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State Secrets Privilege: The Executive Caprice Runs Rampant

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No nation ever yet found any inconvenience from too close an inspection into the conduct of its officers but many have been brought to ruin, and reduced to slavery, by suffering gradual imposition and abuses, which were imperceptible, only because the means of publicity have not been secured.

Edward Livingston

I. INTRODUCTION

The majority of all rules of evidence share as their common justification some tendency to facilitate the illumination of the truth. Conversely, privileges perform an anomalous function in the law of evidence. Rather than advancing the ascertainment of the truth, privileges serve to make the fact-finding process more difficult, or sometimes impossible, by facilitating the cloak of evidence which may be both material and relevant to the litigation process. While privileges pose "an obstacle to the administration of justice," they serve to promote countervailing concerns such as "the protection of interests... which, rightly or wrongly, are regarded as of sufficient social importance to justify some sacrifice of availability of evidence." No-where is this inherent tension better illustrated than in litigation between a private citizen and the government. A litigant's need for information often conflicts with the government's need for secrecy.

As Professor McCormick noted:

Since the turn of the century the activities of government have

1. E. Livingston, Works 15 (1873).
3. Id. at 171.
4. Id.
5. See 8 J. Wigmore, Evidence in Trials at Common Law § 2192 (J. McNaughton rev. 1961) (discussing duty to give testimony). Dean Wigmore states that as a result of the inherent danger which evidentiary privileges pose to the litigation process, they should in every instance be limited to their narrowest purpose. Id.
6. C. McCormick, supra note 2, § 72, at 170.
7. This problem has sometimes been referred to as a conflict between the public interest in secrecy and the private interest of the litigant. See, e.g., Note, Evidence: Privilege Against Revealing State Secrets, 10 Okla. L. Rev. 336 (1957).
multiplied in number and widened in scope, and the need of liti-
gants for the disclosure and proof of documents and other informa-
tion in the possession of government officials has correspondingly
increased. When this need is asserted and opposed, the resultant
question requires a delicate and judicious balancing of the public
interest in the secrecy of "classified" official information against
the public interest in the protection of the claim of the individual to
due process of law in the redress of grievances.8

In theory, the invocation of an evidentiary privilege by the govern-
ment requires the courts to engage in a balancing of these competing
interests. In practice, however, this balancing does not always occur.

This Comment asserts that as to the privilege for military, diplo-
matic, and state secrets (the state secrets privilege), the federal judici-
ary has abdicated its role of balancing the competing interests of the
litigant and the government to the caprice of the federal executive. In
addition, this Comment argues that as a result of the current standard
of review for claims of the state secrets privilege established in United
States v. Reynolds,9 the degree of judicial involvement in assessing
claims of this privilege by the executive is left unresolved. As a result,
the courts have tended to treat claims of the state secrets privilege as
absolute. In so doing, the courts have not only provided the executive
with a shield against governmental liability, but also have provided
the executive with a sword to commit constitutional transgressions of
individual rights. Finally, this Comment proposes that, under the ra-
tionale of United States v. Nixon,10 the state secrets privilege should be
accorded a qualified status. Under this qualified status approach, the
ultimate decision of whether or not to allow a specific state secrets
privilege claim should be made by the federal judiciary after balancing
the litigant's need for discovery against the executive's legitimate in-
terest in secrecy.

II. ORIGINS OF THE STATE SECRETS PRIVILEGE

The state secrets privilege is a common law evidentiary privilege
that allows the government to resist discovery of information and to
prevent any person from giving such information if "there is a rea-
sonable danger that compulsion of the evidence will expose military
matters which, in the interest of national security, should not be di-

8. C. McCormick, supra note 2, § 107, at 262.
The privilege also protects information relating to foreign intelligence gathering methods or capabilities, as well as information which could disrupt diplomatic relations with foreign governments. The existence of the state secrets privilege "has never been doubted."

11. United States v. Reynolds, 345 U.S. 1, 10 (details of recently developed electronic equipment); see also Pollen v. Ford Instrument Co., 26 F. Supp. 583 (E.D.N.Y. 1939) (in suit for patent infringement, production of drawings of military apparatus not required when the government, as intervener, asserted that to do so would reveal military secrets); Firth Sterling Steel Co. v. Bethlehem Steel Co., 199 F. 353 (E.D. Pa. 1912) (in suit for patent infringement, copies of drawings made by defendant of armor piercing projectiles under a contract with the Navy ordered expunged from the record, where the Navy had intervened and objected); Farnsworth Cannon, Inc. v. Grimes, 635 F.2d 268 (4th Cir. 1980), aff'd on rehearing, 635 F.2d 281 (4th Cir. 1980) (no action for wrongful interference with prospective contractual relations between plaintiff and Navy could be maintained where any attempt on the part of the plaintiff to establish prima facie case threatened overriding interest of United States in secrecy); Totten v. United States, 92 U.S. 105 (1876) (no action may be maintained on a contract with the government for secret service as a spy during the Civil War).

