No. 10-778

In the Supreme Court of the United States

BINYAM MOHAMED, et al.

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent,

JEPPESEN DATAPLAN, INC.

Respondent.

On Petition For A Writ of Certiorari to The Court Of Appeals For The Ninth Circuit

BRIEF OF THE CONSTITUTION PROJECT AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES—continued

Page(s)

CONSTITUTION, STATUTES AND RULES

MISCELLANEOUS

TABLE OF AUTHORITIES—continued

Page(s)

TABLE OF AUTHORITIES—continued

Page(s)

BRIEF OF THE CONSTITUTION PROJECT AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICUS CURIAE*[1]

The Constitution Project is an independent nonprofit organization that seeks bipartisan solutions to pressing constitutional issues. The Project brings together policy experts, legal scholars, and former government officials and judges from across the political spectrum to formulate, issue, and promote recommendations for policy reform. The Project's Liberty and Security Committee works to ensure that civil liberties are not trammeled in the pursuit of national security objectives.

The Constitution Project has taken a particular interest in the important issues at stake in this case. In May 2007, members of the Liberty and Security Committee issued a report entitled *Reforming the State Secrets Privilege* (May 31, 2007) (Signatories to the statement are listed in the appendix to this brief.).[2] More recently, the Constitution Project issued a report outlining specific recommendations for the Obama Administration and Congress regarding pressing national security issues (*Liberty*

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[1] Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus* and its counsel made a monetary contribution to its preparation or submission. Counsel of record for all parties received notice at least 10 days prior to the due date of the intention of *amicus* to file this brief. The parties' letters consenting to the filing of this brief have been filed with the Clerk's office.

[2] HTTP addresses for this and certain other materials are included in the Table of Authorities.

and Security: Recommendations for the Next Administration and Congress (Nov. 18, 2008)), as well as a report about over-classification within the Executive Branch (*Reining In Excessive Secrecy: Recommendations For Reform Of The Classification And Controlled Unclassified Information Systems* (July 16, 2009)).

The first two of these reports examine the state secrets privilege formulated by this Court in *United States* v. *Reynolds*, 345 U.S. 1 (1953). They express concern at how the privilege has been expanded in recent years and recommend reforms to restore the independent role of the courts in evaluating privilege claims. This case is a perfect illustration of those concerns. Continuing a disturbing pattern, the Ninth Circuit broadened the privilege so that, rather than simply protecting particular pieces of sensitive evidence from public disclosure, it was allowed to shield the Government from judicial accountability even for the most grievous violations of the Constitution, laws, and treaties of the United States. The bipartisan group of professionals who have endorsed the Constitution Project's efforts to reform the privilege believes that a thorough reexamination of the privilege by all three branches of government is in order. Particularly in conjunction with the recent grant of certiorari in *General Dynamics Corp.* v. *United States*, Nos. 09-1298, 09-1302, this case affords the Court an ideal opportunity to take up that reform effort. The Constitution Project files this brief to urge the Court to restore the state secrets privilege to its properly limited role, and in the process to protect the appropriate balance between the vindication of individual rights and the Government's legitimate interest in protecting its secrets.

SUMMARY OF ARGUMENT

This case offers the Court a much-needed opportunity to clarify the scope and application of the state secrets privilege, an issue of overriding national importance that has been left entirely to the lower courts for too long. In the nearly 60 years since this Court first recognized (and last applied) the privilege, it has evolved from relative obscurity to a centerpiece of the Executive Branch's litigation strategy in an increasingly wide range of cases. In that time, lacking further guidance from this Court, the lower federal courts have broadened the privilege beyond what this Court's precedents authorize.

This case illustrates that unsettling trend. Sitting en banc, a divided Ninth Circuit dismissed claims brought against a private company that is alleged to have been complicit in the abduction, incommunicado detention, and torture of several men suspected of involvement in terrorism. The plaintiffs' disturbing allegations were supported by publicly available information. Nevertheless, invoking a privilege that this Court has recognized only as a means of protecting particular items of evidence from disclosure, the court of appeals ruled that plaintiffs' claims could not be adjudicated at all. And it did so at the pleading stage, before plaintiffs had sought discovery of a single piece of evidence—giving them no opportunity to develop their claims without using material determined to be privileged.

