return to normal political conditions once a state of exception has been invoked. One commentator has warned about the dangers of letting the executive decide when the exception begins and ends, claiming that "when exceptional circumstances arise justifying actions taken under the rule of necessity, and when the executive has the authority to decide when those circumstances exist, there is a risk that such exceptions may become increasingly normal."[468]

In a well-known argument about "the emergency constitution," Bruce Ackerman offers his take on this problem.[469] Because he notes the effects

464 *Id.* at 128 (noting that although the availability heuristic and probability neglect are distinct concepts, it may be difficult, in practice to determine which one is actually driving behavior).

465 *See generally*, Bruce Ackerman, *The Emergency Constitution*, 113 YALE L.J. 1029 (2004); David Dyzenhaus, *Schmitt v. Dicey: Are States of Emergency Inside or Outside the Constitution?*, 7 CARDOZO L. REV. 2005 (2006); Christopher Kutz, *Torture, Necessity and Existential Politics*, 95 CALIF. L. REV. 235 (2007); Trevor Morrison, *Suspension and the Extrajudicial Constitution*, 107 COLUM. L. REV. 1533 (2007); Deborah Pearlstein, *Form and Function in the National Security Constitution*, 41 CONN. L. REV. 1549 (2009); Mark Rahdert, *Double-Checking Executive Emergency Power: Lessons from Hamdi and Hamdan*, 80 TEMP L. REV. 451 (2007).

466 *See* Ackerman, *supra* note 465, at 1037.

467 *Id.*

468 Thomas P. Crocker, *Overcoming Necessity; Torture and the State of Constitutional Culture*, 61 SMU L. REV. 221, 230 (2008).

469 *See generally* Ackerman, *supra* note 465.

of emergency measures on individuals (he treats detention as a specific example),[470] his work is pertinent here. Writing post-9/11 about the problem of future global, catastrophic terror threats, he asks whether the U.S. Constitution, which says little about emergency powers, could respond adequately.[471] Ackerman thinks that a new constitutional design, incorporating emergency powers, is needed.[472] The existing structure provides powers that are capable of addressing two kinds of threats — crime and war — but terrorist attacks are a different kind of threat, requiring a different response.[473] Ackerman is aware of the well-founded fear that a permanent necessity regime could result from the granting of these constitutionally-based emergency powers. However, Ackerman argues that the powers could be cabined by certain structural limits, such as a "supermajoritarian escalator,"[474] where an ever-increasing legislative supermajority would be required for each extension of the timeframe of emergency powers. Ackerman does not think that the "common law cycle"[475] of judicial decision-making is sufficiently responsive to resolve the problems raised by terrorist-created emergencies.[476] He mentions the Japanese internment cases as an example of when the courts "got it wrong."[477]

It seems that Ackerman would take issue with the argument that the Supreme Court did, in fact, perform an important role in managing the balance between Rule of Law and effective anti-terror policy post-9/11. Azmy shows that the Court did this by opening the district courts to detainees' habeas petitions and consequently encouraging the development of common law standards of adjudication for those petitions.[478] Ackerman does, in fact, see a role for the courts: as "backstop" against executive overreach at the "micro" level.[479] In other words, the courts are better able to adjudicate at this level, deciding the claims of individuals (*e.g.*, detainees and information-seeking members of the public) within the bounds of the emergency regime. He is less comfortable, though, with the courts refereeing macro conflicts involving challenges to the legitimacy of the emergency powers

470 *See generally id.*
471 *Id.* at 1030–31.
472 *Id.* at 1031.
473 *Id.* at 1032.
474 *Id.* at 1047.
475 Ackerman, *supra* note 465, at 1042.
476 *Id.*
477 *Id.*
478 Azmy, *supra* note 35, at 514.
479 Ackerman, *supra* note 465, at 1086.

the executive is using.[480]

Kim Scheppele views the emergency powers argument with skepticism.[481] She reminds us that Ackerman wrote in a time when the possibility for calm and deliberate reflection had passed.[482] We are aware of one such catastrophic emergency even as we anticipate how to deal with the next. But Scheppele's sense of the actual experience of governments claiming and using emergency powers is different. There are, she argues,