12. See, e.g., Ellsberg v. Mitchell, 709 F.2d 51 (D.C. Cir. 1983), cert. denied, 465 U.S. 1038 (1984) (upholding state secrets privilege made by various federal officials and agencies in a constitutional tort action brought by plaintiffs seeking compensation for warrantless electronic surveillance); Halkin v. Helms, 690 F.2d 977 (D.C. Cir. 1982) (upholding claim of state secrets privilege made by National Security Agency with respect to its interceptions of communications involving individuals and organizations formerly active in protesting United States involvement in the Vietnam War, where these communications either originated in the United States for transmission abroad or originated abroad for transmission to the United States); A.C.L.U. v. Brown, 619 F.2d 1170 (7th Cir. 1980) (upholding state secrets privilege claim by government against suit seeking redress for alleged illegal investigation and intelligence gathering activities aimed at plaintiff); Halkin v. Helms, 598 F.2d 1 (D.C. Cir. 1978) (upholding claim of state secrets privilege made by National Security Agency with respect to its interceptions of communications involving individuals and organizations formerly active in protesting United States involvement in the Vietnam War, where these communications either originated in the United States or transmission abroad or originated abroad for transmission to the United States); Heine v. Raus, 399 F.2d 785 (D.C. Cir. 1978) (upholding claim of state secrets privilege as to information regarding employment of defendant CIA agent operating in the United States); Jabara v. Kelley, 75 F.R.D. 475 (E.D. Mich. 1977) (motion to compel answers to interrogatories denied in an action by an attorney against officials of the federal government for wiretap damages after assertion by government of state secrets privilege).


However, use of the state secrets privilege has been limited. Its genesis in American jurisprudence can be traced to Aaron Burr's trial for treason. In United States v. Burr, the Court was faced with the issue of whether the judiciary had the power to compel testimony from the executive in the face of an assertion of executive privilege. Chief Justice John Marshall issued a subpoena duces tecum to President Jefferson to produce correspondence between the President and General Wilkerson. The government objected that the correspondence probably revealed diplomatic communications between the United States and Spain. After holding that the President could be subpoenaed and examined as a witness and be required to produce any papers in his possession, Chief Justice Marshall recognized a privilege for documents containing state secrets:

There is certainly nothing before the court which shows that the letter in question contains any matter the disclosure of which would endanger the public safety. If it does contain such matter, the fact may appear before disclosure is made. If it does contain any matter which it would be imprudent to disclose, which it is not the wish of the executive to disclose, such matter, if it be not immediately and essentially applicable to the point, will, of course, be suppressed.


As one court has noted, "A ranking of the various privileges recognized in our courts would be a delicate undertaking at best, but it is quite clear that the privilege to protect state secrets must head the list." Halkin, 598 F.2d at 7. This article recognizes that in addition to the state secrets privilege, there are many other evidentiary privileges for governmental secrets. However, an examination of these various privileges is beyond the scope of this article. This article will limit its focus to the state secrets privilege, and to the executive privilege to the extent that it impacts the state secrets privilege.

Thus, Chief Justice Marshall deemed that the rationale for the state secrets privilege was rooted in the interest of protecting the public safety.

The public policy foundation of the state secrets privilege was further articulated in *Totten v. United States*. In *Totten*, a suit was brought by the claimant to recover compensation allegedly owing to a deceased wartime spy for espionage conducted during the Civil War under a contract with the United States. Justice Field, after exploring the unique character of a contractual relationship for espionage, held that no action could be maintained on a contract with the government for secret service as a spy. Justice Field stated that "[t]he secrecy which such contracts impose precludes any action for their enforcement." Justice Field then enunciated the rationale for the holding:

> 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.

Thus, like the court in *Burr*, the court in *Totten* was persuaded that the state secrets privilege is rooted in public policy; the need to protect the national security, as well as the confidential nature of certain communications.

However, in juxtaposition to these early cases, many of the modern cases have suggested or argued that the state secrets privilege derives from the separation of powers doctrine. The constitutional basis of the state secrets privilege is unclear. In *United States v. Reynolds*, the Court suggested that the privilege was rooted in the separation of powers. In *United States v. Nixon*, the Court appears to have derived the privilege from the President’s Article II duties as Commander in Chief and his responsibility for the conduct of foreign

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18. 92 U.S. 105 (1876).
19. *Id.* at 107. Justice Field stated further that
   > If upon contracts of such a nature an action against the government could be maintained . . . , whenever an agent should deem himself entitled to a greater or different compensation than that awarded to him, the whole service in any case, and the manner of its discharge, with the details of dealings with individuals and officers, might be exposed, to the serious detriment of the public.
   *Id.* at 106-07.
20. *Id.* at 107.
21. See infra text accompanying notes 125-27.
22. 345 U.S. 1 (1953).
23. *Id.* at 6 n.9.
affairs. 25 One modern commentator, in discussing the basic unsettled problem as to the degree of judicial involvement in assessing claims of the privilege, noted "the understandable desire of courts to avoid murky constitutional issues involving the separation of powers doctrine, and to avoid as well a stark confrontation with the executive branch." 26

III. ANALYSIS OF THE MODERN RULE: UNITED STATES V. REYNOLDS

A. United States District Court Decision

The widows of three civilians killed in the crash of an Air Force B-29 bomber during a flight to test certain secret electronic equipment brought wrongful death claims under the Federal Tort Claims Act 27 against the United States. 28 During discovery, the plaintiffs moved for production of an accident report prepared by the Air Force, as well as statements by the three surviving crew members taken at the time of the accident. 29 The government filed a motion to quash, 30 invoking Air Force regulations promulgated pursuant to the federal housekeeping statute. 31

The district court denied the motion to quash, and ordered production of the documents. 32 Shortly thereafter, the Secretary of the Air Force filed a formal claim of privilege with the district court, asserting both the right to withhold information under the housekeeping statute, as well as the further right to withhold the information because it was of such a "confidential" nature that disclosure would be "prejudicial to this Department and would not be in the public

25. Id. at 710; see U.S. Const. art. II, § 2, cl. 1 which states that "[t]he President shall be Commander in Chief of the Army and Navy of the United States."
27. 28 U.S.C. §§ 1346, 2671 (1982). The Federal Tort Claims Act provides in relevant part:

(b) [T]he district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages . . . for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

Id. at § 1346.
29. Id. at 469.
30. Id.
31. Id. at 471.
32. Id. at 472.
As a compromise, the Air Force offered instead to produce the witnesses who had testified at the investigation, allowing them to refresh their memories from any statement they made to the investigators, and testify as to any matter not classified.