This expansive application of executive immunity goes beyond anything this Court has endorsed. The state secrets privilege recognized in *United States* v. *Reynolds* is an evidentiary privilege; it protects certain evidence from disclosure but does not bar the adjudication of entire claims. This Court has recog-

nized only a very narrow bar on litigation involving state secrets. In *Totten* v. *United States*, 92 U.S. 105 (1875), the Court held that claims brought to enforce clandestine employment contracts between the Government and its secret agents are non-justiciable. This Court has never expanded *Totten* beyond its contract-law roots or suggested that the *Reynolds* privilege bars a significantly broader range of cases implicating national security. Yet that is precisely the result of the decision below. That expansion of the *Totten* bar—and the concomitant transformation of the state secrets privilege into an immunity doctrine—warrants this Court's review.

Review is needed not only because the Ninth Circuit's decision departs from this Court's cases, but because the expansion of the state secrets privilege threatens grievous consequences for separation of powers and the rule of law. The ruling below potentially shields the Government from virtually any litigation challenging activities it claims are secret—even when those activities have garnered widespread public attention, target Americans, or run contrary to the commands of the Constitution or of Congress. Allowing the privilege to be used to make entire cases disappear effectively makes the Government immune from judicial scrutiny when it acts in the name of national security. But that idea, as this Court has recognized in a recent series of cases addressing the response to the September 11 attacks, is antithetical to our system of constitutional democracy.

In recent years, both Congress and the President have recognized the dangers that the privilege poses and have proposed reforms. But Congress has yet to enact any corrective legislation, and the Executive's new guidance is extremely limited. Far from obviat-

ing the need for action by this Court, those efforts only underscore the pressing need for the Court to restore the privilege to its proper sphere. This case provides an ideal opportunity for the Court to do just that. Certiorari is warranted to confirm the limited reach of the *Totten* bar and to reaffirm that the state secrets privilege may properly be applied only to specific requests for concrete evidence.

ARGUMENT

I. Certiorari Is Warranted Because This Court's Cases Do Not Support The Ninth Circuit's Dangerous Expansion Of The State Secrets Privilege.

The Ninth Circuit's decision to dismiss petitioners' claims at the pleading stage based merely on a *prediction* about the kinds of evidence that would be required broadens the state secrets privilege far beyond anything this Court has ever endorsed. Certiorari is warranted to review and correct that unwarranted and dangerous expansion of the privilege.

A. The Ninth Circuit expanded the privilege well beyond what this Court's cases allow.

This Court's decisions concerning the litigation of claims that touch upon classified matters establish two important, but limited, propositions. First, the narrow set of claims that seek enforcement of secret employment contracts between the Government and its clandestine agents are non-justiciable. See *Tenet* v. *Doe*, 544 U.S. 1 (2005); *Totten* v. *United States*, 92 U.S. 105 (1875). Second, the Government, in civil cases, may in some circumstances assert a privilege to prevent the production of evidence whose disclo-

sure would threaten national security. See *United States* v. *Reynolds*, 345 U.S. 1 (1953).

The privilege recognized in *Reynolds* is at once broader and more limited than the *Totten* rule: *Totten* describes a "unique and categorical" nonjusticiability doctrine designed to "preclude judicial inquiry" into "secret espionage relationship[s]" between the Government and its agents. *Tenet*, 544 U.S. at 6 n.4, 7. It bars all litigation of such claims. In contrast, *Reynolds* applies to a larger category of cases—those involving evidence that would expose "military and state secrets," 345 U.S. at 7—but it offers the Government considerably less: a privilege against having to disclose certain evidence, not a categorical exemption from judicial scrutiny. *Id.* at 11. Properly understood, neither doctrine applies to preclude further litigation of this case.