> [a]lso clear tendencies for emergency powers to exceed the depth and duration of the threats that brought them into being. The United States itself has certainly experienced over its history the temptations of emergency rule and also permitted extraordinary presidential powers long after the ends of the wars that provided the rationales for using emergency powers in the first place.[483]

Scheppele concludes by citing a passage from *Ex Parte Milligan,* the Civil War-era case where the Supreme Court invalidated President Lincoln's death sentence for a Confederate sympathizer.[484] The case stands as a rebuke of emergency executive actions during wartime. Because the courts were open and functioning at the time and place where Milligan's actions occurred, Lincoln's order that Milligan be tried by military tribunal was illegal.[485] Ackerman might say that *Milligan* is an example of macro adjudication occurring after the fact in a period of reflection and adjustment. After all, *Milligan* was decided after Lincoln's death and the end of the Civil War.[486] Ackerman does not think courts should be charged with evaluating executive emergency powers in real time, as the emergency unfolds, but he does not object to macro-level review as hindsight judgment, when things have calmed down.[487] Thus, *Milligan*'s repudiation of emergency power might not bother him. Nonetheless, the *Milligan* court made two important points in its opinion: that the Constitution as written is capable of addressing emergencies,[488] and that the Court itself stood ready to perform its role in protecting individuals against illegitimately deployed executive power.[489]

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480 *Id.*

481 *See* Kim Scheppele, *We Are All Post-9/11 Now*, 75 FORDHAM L. REV. 607, 607 (2006).

482 *Id.* at 607–08.

483 *Id.* at 613.

484 71 U.S. 2 (1866).

485 *Id.*

486 *Id.*

487 Ackerman, *supra* note 465, at 1066, 1074.

488 *Milligan*, 71 U.S. 2.

489 *Id. See generally* Kutz, *supra* note 465 (noting concern that the state might decide prematurely that

The historical record should be considered even more closely. Justice Brennan believed that historical evidence showed that courts had, in fact, managed to perform their institutional role in times of crisis without impeding governance or imperiling order.[490] In explaining the importance of the Bill of Rights as part of a system of ordered and protected liberties, Brennan cited the fears of some pro-executive commentators who warned that courts would give too much weight to individual liberties and not enough to political exigency.[491] Upon examining what courts have actually done when the nation was under threat,[492] Brennan concluded that those fears seem unfounded. Brennan notes that courts have more often behaved conservatively: they have "been too willing to compromise civil liberties when the authorities deemed it expedient to do so."[493] In fact, Brennan thought, "in retrospect, more vigorous enforcement of the Bill of Rights during times of national security crisis would not have been damaging."[494] The problem, then, has not been too much solicitude for individual rights, but not enough.

Beneath the problem of courts' institutional (or historically-assessed) capability to adjudicate macro-level conflicts in real time (that is, to manage the executive's emergency powers), there is a fundamental theoretical question raised by the emergency powers problem: What is the legal status of the "state of exception"? Does it fall "inside or outside" the legal order, in the words of one commentator?[495] There is a scholarly dispute on this point, which is aptly summarized in the literature of emergency powers.[496] But in concrete historical actions by the executive branch, state actors provide an answer of their own.[497] In order to preserve at least the appearance of legitimacy, the executive will seek to justify departures from the "ordinary" limits of state force.[498] Detention and coercive interrogation are two of the more stark examples of extraordinary state practices, and they are explained as lawful and legitimate state actions.[499] One example of a statement purportedly legalizing such actions was the Bush administration's assurance that it was treating detainees humanely even though the Geneva

the point of existential threat has been reached and then (prematurely) declare a state of emergency).

490 William J. Brennan, *Why Have a Bill of Rights?,* 26 VAL. U.L REV. 1 (1991).

491 *Id.* at 32.

492 *Id.* at 7.

493 *Id.* at 15.

494 *Id.*

495 *See* Dyzenhaus, *supra* note 465.

496 *Id.*

497 *Id.* at 2019.

498 *Id.* at 2015.

499 *Id.* at 2024.