The district court ordered the government to submit the documents in question "for examination by the court... so that the court could determine whether the disclosure 'would violate the Government's privilege against disclosure of matters involving the national or public interest.'" When the government refused to comply, the court ordered that the facts on the question of negligence be taken as established in plaintiffs' favor, and prohibited the government from introducing evidence to controvert those facts. After a hearing on the damages issue, judgment was entered in favor of plaintiffs.

B. The Third Circuit Court of Appeals Decision

The Court of Appeals for the Third Circuit affirmed. In an opinion by Judge Maris, the court of appeals first addressed the government's contention that the housekeeping statute:

In giving to the Secretary of the Air Force authority to prescribe regulations for the custody and use of the records and papers of his department necessarily confers upon him full discretionary power in the public interest to refuse to produce any such records for examination and use in a judicial proceeding and that such records thereby become "privileged."

Even though the court acknowledged the validity of the regulations promulgated by the Secretary of the Air Force under the housekeeping statute, the court refused to recognize the government's assertion that the branches of the executive departments are entitled to an absolute housekeeping privilege against disclosure of their inter-

33. Reynolds v. United States, 192 F.2d 987, 996 (3d Cir. 1951). An accompanying affidavit by the Judge Advocate General of the Air Force further stated that the report could not be furnished "without seriously hampering national security, flying safety and the development of highly technical and secret military equipment." Id. at 990.
34. Id. at 990.
35. Id. at 990-91.
36. Id. at 991.
37. Id.
38. Id. at 998.
39. Id. at 992. The court also noted that the government's assertion brought into focus considerations based upon the separation of powers. Id.
40. Id.
The court reasoned that any privilege under the housekeeping statute must yield to the expression of the congressional will in the Federal Tort Claims Act in which the government is treated as if it were a private person. The court noted "the recognition of such a sweeping privilege against any disclosure of the internal operations of the executive departments of the Government as contrary to a sound public policy." The court observed that:

It is but a small step to assert a privilege against any disclosure of records merely because they might prove embarrassing to government officers. Indeed it requires no great flight of imagination to realize that if the Government's contentions . . . were affirmed the privilege against disclosure might gradually be enlarged by executive determinations until, as is the case in some nations today, it embraced the whole range of governmental activities.

The court next addressed the government’s contention that, in addition to the housekeeping statute, the documents at issue were protected from production by the state secrets privilege. The court recognized the existence of the privilege and stated unequivocally that if the material in question was in fact privileged, the government could decline disclosure. However, the government, taking umbrage with the district court’s ruling that the documents should be submitted for an inspection in camera to determine the validity of the privilege claim, contended that “it is within the sole province of the Secretary of the Air Force to determine whether any privileged material is contained in the documents and that his determination of this question must be accepted by the district court without any independent consideration of the matter by it.”

The court of appeals vehemently disagreed with the government’s position, holding in camera inspection was the proper mechanism for determining the validity of a state secrets privilege claim. Specifically, the court of appeals stated:

We cannot accede to this proposition. On the contrary we are sat-

41. Id. at 994.
42. Id. It should be noted that in Reynolds, the Third Circuit Court of Appeals and the Supreme Court were in direct disagreement over the effect of the Federal Tort Claims Act on the assertion of governmental evidentiary privileges. See infra text accompanying note 54.
43. Reynolds v. United States, 192 F.2d at 995.
44. Id.
45. Id. at 996. The court noted that "[t]he claim of privilege thus made is of a wholly different character from the one previously discussed. It asserts in effect that the documents sought to be produced contain state secrets of a military character." Id.
46. Id.
47. Id. at 996-97.
satisfied that a claim of privilege against disclosing evidence relevant to the issues in a pending law suit involves a justiciable question, traditionally within the competence of the courts, which is to be determined in accordance with the appropriate rules of evidence, upon the submission of the documents in question to the judge for his examination in camera. Such examination must obviously be ex parte and in camera if the privilege is not to be lost in its assertion. But to hold that the head of an executive department of the Government in a suit to which the United States is a party may conclusively determine the Government's claim of privilege is to abdicate the judicial function and permit the executive branch of the Government to infringe the independent province of the judiciary as laid down by the Constitution.48

The court reasoned that in camera review of a state secrets privilege claim is not only mandated by the separation of powers doctrine, but is also a uniquely judicial function which the judiciary is competent to perform. The court noted:

The Government of the United States is one of checks and balances. One of the principal checks is furnished by the independent judiciary which the Constitution established. Neither the executive nor the legislative branch of the Government may constitutionally encroach upon the field which the Constitution has reserved for the judiciary by transferring to itself the power to decide justiciable questions which arise in cases or controversies submitted to the judicial branch for decision. Nor is there any danger to the public interest in submitting the question of privilege to the decision of the courts. The judges of the United States are public officers whose responsibility under the Constitution is just as great as that of the heads of the executive departments. When Government documents are submitted to them in camera under a claim of privilege the judges may be depended upon to protect with the greatest of care the public interest in preventing the disclosure of matters which may fairly be characterized as privileged. And if, as the Government asserts is sometimes the case, a knowledge of background facts is necessary to enable one properly to pass on the claim of privilege those facts also may be presented to the judge in camera.49