Nevertheless, a divided Ninth Circuit, sitting en banc, ordered the dismissal at the pleading stage of petitioners' suit, which alleges that private contractors knowingly participated in an illegal CIA rendition program. The en banc court rejected the dissent's position that the privilege, as a rule of evidence, "is relevant not to the sufficiency of the *complaint*, but only to the sufficiency of evidence available to later *substantiate* the complaint." Pet. App. 87a. Whereas the en banc dissent (and the original panel) concluded that the privilege must be invoked with respect to specific evidence—and, following *Reynolds*, would have given petitioners a chance to prove their case without any evidence properly deemed privileged (Pet. App. 93a)—the majority threw out the case in its entirety. Pet. App. 73a.

The Ninth Circuit's decision conflates the *Reynolds* privilege with the *Totten* bar: the court invoked

the privilege to preclude any further proceedings in a case challenging allegedly illegal actions taken by the Government in the name of national security. Such an expansion, which could effectively immunize a wide swath of Executive misconduct from judicial review, is not supported by this Court's precedents.

For one, the Ninth Circuit's ruling ignores the narrow focus of the *Totten* bar. The *Totten* decision was grounded in circumstances particular to the law of contracts. In barring adjudication of the dispute between the Government and its former spy, *Totten* emphasized the mutual understanding between the parties: "Both employer and agent must have understood that the lips of the other were to be forever sealed respecting the relation of either to the matter. *This condition of the engagement was implied from the nature of the employment* * * *." 92 U.S. at 106 (emphasis added). *Totten* thus rests on the premise that a categorical prohibition on litigation over the substance of a secret employment relationship is an implied condition of the contract. *Id.* at 107. The plaintiff in such a case knew (or should have known) what he was bargaining for and, by agreeing to become a spy, assumed the risk that he would not be able to resort to litigation if the Government failed to live up to its end of the bargain.

That crucial element of consent is entirely absent here. Far from entering a voluntary contractual relationship with the Government, petitioners allege that they were subjected to a highly involuntary regime of detention, coercive interrogation, and abuse. It is impossible to assert that they consented in any way to a bar on their right to pursue their legal claims. The principles that supported the result in *Totten*, and made it appropriate to turn that litigant

out of court, do not apply here. Indeed, this Court has never applied the *Totten* bar outside the context of a clandestine contract. See *Tenet*, 544 U.S. at 10 (emphasizing that *Totten* applies in the "the distinct class of cases that depend upon clandestine spy relationships"); *Webster* v. *Doe*, 486 U.S. 592 (1988) (*Totten* bar not applied to claim involving CIA employee where agency acknowledged that plaintiff was an employee). Yet the Ninth Circuit has now taken that step.

The court of appeals' ruling similarly goes beyond *Reynolds*. That case involved a concrete dispute over a concrete document. The Court ruled that the plaintiffs had no right to obtain and use that document to prove their claims, but expressly held that they should have an opportunity to "adduce the essential facts * * * without resort to material touching upon military secrets." *Reynolds*, 345 U.S. at 11. In this case, by contrast, petitioners have not yet sought to discover any particular information, classified or otherwise. The case was dismissed before discovery even commenced, and the courts thus have not yet been able to conduct the concrete analysis called for in *Reynolds*. Instead, the Ninth Circuit held that, even assuming "plaintiffs' prima facie case and Jeppesen's defenses m[ight] not inevitably depend on privileged evidence," "dismissal [was] nonetheless required" because the majority believed "there [was] no feasible way to litigate Jeppesen's alleged liability *without creating an unjustifiable risk of divulging state secrets*." Pet. App. 60a. The court of appeals thus dismissed petitioners' suit based merely on the *prediction* that state secrets would be implicated. In sharp contrast to *Reynolds*, petitioners here were given no chance to prove their claims using an

alternative to any evidence that might properly have been deemed privileged.

That is not an appropriate application of *Reynolds*. The state secrets privilege is an evidentiary privilege, and thus it protects actual evidence. Without knowing what particular evidence the parties actually might need, and may be available, to prove their claims and defenses, the courts are simply not in a position to determine whether "there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged." 345 U.S. at 10. And without knowing what evidence the parties actually need, the court cannot, as *Reynolds* requires, determine whether it is possible for the parties to prove their cases in some other way.