Convention's standards would not be applied to them.[500] Thus, a promise of humane treatment was offered to suggest that rule of law was still operating. Of course, once the legal requirements are stripped away, what remains is conduct by sufferance, rather than conduct by legal obligation. One thing that the *Hamdan* Court did by holding the executive to the standards of the Uniform Code of Military Justice[501] (and by extension, to the Geneva Convention and the Law of War incorporated therein),[502] was to affirm that rule of law continued to operate even in the course of the "war on terror."[503] What about after suspension is actually, formally proclaimed? On this point, Dyzenhaus emphasizes that once suspension occurs, claims of legality are simply window-dressing.[504] As he puts it, "law cannot effectively enshrine a distinction between constitutional dictatorship and dictatorship. They appear to be vain attempts to find a role for law while at the same time conceding that law has no role."[505] Carl Schmitt might read this statement as a realistic acknowledgment of the prerogative of sovereignty, but Dyzenhaus seems to mean it as a criticism of the willingness of some to believe that rule of law survives suspension.

Mosaic claims will arise in times of crisis. They have proliferated in the two national security-related areas considered here: detention of suspected terrorists and protection of state secrets. The decisional law in these areas continues to develop as courts are presented with new disputes to resolve. Thus, in the end, common law rules fashioned by the federal courts can be important sources of fundamental justice. In the case of the mosaic theory, the courts must correct an injustice of their own making. By importing the mosaic theory into the federal common law of habeas and evidentiary privilege, the courts have created an unmanageable doctrine whose expansion facilitates executive overreach. They can tame the doctrine, but they must be willing to do so despite executive insistence that its unfettered application is necessary for protecting national security.

CONCLUSION

The use of the mosaic theory as an analytical tool in individual rights

[500] Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 FED. REG. 57,833 (Nov. 13, 2001).
[501] Hadan v. Rumsfeld, 548 U.S. 557, 557 (2006).
[502] *Id.*
[503] *Id.*
[504] *See* Dyzenhaus, *supra* note 465, at 2017.
[505] *Id.* at 2017.

cases has shaped case law in troubling ways. It is far easier to for the executive branch to accomplish information control (via state secrets assertion) and continued detention (via contesting habeas petitions) with the mosaic theory available for use than without it. In other words, it facilitates negative outcomes in terms of individual liberties. Wittes suggests that use of the term "mosaic" in government legal arguments "poses no inherent controversy," as it simply a "metaphor for recognition of . . . latent probative value."[506] This might be true were it not for the fact that the mosaic theory has affected the substantive evaluation of evidence[507] and in turn has shaped the evidentiary record in the types of cases considered here. As a device for structuring legal narratives, it can be said that the mosaic concept "poses no inherent controversy,"[508] but as part of the grammar of executive power, it is (and should be) controversial. In particular, it allows incompetent evidence to form the basis for habeas denial, and it allows public, unclassified information to remain secret. The reversals of district court decisions that had criticized the mosaic theory are not explained merely by science or logic, but rather by a deferential view of executive action. Deference has been the rule rather than the exception in state secrets jurisprudence if one views the sixty-year history of the doctrine. Similarly, in detention-related rulings following 9/11, the circuits deferred to the executive – in material witness cases,[509] in challenges to use of military tribunals[510] – until the Supreme Court handed down *Hamdi,*[511] *Rasul,*[512] *Hamdan,*[513] and *Boumediene.*[514] What is troubling, then, is not the government's use of the mosaic as a narrative strategy but rather the facilitation of weak legal claims that bolster executive power. Courts must resist the government's demands that evidentiary standards be loosened to allow the executive to pursue its institutional functions. For this abdication of the courts' role in our system of checks and balances threatens to throw the separated powers out of balance.

506 WITTES, *supra* note 35, at 113.

507 Pozen, *supra* note 10, at 631.

508 HARVARD LAW SCHOOL PROJECT ON LAW AND SECURITY THE EMERGING LAW OF DETENTION 2.0 (2012).

509 *See, e.g.*, United States. v. Awadallah, 349 F. 3d 42 (2d Cir. 2004), *cert. denied*, 125 S. Ct. 861 (2005).

510 *See, e.g.*, Hamdan v. Rumsfeld 415 F. 3d 33 (D.C. Cir. 2005).

511 Hamdi v. Rumsfeld, 542 U.S. 507 (2004).

512 Rasul v. Bush, 542 U.S. 466 (2004).

513 Hamdan v. Rumsfeld, 548 U.S. 557 (2006).

514 Boumediene v. Bush, 128 S.Ct. 2229(2008).

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