48. Id. at 997.
49. Id. at 997-98.
C. The United States Supreme Court Decision

The Supreme Court reversed and remanded the case.\textsuperscript{50} In an opinion by Chief Justice Vinson on behalf of a six-member majority,\textsuperscript{51} the Court first addressed the contention of the government that "the executive department heads have power to withhold any documents in their custody from judicial view if they deem it to be in the public interest" and the opposing assertion by respondents that "the executive's power to withhold documents was waived by the Tort Claims Act."\textsuperscript{52} The majority noted that "[b]oth positions have constitutional overtones which we find it unnecessary to pass upon, there being a narrower ground for decision."\textsuperscript{53} The Court then rejected the theory that the Federal Tort Claims Act waived any privilege of nondisclosure. The majority cited the provision of the Federal Rules of Civil Procedure allowing only discovery of matters "not privileged," and analyzed the government's claim as a matter of privilege under the law of evidence.\textsuperscript{54} The Court then stated that when the Secretary of the Air Force lodged his formal claim of privilege, "he attempted therein to invoke the privilege against revealing military secrets."\textsuperscript{55} After observing that judicial experience with the state secrets privilege "has been limited in this country,"\textsuperscript{56} the Court set out certain procedural requirements which must initially be satisfied in order to properly assert the state secrets privilege. The Court stated that:

The privilege belongs to the Government and must be asserted by it; it can neither be claimed nor waived by a private party. It is not to be lightly invoked. There must be a formal claim of privilege, lodged by the head of the department which has control over the matter, after actual personal consideration by that officer. The court itself must determine whether the circumstances are appropriate for the claim of privilege, and yet do so without forcing a disclosure of the very thing the privilege is designed to protect.\textsuperscript{57}

The majority noted that "[t]he latter requirement is the only one
which presents real difficulty," analogizing it to the judicial treatment of the privilege against self-incrimination in trying to reach a "formula of compromise." In so doing, the majority tried to strike a similar balance between the litigants' need for discovery and the executive's legitimate interest in maintaining secrecy for the national security in the context of a claim of the state secrets privilege. In this context, Chief Justice Vinson further held that the court must independently decide the validity of a privilege claim and that "[j]udicial control over the evidence in a case cannot be abdicated to the caprice of executive officers." However, the Chief Justice noted that judicial inquiry into the underlying substance of the claim should not be carried to the point where validation of the claim would result in the disclosure of the very information the privilege was designed to protect. While attempting to formulate a workable compromise between the competing interests of the government and the litigants, the court created an exception whereby a claim of the state secrets privilege would be supported without *in camera* review of the evidence:

Yet we will not go so far as to say that the court may automatically require a complete disclosure to the judge before the claim of privilege will be accepted in any case. It may be possible to satisfy the court, from all the circumstances of the case, that there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged. When this is the case, the occasion for the privilege is appropriate, and the court should not jeopardize the security which the privilege is meant to protect by insisting upon examina-

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58. United States v. Reynolds, 345 U.S. at 9. With regard to the privilege against self-incrimination, the Court observed:

The privilege against self-incrimination presented the courts with a similar sort of problem. Too much judicial inquiry into the claim of privilege would force disclosure of the thing the privilege was meant to protect, while a complete abandonment of judicial control would lead to intolerable abuses. Neither extreme prevailed, and a sound formula of compromise was developed.

*Id.* at 8-9.

The Court then articulated the balancing process employed by the courts when the privilege against self-incrimination was invoked:

"[T]he court must be satisfied from all the evidence and circumstances, and "from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure would result." (citations omitted). If the court is so satisfied, the claim of the privilege will be accepted without requiring further disclosure.

*Id.* at 9.

59. *Id.* at 9-10.

60. *Id.* at 8.
tion of the evidence, even by the judge alone, in chambers.\textsuperscript{61}

Thus, in such a situation, the court's role is limited to the question of whether the privilege was claimed under circumstances indicating a "reasonable possibility" that military or state secrets would be revealed. When this is the situation, the majority in \textit{Reynolds} held that the litigant's interest in discovery is a factor, but only to the degree of scrutiny that the court should accord a privilege claim.\textsuperscript{62} The standard of review was stated by Chief Justice Vinson as follows:

In each case, the showing of necessity which is made [by the plain-
tiff] will determine how far the court should probe in satisfying itself that the occasion for invoking the privilege is appropriate. Where there is a strong showing of necessity, the claim of privilege should not be lightly accepted, but even the most compelling neces-
sity cannot overcome the claim of privilege if the court is ulti-
mately satisfied that military secrets are at stake.\textsuperscript{63}

In applying the foregoing principles to the facts of the case, the majority concluded that the formal claim of privilege by the Secretary of the Air Force was sufficient to cut off further demands for the disclosure of the documents, as the plaintiffs had made only a "dubious showing of necessity."\textsuperscript{64} Moreover, the Court found that the offer of the Air Force to produce the essential witnesses for deposition presented plaintiffs with a "reasonable opportunity" to develop the essential facts and concluded "[w]e think that offer should have been accepted."\textsuperscript{65} Finally, the majority addressed the respondent's conten-
tion that in a civil forum where the government is a defendant, as is the case in criminal litigation where the government prosecutes, the government can only invoke the state secrets privilege at the price of losing the lawsuit.\textsuperscript{66} However, the majority stated that "[s]uch ration-
al has no application in a civil forum where the Government is not the moving party, but is a defendant only on terms to which it has consented."\textsuperscript{67} Thus, the Court held that where the state secrets privi-
lege is successfully asserted, military and state secrets are not subject to discovery in a civil suit against the government.

\begin{itemize}
  \item \textsuperscript{61} \textit{Id.} at 10.
  \item \textsuperscript{62} \textit{Id.} at 11.
  \item \textsuperscript{63} \textit{Id.}
  \item \textsuperscript{64} \textit{Id.} at 10-11.
  \item \textsuperscript{65} \textit{Id.} at 11.
  \item \textsuperscript{66} \textit{Id.} at 12.
  \item \textsuperscript{67} \textit{Id.}
\end{itemize}
IV. THE EFFECTS OF THE STATE SECRETS PRIVILEGE ON THE LITIGATION PROCESS

The effect of the invocation of the state secrets privilege varies depending on the context in which it is asserted.