Indeed, the assumption that confidential material would be necessary is particularly unwarranted in this case, given that substantial information about the CIA program at issue has already been made public, including by the Government itself. President Bush himself expressly acknowledged the existence of secret prisons operated by the CIA during a speech in 2006, see BBC News, *Bush Admits to Secret CIA Prisons* (Sept. 7, 2006), and other government officials have publicly confirmed the existence and nature of the rendition program.[3] And there is public

[3] Secretary of State Rice explained, for example. that "the United States and other countries have used 'renditions' to transport terrorist suspects from the country where they were captured to their home country or to other countries where they can be questioned, held, or brought to justice." Condoleezza Rice, Remarks Upon Her Departure for Europe (Dec. 5, 2005). Former CIA Director George Tenet likewise described the CIA's role in some seventy renditions and elaborated on a number of

information specifically about Jeppesen Dataplan's role in the program. See Pet. 16-17. The Government should not be allowed to selectively reveal classified information for political benefit and then invoke the privilege to block litigation challenging the legality of the same program.

The Ninth Circuit ignored these important doctrinal limitations. By extending the *Totten* bar and conflating it with the *Reynolds* privilege, the ruling below effectively bars virtually any suit challenging national-security-related activities—no matter how egregious the alleged conduct and no matter that it may already be public knowledge. That goes beyond anything this Court has recognized and, as explained in the next section, is fraught with peril for our system of constitutional governance. The consequences of such an expansion warrant certiorari.

B. The Ninth Circuit's expansion of the privilege undermines separation of powers.

The Ninth Circuit's ill-considered extension of *Totten* and *Reynolds* not only harms individual plaintiffs by denying them recourse to the courts, but also has more systemic consequences—threatening the separation of powers at the heart of our constitutional scheme.

To prevent the accumulation of power and to ensure that the conduct of the three branches of government will be constrained by law, the Constitution authorizes each branch to act as a check on the others. As Madison explained, "[t]he accumulation of all

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specific examples. See Written Statement for the Record of the Director of Central Intelligence Before the Joint Inquiry Committee (Oct. 17, 2002).

powers, legislative, executive, and judiciary, in the same hands, * * * may justly be pronounced the very definition of tyranny." THE FEDERALIST No. 47, at 301 (James Madison) (Clinton Rossiter ed. 1961). Integral to the system of checks and balances envisioned by the Framers is the ability of the Judiciary to decide, when presented with a genuine "Case" or "Controversy," whether the other branches have acted outside their legal authority. By refusing to evaluate the outrageous government conduct alleged by petitioners against the requirements of the Constitution, statutes, and treaties of the United States, the Ninth Circuit abdicated its duty to "say what the law is" and gave the Executive Branch carte blanche to decide the limits of its own power.

This analysis is no different because this case implicates the President's war powers. The limits on presidential authority, and the Judiciary's obligation to enforce those limits, do not disappear in times of war. See, *e.g., Hamdi* v. *Rumsfeld*, 542 U.S. 507, 536 (2004); *Ex Parte Milligan*, 71 U.S. (4 Wall.) 2, 120-21 (1866). The Constitution "most assuredly envisions a role for all three branches when individual liberties are at stake." *Hamdi*, 542 U.S. at 536. Thus, although the Executive Branch has considerable power to defend the Nation against threats from abroad, that does not divest the courts of their independent responsibility to determine whether that power is being exercised consistent with the law. In this context, judicial review "does not undermine the Executive's powers as Commander in Chief. On the contrary, the exercise of those powers is vindicated, not eroded, when confirmed by the Judicial Branch." *Boumediene* v. *Bush*, 553 U.S. 723, 797 (2008). It thus has long been settled that "the allowable limits of military discretion, and whether or not they have been

overstepped in a particular case, are judicial questions." *Sterling* v. *Constantin*, 287 U.S. 378, 401 (1932).

Illustrating that point, this Court has recently rejected the President's argument that his power over military and foreign affairs precludes the courts from entertaining claims brought by individuals (both citizens and non-citizens) detained by the Government in its efforts to combat terrorism. *Boumediene*, 553 U.S. at 797-98; *Hamdan* v. *Rumsfeld*, 548 U.S. 557 (2006); *Hamdi*, 542 U.S. 507. Those cases involved sensitive issues of national security, yet this Court was able to decide them without "sorely hamper[ing] the President's ability to confront and defeat a new and deadly enemy," or to "prevent future attacks of the grievous sort that we have already suffered." *Hamdan*, 548 U.S. at 636 (Breyer, J., concurring) (internal quotation marks omitted).

The analysis that compelled the Court to reject the Executive's broad assertions that it must be given the power to fight against terrorism free from judicial interference applies with equal force in this case. Here, the Executive goes so far as to argue that the courts cannot even know what it is doing in the name of national defense—even where the issue arises in a concrete legal case involving serious claims that the President's agents have violated the laws that he is charged to "faithfully execute[]," U.S. CONST. art. II, § 3. On that basis, the Ninth Circuit agreed to dismiss a case based merely on its potential to implicate secret national security matters. And it did so without allowing any inquiry into the facts alleged—even those that are already public knowledge—or any of the legal arguments.

Such an expansive vision of executive immunity profoundly disrupts our system of checks and balances and poses an acute danger to individual liberties. This conception of the privilege allows the Executive not just to protect certain evidence, but to dictate whether a litigant can maintain its claims and defenses at all. That effectively gives executive officers the power to prescribe the outcome of individual cases—an affront to Article III's guarantee of an independent judiciary (see *United States* v. *Klein*, 80 U.S. 128, 146 (1872)) and an ironic one given the federal courts' historical role in protecting individuals against government abuse. Such "[c]oncentration of power puts personal liberty in peril of arbitrary action by officials, an incursion the Constitution's three-part system is designed to avoid." *Hamdan*, 548 U.S. at 638 (Kennedy, J., concurring).

The Ninth Circuit's ruling also aggrandizes the Executive Branch at the expense of Congress. Expanding the *Totten* bar rends a significant hole in the jurisdiction of the federal courts to hear "all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C.§ 1331. That is a hole that Congress, which "decides what cases the federal courts have jurisdiction to consider" and "when, and under what conditions, federal courts can hear them," has not seen fit to recognize. *Bowles* v. *Russell*, 551 U.S. 205, 212-13 (2007). The result allows the President to usurp Congress's constitutional power to determine what cases the federal courts may hear.

The Ninth Circuit's approach is not limited to activities undertaken abroad and directed at foreign nationals. To the contrary, the court's reasoning would equally immunize operations targeting U.S.

citizens at home. Under the decision below, CIA operatives could kidnap innocent Americans from their homes and torture or even murder them, and, so long as the Executive maintained that the operation was classified, those citizens or their heirs would have no opportunity for judicial redress. The ruling thus gives the Government license to trammel on the most fundamental rights of citizens and non-citizens, at home and abroad, without fear of being called to account in any judicial forum.

In sum, the Ninth Circuit's aggressive application of the state secrets privilege circumscribes the independence of the courts within their constitutional sphere, allowing the Executive to foreclose judicial remedies for those who have suffered legal wrongs. It impermissibly makes the privilege into "a shield behind which the government may insulate unlawful behavior from scrutiny and redress by citizens." *Halkin* v. *Helms*, 598 F.2d 1, 13-14 (D.C. Cir. 1978) (Bazelon, J., dissenting).

C. The Ninth Circuit's decision continues a pattern of lower court distortions of the privilege beyond its original bounds.

The Ninth Circuit's decision, unfortunately, does not stand alone. In the absence of meaningful guidance from this Court, the Government has successfully persuaded other lower courts to broaden the privilege—including, as in this case, approving the pleading-stage dismissal of claims seeking vindication for grievous misconduct. These developments warrant this Court's attention. See Pet. 21-22, 23-25.