A. Criminal Litigation Where the Government Prosecutes

When the government institutes criminal proceedings in which information otherwise within the ambit of the state secrets privilege is shown to be relevant and necessary to the defense of a charge, the government has been held to have waived the privilege. In such a case, if the government nevertheless insists upon withholding the information shown to be relevant and necessary, the court must take appropriate remedial action, including, if necessary, dismissal of the charge. In *Reynolds*, the majority, in dicta, articulated the rationale behind this rule:

The rationale of the criminal cases is that, since the Government which prosecutes an accused also has the duty to see that justice is done, it is unconscionable to allow it to undertake prosecution and then invoke its governmental privileges to deprive the accused of anything which might be material to his defense.

Therefore, in the context of criminal litigation, there is a built-in system to guarantee that the defendant's interests are considered. The reason for this rule is the protection of liberty from criminal incarceration without due process of law provided by the Fifth Amendment.

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68. See, e.g., United States v. Coplon, 185 F.2d 629 (2d Cir. 1950); United States v. Grayson, 166 F.2d 863 (2d Cir. 1948); United States v. Beekman, 155 F.2d 580 (2d Cir. 1946); United States v. Andolschek, 142 F.2d 503 (2d Cir. 1944); Roviaro v. United States, 353 U.S. 53 (1957).

69. See United States v. Reynolds, 345 U.S. at 12.

70. *Id.*

71. U.S. CONST. amend. V. This amendment provides in relevant part: "No person shall . . . be deprived of life, liberty, or property, without due process of law. . . ." *Id.* It should be further noted that in a criminal case, where the government has in its possession a statement made by a government witness prior to trial respecting the subject matter of his testimony, on proper application the statement must be disclosed to the defendant for use in cross-examination of that witness, even if the statement involves a state secret. See *Jencks* v. United States, 353 U.S. 657 (1957). Under this rule, if the government refuses to furnish the material ordered by the court, the court may strike the witness' testimony from the record, declare a mistrial, or take such other remedial action as the interests of justice require, including dismissal of the case. *Id.*
B. Civil Litigation Where the Government Prosecutes

When the government institutes civil litigation while withholding evidence adverse to its interests or pertinent to the claim or defense of an adverse litigant, there is authority for the view that the government has waived its privilege as to that evidence.\textsuperscript{72} The rationale of this rule is that the government, by filing suit, put the privileged information at issue and made it relevant to the case. It would, therefore, be unfair to allow the government to subsequently rely on the privilege to the detriment of the defendant.

C. Civil Litigation Where the Government is Not a Party

When the government invokes the state secrets privilege in the context of civil litigation to which it is not a party, the effect is simply to make the evidence unavailable to the participants. It is as though a witness had died or claimed the privilege against self-incrimination, and no specification of the consequences is necessary.\textsuperscript{73} The rule deals only with the effect of a successful claim of privilege by the government in proceedings to which it is not a party. The rationale of this rule is that the resolution of an evidentiary dispute should not “relate to who has won the race to the courthouse.”\textsuperscript{74} In such a case, sanctions against either party are inappropriate because neither party is responsible for the suppression of the evidence.\textsuperscript{75}

However, there is authority to the effect that if any attempt on the part of a plaintiff to establish a \textit{prima facie} case would result in the possible disclosure of state secrets, “the overriding interest of the United States and the preservation of its state secrets precludes any further attempt to pursue the litigation.”\textsuperscript{76} Thus, even where there is

\textsuperscript{72} See Hearn v. Rhay, 68 F.R.D. 574, 581 (E.D. Wash. 1975). \textit{But see} Republic of China v. National Union Fire Ins. Co., 142 F. Supp. 551 (D. Md. 1956) (holding that the United States was not barred from maintaining a libel action against ship insurers although it had invoked the state secrets privilege with respect to the answer to one interrogatory and the insurers contended that the answer might help them to establish an affirmative defense).


\textsuperscript{74} Farnsworth Cannon, Inc. v. Grimes, 635 F.2d 268, 272 (4th Cir. 1980).

\textsuperscript{75} \textit{Id.} at 270-71.

\textsuperscript{76} \textit{Id.} at 281; \textit{see also} Halpern v. United States, 258 F.2d 36, 41 n.4 (2d Cir. 1958).

However, the application of this rule can pose grave consequences:

Any litigant \ldots whose proof is hampered by the invocation of [the state secrets privilege] can hereafter be turned away from his efforts to obtain justice on the questionable grounds that, for reasons as to which he must remain uninformed, he might
only the potential for the revelation of state secrets, dismissal of the action is appropriate.

D. Civil Litigation Where the Government Defends

When the government is a defendant in civil litigation and asserts the state secrets privilege, the Reynolds standard is triggered.\(^{77}\) Once the plaintiff has met his initial burden of showing that the information he seeks is both relevant and material to prove his case, the burden shifts to the government to show that the evidence sought involves military, diplomatic, or state secrets that, in the interests of national security, should not be divulged.\(^{78}\) The disclosure must reasonably be expected to cause exceptionally grave danger or serious damage to national security. It is not, however, necessary that the government show that harm will inevitably result, but only that there is a reasonable danger that harm will result from disclosure.\(^{79}\) Furthermore, the showing made by the government need not extend to disclosing information protected by the privilege, even to the judge alone \textit{in camera}.\(^{80}\) The showing made by the government must only reasonably indicate that compulsion of the evidence would expose military, diplomatic, or state secrets.\(^{81}\)

In theory, the court has the ultimate authority to determine from all of the facts, circumstances, and documents presented by the parties whether the state secrets privilege should be upheld. Some courts have interpreted the Reynolds approach to allow a balancing of the competing interests, with a variable burden of proof placed upon the government depending on the need for the privileged material shown by the party seeking disclosure.\(^{82}\) However, the prevailing approach by the majority of jurisdictions is that while a court, when evaluating a claim of the privilege, may take into account the need for the information demonstrated by the party seeking disclosure, that need is only a factor in determining the extent of the court's inquiry into the

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\(^{77}\) United States v. Reynolds, 345 U.S. 1, 12 (1953).