By all measures, invocations of the state secrets privilege have surged dramatically in recent years. See Robert M. Chesney, *State Secrets and the Limits*

of National Security Litigation, 75 GEO WASH. L. Rev. 1249, 1315 (2007). Professor Chesney's comprehensive statistical analysis confirms the striking uptick in privilege claims since the 1970s; while the privilege was asserted only twice between 1961 and 1970 and 14 times between 1971 and 1980, the Government asserted it 23 times between 1981 and 1990, 26 times between 1991 and 2000, and 20 times between 2001 and 2006. *Ibid.* The privilege, moreover, has increasingly been used not just to wall off certain evidence, but to dismiss entire cases or claims. *Id.* at 1307 (reporting that the privilege was invoked to seek outright dismissal in five of the 14 cases between 1971 and 1980 (36% of invocations);, 9 of the 23 cases between 1981 and 1990 (39%); 13 of the 26 cases between 1991 and 2000 (50%); and 15 of the 20 cases between 2001 and 2006 (75%); see also Amanda Frost*, The State Secrets Privilege and Separation of Powers,* 75 FORDHAM L. REV. 1931, 1939 (2007) ("the Bush Administration * * * has sought dismissal [based on the state secrets privilege] in ninety-two percent more cases per year than in the previous decade").

Those invocations have been largely successful. Of the 78 cases Professor Chesney catalogued in which the merits of a privilege claim were addressed, the court sustained the claim in whole or in part in 69 cases. See Chesney, 75 GEO. WASH. L. REV. at 1315-32. An especially significant example is the Fourth Circuit's decision in *El-Masri* v. *United States*, 479 F.3d 296 (4th Cir. 2007). Like this case, *El-Masri* was a suit brought by an individual who claimed to have been an innocent victim of the CIA's extraordinary rendition program. El-Masri alleged that he was mistakenly held in U.S. custody for months while he was beaten, drugged, interrogated,

and placed in solitary confinement at a "black site" in Afghanistan. The Fourth Circuit upheld the dismissal of the case at the pleadings stage. It did so without even giving the plaintiff an opportunity to try to prove his case using alternative, unclassified sources of evidence. *Id.* at 313.[4]

All of this suggests a troubling evolution of the state secrets privilege from a limited rule of evidence to what is often an absolute bar to litigation. The privilege that originally was supposed to offer the Government narrow protection for specific pieces of classified evidence has now become a powerful thumb on the scale that the Executive is free to deploy with little meaningful judicial oversight. These developments are not consistent with, much less compelled by, *Reynolds*, which expressly instructed the lower courts to try to identify ways for the plaintiffs to present their claims without relying on the privileged evidence. See 345 U.S. at 11. The lower courts have been able to steadily expand the privilege in large part because this Court has not returned to these issues in any direct way since *Reynolds*. Benign neglect has led to mischief, and the broadening of the privilege in the last decades needs this Court's attention. Given the privilege's proven potential to erode accountability and deprive righteous litigants of their day in court, the Court should use this case to confine it to its appropriate sphere.

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[4] See also, *e.g.*, *Kasza* v. *Browner*, 133 F.3d 1159, 1166 (9th Cir. 1998) (dismissing suit seeking to compel the Air Force's compliance with hazardous waste reporting requirements); *Black* v. *United States*, 62 F.3d 1115, 1118–1120 (8th Cir. 1995) (dismissing plaintiff's claims against CIA and FBI for assault, battery, and intentional infliction of emotional distress).

D. Congress and the President both have recognized the need to reform the privilege.

In recent years, both Congress and the President have acknowledged that the state secrets privilege needs reform. Congress has proposed (but not enacted) a legislative overhaul of the privilege, while the Obama Administration has issued a new set of guidelines that the Executive is supposed to follow before asserting the privilege. These efforts are encouraging, as they indicate the widespread recognition that the privilege has strayed from its foundations and requires modification. But they do not obviate the need for this Court to do its part to keep the privilege properly confined.

In 2008 and 2009, bills to reform the state secrets privilege were introduced in both the House and Senate.[5] The bills included various procedural and substantive features that offer a useful model to this Court in adjusting the *Reynolds* framework. The Senate bill, for example, would expressly bar use of the privilege as grounds for dismissing a case. S. 417 § 4055. It also would require courts to actually review each "specific item of evidence" for which the Government invoked the privilege to determine whether the privilege claim is valid. *Id.* § 4054(e)(1). Before the court could accept a privilege claim, it would have to find that the evidence "contains a state secret" and that there is "no possible means of

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[5] See State Secrets Protection Act, S. 2533, 110th Cong. (2008); State Secret Protection Act of 2008, H.R. 5607, 110th Cong. (2008); State Secrets Protection Act, S. 417, 111th Cong. (2009); State Secret Protection Act of 2009, H.R. 984, 111th Cong. (2009).

effectively segregating it from other evidence." *Ibid.* If the court finds the evidence privileged, it would have to determine whether "it is possible to craft a non-privileged substitute * * * that provides a substantially equivalent opportunity to litigate the claim or defense." *Id.* § 4054(f). This legislation has not been enacted, however, and its prospects are uncertain. In any event, the possibility of legislative action is no deterrent to meaningful reevaluation of the privilege by this Court.

The same is true of the recent privilege reform efforts made by the Executive Branch. Reflecting the concern that the privilege has been abused, in 2009 the Attorney General issued new guidelines to regulate the Executive's use of the privilege. Memorandum from Eric Holder, Attorney General, to Heads of Executive Departments and Agencies and Heads of Dep't Components (Sept. 23, 2009). While a welcome acknowledgment of some of the problems with the privilege, the guidelines are hardly a full solution. They are neither legally binding nor judicially enforceable; the President or the Attorney General is free to depart from them without consequence, and a new administration could revoke them at will.

The guidelines also leave a number of important questions unanswered. They say nothing about whether the Government will consent to having courts independently review supposedly privileged evidence. Nor do they require Executive officials to propose alternatives or substitutes to privileged evidence. Most troubling, and most relevant to the circumstances here, the Guidelines do nothing to prevent the Government from using the privilege to scuttle cases at the pleading stage, before the opposing party has a chance to prove its case using non-

privileged evidence. The guidelines are a important first step, but they only highlight the need for this Court to impose *legally binding* constraints on the use of the privilege. Executive self-regulation is no substitute for clear instruction from this Court. The privilege is judge-made law, and the Court is the institution best positioned to correct its misapplication and guide its proper use.

II. This Case Provides An Ideal Opportunity To Confirm The Limited Reach Of *Totten* And The Evidentiary Focus Of The State Secrets Privilege.

This case is a perfect vehicle for the Court to address the dangers posed by overbroad applications of the state secrets privilege. This case involves allegations of gross human rights abuse, including violations of the Constitution, statutes, and treaties of the United States. It involves a CIA program that has been publicly acknowledged by the President of the United States, many details of which are now largely a matter of public knowledge. Despite all that, petitioners were thrown out of court prior to any discovery based on a broad application of the state secrets privilege that this Court has never embraced. This case thus squarely presents the important and recurring question whether the privilege is properly applied to render whole claims non-justiciable because they challenge clandestine conduct undertaken by the Government in the name of national security.

The fact that this Court is currently hearing two consolidated cases involving the privilege only reinforces the importance of a grant in this case. See *General Dynamics Corp.* v. *United States*, Nos. 09-1298, 09-1302. *General Dynamics* involves signifi-

cant questions about the proper scope and application of the privilege, and thus the Constitution Project filed a brief in that matter. See Br. of the Constitution Project as *Amicus Curiae*, *General Dynamics Corp.* v. *United States* (Nos. 09-1298, 09-1302), 2010 WL 4735594 (Nov. 19, 2010). But those cases are procedurally distinct; they do not involve a pleading-stage dismissal, and the question presented there focuses on the use of the privilege to scuttle a private litigant's *defense* against an affirmative Government claim. This case has a different focus, one that complements the issues raised in *General Dynamics*. Taken together, these cases offer the Court an excellent opportunity to examine the privilege in its most important manifestations and to forge a comprehensive approach that has become increasingly necessary as the privilege has come to greater prominence.