\(^{80}\) United States v. Reynolds, 345 U.S. at 10.

\(^{81}\) \textit{Id.}

\(^{82}\) \textit{See, e.g., A.C.L.U. v. Brown, 619 F.2d 1170 (7th Cir. 1980).}
appropriateness of the claim.\textsuperscript{83}

If the court decides that compulsion of the evidence will not jeopardize national security, \textit{in camera} review of the material at issue may be ordered. The court may not permit the requester's counsel to participate in such examination.\textsuperscript{84} However, if the court decides "from all the circumstances of the case, that there is a reasonable danger that compulsion of the evidence will expose" state secrets, \textit{in camera} review is inappropriate.\textsuperscript{85}

When properly invoked, the state secrets privilege is absolute. No competing public or private interest can be advanced to compel disclosure of information found to be protected by a claim of this privilege.\textsuperscript{86} Assertion of the privilege does not compel a court to issue any sanction against the government even if the pertinent information

\textsuperscript{83} United States v. Reynolds, 345 U.S. at 11; see also Halkin v. Helms, 690 F.2d at 990.

If a compelling showing of need has been made and at the same time the surrounding circumstances do not make apparent the likelihood that disclosure will lead to serious injury, the court can insist that the claim of privilege be made on the public record and that the government either publicly explain the kinds of injury to the national security it seeks to avoid, or indicate why such an explanation itself would endanger the national security. See Ellsberg v. Mitchell, 709 F.2d 51 (D.C. Cir. 1983).

In contrast to the \textit{Reynolds} approach, the individual seeking disclosure of sensitive documents under the Freedom of Information Act is not required to make a showing of need or interest for the records. See Freedom of Information Act, 5 U.S.C. § 552 (1970). Any showing of need or interest is irrelevant. See Forshen v. Califano, 587 F.2d 1128, 1134 (D.C. Cir. 1978); Sterling Drug, Inc. v. F.T.C., 450 F.2d 698, 705 (D.C. Cir. 1971). Thus, as Judge Bazelon observed in his dissent in \textit{Halkin v. Helms}, the \textit{Reynolds} standard of review:

\begin{quote}
produces the anomalous result that a FOIA requestor, who may have no special need for the requested information, is given broader access to government information than a plaintiff who requires the information in order to pursue remedies for violation of constitutional rights. . . . Not only does this result defy common sense, but ultimately it will simply lead to a waste of judicial resources. Henceforth, plaintiffs seeking information in a civil suit will simply file a simultaneous FOIA request to reap the advantage of the broader inquiry under FOIA. Nothing will be gained except duplication and delay.
\end{quote}

\textit{Halkin v. Helms}, 598 F.2d 1, 16 (D.C. Cir. 1978) (Bazelon, J., dissenting).


As the court noted in \textit{Ellsberg v. Mitchell}:

\begin{quote}
The rationale for this rule is that our nation's security is too important to be entrusted to the good faith and circumspection of a litigant's lawyer (whose sense of obligation to his client is likely to strain his fidelity to his pledge of secrecy) or to the coercive power of a protective order.
\end{quote}


\textsuperscript{85} United States v. Reynolds, 345 U.S. at 10.

\textsuperscript{86} See \textit{Halkin v. Helms}, 598 F.2d at 7; Kinoy v. Mitchell, 67 F.R.D. 1, 9 (S.D.N.Y. 1975); \textit{Halkin v. Helms}, 690 F.2d at 990; United States v. Reynolds, 345 U.S. at II.
is necessary to prove some element of a plaintiff's case. Thus, the consequence of successfully asserting the state secrets privilege is grave, since once it is established, it serves as an absolute bar to disclosure. This effectively forecloses relief for violations of individuals' rights by precluding the discovery of evidence that the transgressions did occur.

V. CRITICISMS OF THE REYNOLDS STANDARD

The standard articulated in United States v. Reynolds for evaluating claims by the government of the state secrets privilege is inadequate for seven major reasons: 1) the procedural requirement that the department head may invoke the privilege only after personal consideration of the material rarely occurs in practice; 2) the Reynolds standard is largely based on the unjustified assumption that the federal judiciary is neither competent, nor trustworthy enough to decide sensitive issues of national security; 3) the executive branch tends to be biased in favor of the need for secrecy; 4) the executive branch may assert the privilege unevenly; 5) the Reynolds standard does not clearly articulate what information relates to “national security”; 6) the Reynolds standard does not provide a trial court with a clear roadmap for evaluating when in camera review is unnecessary; 7) the Reynolds standard violates the separation of powers doctrine. These criticisms will be discussed below.