On the merits, the Court should use this case to reaffirm the narrow scope of *Totten* and reject the Ninth Circuit's expansion of the state-secrets privilege into a broad non-justiciability doctrine. The Court should first confirm, as discussed above, that the *Totten* bar is limited to cases arising out of covert agreements between the Government and its secret agents. The only categorical bar on national-security-related litigation for which federal jurisdiction and a valid cause of action exist is the prohibition on covert agents suing the Government to recover based on clandestine contracts. The *Totten* rule does not give the federal courts license to carve out new categories of cases that they simply will not entertain based on concerns about protecting government secrets.

With *Totten* properly confined to its foundations in the law of contracts, the Court should make clear

that the state secrets privilege is a limited rule of evidence. The privilege exists to protect particular information the disclosure of which would jeopardize national security. It is not a tool for making entire cases automatically disappear. That understanding has at least two important consequences.

First, a privilege claim must focus on specific information that the parties believe they need to prove their claims and defenses. And that information should be subject to independent judicial review to ensure that it is legitimately protected from disclosure. The promise of meaningful judicial review is the most effective way to ensure that the privilege is used appropriately, rather than as a cover for negligence or malfeasance. It provides a disincentive for the Government to assert the privilege where it is not warranted, counteracting the bureaucratic incentive to use secrecy as a deterrent to accountability. And, where a privilege claim is valid, putting the Government to its proof makes the entire process more transparent and legitimate. It helps ensure litigants that the courts are respecting their interests and that their right to obtain evidence in the judicial process has not been delegated to "the caprice of executive officers." *Reynolds*, 345 U.S. at 9-10.

Second, the result of a valid privilege invocation should not be the automatic dismissal of a litigant's claims. The courts must instead make every effort to allow claims to proceed even where privileged material is implicated. In crafting appropriate procedures to allow litigation to continue without compromising classified material, courts would not be writing on a blank slate. Since *Reynolds*, federal courts have gained considerable experience handling classified information and assessing claims concern-

ing such material. See *Reforming the State Secrets Privilege* at 5. The courts have developed a variety of innovative "procedures which will protect the privilege and yet allow the merits of the controversy to be decided in some form." *Fitzgerald* v. *Penthouse Int'l Ltd.*, 776 F.2d 1236, 1238 n.3 (4th Cir. 1985). For example, courts can order the Government to provide a non-privileged substitute for classified evidence. That procedure has been used with considerable success under the Classified Information Procedures Act (CIPA), 18 U.S.C. App. 3; see, *e.g., United States* v. *Rezaq*, 134 F.3d 1121, 1143 (D.C. Cir. 1998).

In recent years, the federal courts have also developed considerable experience handling classified information in habeas cases brought by Guantanamo detainees. Those courts have developed workable procedures designed to allow reasonable access to classified evidence, while protecting it from public disclosure, thereby making good on this Court's conviction that "[l]iberty and security can be reconciled; and in our system they are reconciled within the framework of the law." *Boumediene*, 553 U.S. at 798; see The Constitution Project & Human Rights First, *Habeas Works: Federal Courts' Proven Capacity to Handle Guantánamo Cases—A Report from Former Federal Judges*, at 17 (June 2010) (describing procedures that seek "to strike a careful balance between protecting classified information and ensuring that petitioners have enough information to challenge their detention"). This Court should take account of these innovations in rethinking the state secrets privilege. It should make clear that litigants should not be prematurely deprived of the opportunity to adjudicate their claims merely because they cannot have access to certain evidence.

This case presents the Court with an ideal opportunity to take up these important questions, to correct the dangerous understanding of the privilege represented by the decision below, and in its place to forge a strong, but appropriately limited, understanding of the privilege for the 21st century.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX

Members Of The Constitution Project's Liberty And Security Committee Endorsing The Statement On Reforming The State Secrets Privilege[1]

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[1] Affiliations are for identification purposes only and describe the member as of the time he or she endorsed the Constitution Project's 2007 statement on reforming the state secrets privilege.

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