A. Personal Consideration By Head of Department

The first criticism of the Reynolds standard is that the procedure requiring the department head to invoke the privilege only after personal consideration of the material rarely occurs in practice. Professor Wigmore, in his treatise on evidence, commented on the process by which the department head arrives at his decision whether to invoke the privilege:

The subordinate at [the] lowest point, obsessed by the general dogma against disclosure, prepares a reply denying the application; he will usually not have the initiative or the courage to propose an exceptional use of discretion in favor of granting the application. This draft reply is sent up, “through channels . . .” past two or

87. Salisbury v. United States, 690 F.2d 966, 975 (D.C. Cir. 1982).
88. See, e.g., Halkin v. Helms, 690 F.2d 977 (D.C. Cir. 1982) (holding that dismissal of plaintiff’s claims against the government for illegal surveillance and interception of its foreign communications was proper because the maintenance of the action depended upon the production of the privileged information); Salisbury v. United States, 690 F.2d 966 (D.C. Cir. 1982).
more intervening superiors (each one treating it in routine fashion),
till it reaches the Departmental head or other chief officer whose
signature is necessary. Arriving in a ponderous pile of daily draft
correspondence, it receives that necessary signature without fur-
ther consideration.89

Moreover, even if the department head does move more pressing
matters aside in order to consider the merits of disclosure requests
before him, he will usually take the staff proposals “on compulsory
faith”; “staff recommendations will inevitably be taken as prima facie
correct.”90 Thus, “[c]ertification by the department head that he has
‘personally’ considered the matter must in most cases, therefore, be an
empty formality if only because of the relentless pressure of far more
important affairs.”91

Yet, in Kinoy v. Mitchell, a federal district court held that it
would not recognize the government’s claim that documents sought
were protected by the state secrets privilege until assertion of that
claim was made by a responsible executive officer upon personal con-
sideration.92 In so holding, the court emphasized that the “actual
personal consideration” requirement of Reynolds “is not . . . a mere
technical requirement. Because the Court must rely so heavily upon
the judgment of the responsible executive officer in a case such as this,
it must be clear that the judgment was properly exercised.”93

However, as a result of the administrative process for decision
making within the executive branch, this procedural safeguard is re-
really illusory. The end result is that, in many cases, the decision to
oppose disclosure on privilege grounds will be automatic, with little or
no attention given to the relative possibility of injury attendant to dis-
closure or the reasons necessitating the discovery.

B. Judicial Competency and Trustworthiness

The second criticism of the Reynolds standard is that it is based
to a large extent on the unjustified assumption that the federal judici-
ary is neither competent nor trustworthy enough to decide sensitive
issues of national security. This assumption is unjustified for the fol-
lowing reasons.

89. 8 J. WIGMORE, supra note 5, § 2378, at 798 n.7 (quoting 8 J. WIGMORE, EVIDENCE
§ 2378(a) (3d ed. 1940)).
93. Id. at 9.
1. Judicial competence

Proponents of the view that the executive's claim of the state secrets privilege should be conclusive base this position on the assumption that only an experienced intelligence officer can properly determine whether certain material should be kept secret. However, as one court has noted, "such an extreme solution . . . would have grave drawbacks."

In fact, federal judges routinely evaluate technical data in patent, anti-trust and securities cases, as well as other similarly complex areas of litigation. Thus, "[s]eemingly there are few cases in which data are so secret with its value so subtle that a judge could not be trusted to make a reasoned decision." Moreover, while the executive has a

94. See, e.g., Ellsberg v. Mitchell, 709 F.2d at 57 n.31 ("[T]he probability that a particular disclosure will have an adverse effect on national security is difficult to assess, particularly for a judge with little expertise in this area."); see also Halkin v. Helms, 598 F.2d at 8-9, where the court articulated the factors which limit judicial competence to evaluate an executive prediction of the harms likely to result from disclosure of particular materials. The court noted:

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.

95. Ellsberg v. Mitchell, 709 F.2d at 58.

96. See Zagel, supra note 14, at 900.

97. Id.; see also United States v. United States Dist. Court, 407 U.S. 297 (1972) (Government asserted that domestic electronic surveillance operations were exempt from judicial review, both because the program was an exercise of the President's constitutional power to protect national security under 18 U.S.C. § 2511(3), and because issues of domestic surveillance are too complex for judicial evaluation). In United States v. United States Dist. Court, the Court noted:

We cannot accept the Government's argument that internal security matters are too subtle and complex for judicial evaluation. Courts regularly deal with the most difficult issues of our society. There is no reason to believe that federal judges will be insensitive to or uncomprehending of the issues involved in domestic security cases.

98. See Ellsberg v. Mitchell, 709 F.2d at 57 n.31 ("[T]he probability that a particular disclosure will have an adverse effect on national security is difficult to assess, particularly for a judge with little expertise in this area."); see also Halkin v. Helms, 598 F.2d at 8-9, where the court articulated the factors which limit judicial competence to evaluate an executive prediction of the harms likely to result from disclosure of particular materials. The court noted:

Id. at 320.

In Zweibon v. Mitchell, 516 F.2d 594 (D.C. Cir. 1975), cert. denied, 425 U.S. 955 (1976), the court applied the United States District Court rationale for domestic security, to cases involving issues of foreign security: "Although the judicial competence factor arguably has more force when made in the foreign rather than the domestic security context, the response of Keith to the analogous argument is nevertheless pertinent to any claim that foreign security
tendency to overvalue the effect that disclosure of certain material may have on national security, the courts, however, are unlikely to undervalue a particular claim of privilege. The difficulty in assessing the validity of a claim of privilege founded upon state secrets "calls for a particularly judicial expertise—balancing the government's need for secrecy against the rights of individuals." 98 Furthermore, as one legal scholar has noted:

The head of an executive department can appraise the public interest of secrecy as well (or perhaps in some cases better) than the judge, but his official habit and leaning tend to sway him toward a minimizing of the interest of the individual. . . . The determination of questions of fact and the applications of legal standards thereto in passing upon the admissibility of evidence and the validity of claims of evidential privilege are traditionally the responsibility of the judge. As a public functionary he has respect for the executive's scruples against disclosure and at the same time his duties require him constantly to appraise private interests and to reconcile them with conflicting public policies; he may thus seem better qualified than the executive to weigh both interests understandingly and to strike a wise balance. 99

Thus, it is clear that the assumption that the judiciary is incompetent to weigh claims of the state secrets privilege is unjustified. The judiciary, in most cases, is as qualified, if not more qualified, to balance the competing interests. Furthermore, in those rare situations where a court determines that it is ill-equipped to strike a reasonable balance, it can employ the expertise of the executive officer invoking the privilege, in order to provide it with a greater appreciation of the subtlety or complexity of a particular case.

2. Judicial trustworthiness

Proponents of the Reynolds standard also contend that even if the courts are allowed to review the evidence, even an ex parte or in camera examination is not entirely safe. 100 However, this argument is

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99. See C. McCormick, supra note 2, § 110, at 269.
100. See Clift v. United States, 597 F.2d 826, 829 (2d Cir. 1979), where the court stated: It is not to slight judges, lawyers or anyone else to suggest that any such disclosure carries with it serious risk that highly sensitive information may be compromised. In our own chambers, we are ill equipped to provide the kind of security highly sensitive information should have.
also unjustified. Federal judges are just as much employees of the federal government as are executive officers. Judges who review sensitive material in camera would not pose any greater threat to national security than would an employee of the executive branch. As Professor Wigmore has observed: "Is it to be said that even . . . disclosure [during in camera review] cannot be trusted? Shall every subordinate in the department have access to the secret, and not the presiding officer of justice? Cannot the constitutionally coordinate body of government share the confidence?"101

Indeed, executive subordinates often have access to highly sensitive material.102 Thus, "it is singular that there should be any qualms about permitting the courts to weigh any administrative claims for secrecy."103

C. The Executive Branch Tends to be Biased in Favor of the Needs of Secrecy

The third criticism of the Reynolds standard is that it gives the executive too much leeway to invoke the state secrets privilege, without the concomitant review by the court, where "from all the circumstances . . . , there is a reasonable danger that compulsion of the evidence will expose military matters."104 The weakness of this attempt to try to strike a balance between the interests of the litigant and the government is that the executive, which must only carry a minimal burden of proof, has an institutional tendency to be biased in favor of the need for secrecy. The end result is that whenever the executive is "given a blank cheque," it yields "to the temptation to overdraw."105

This temptation to overdraw is manifested in many ways. First, "[t]he executive has made the state secrets problem worse than it need be by retaining unnecessary classifications on billions of items."106 Second, when "all the circumstances" dictate that a state secret is involved which should not be divulged in the interests of national se-

Id. (quoting Alfred A. Knopf, Inc. v. Colby, 509 F.2d 1362, 1369 (4th Cir.), cert. denied, 421 U.S. 992 (1975)).
101. 8 J. Wigmore, Evidence § 2379 (3d ed. 1940).
106. Zagel, supra note 14, at 899.
curity, and because the executive will almost always be able to argue that state secrets are involved, the court will almost always defer to the executive's sworn assertion of the privilege. 107

Thus, the Reynolds standard provides the executive with the incentive to overclassify information in order to resist discovery. One author observed that, "in many of the cases [in which the state secrets privilege is asserted] the information is really being withheld in order to gain advantage in the suit or to avoid official embarrassment or simply to avoid troublesome interruption of bureaucratic routine." 108

Thus, "[e]ntrust the administrators with the exclusive power to determine which facts shall be divulged, . . . and the gate to unlimited extension of the privilege categories is open." 109

Because the Reynolds standard encourages the executive to be biased in favor of the needs of secrecy, the standard invites unbridled extension of the privilege categories, and the possibility of untold abuses.

D. The Executive Branch may Assert the Privilege Unevenly

The fourth criticism of the Reynolds standard is that it allows the government to assert the state secrets privilege unevenly. 110 Consequently, the standard allows the government to use the privilege unilaterally to its advantage, and yet not be bound by any standards of disclosure. The end result is that the standard encourages the executive to engage in political jockeying by manipulating the privilege to

107. Id.

While it would seem to be fair to assume that a court order would at least induce the executive to reexamine the withholding of information in light of the limited courtroom disclosure contemplated, this has not been the case, in part because the judicial record has been one of great deference to the executive.

Id.

108. Hardin, supra note 14, at 884. Similarly, Berger & Krash have indicated that "[n]o one has more eagerly resorted to the discovery machinery than the Government; no one has been more grudging in making it reciprocally available." Berger & Krash, supra note 14, at 1451.

109. Id. at 1464.

110. Halkin v. Helms, 598 F.2d at 9. Compare the language of Halkin, where the court stated that "[t]he government is not estopped from concluding in one case that disclosure is permissible while in another case it is not," id. at 9, with the reasoning in Ellsberg v. Mitchell, 709 F.2d 51 (D.C. Cir. 1983), where the court noted:

While . . . the revelation in one context of a body of information does not prevent the government in another arena from invoking the state secrets privilege to shield a closely related body of information [citations omitted], such selective dissemination certainly detracts from the government's ability to rely on inferences drawn from the "surrounding circumstances" in justifying its privilege claim.

Id. at 61 n.47.
its own political advantage, while allowing the executive to safeguard a broad class of information when disclosure would be harmful to its interests in the context of civil litigation.

The executive itself often releases classified information in a variety of settings and for a variety of purposes, even though such disclosure could arguably be detrimental to the national security. The executive allows such disclosures to occur because in most cases, it is politically advantageous for it to do so. Yet, under the *Reynolds* standard, the executive is not estopped from releasing sensitive information in one context, while shielding the same information under the rubric of the state secrets privilege in another context.

As a result, the standard allows the government to release sensitive information to the public when it is beneficial to the government’s cause, while denying disclosure when such release would be detrimental. In cases where the classified information is significantly relevant to the litigant’s claim, invocation of the state secrets privilege may seriously impede the litigant's ability to carry the requisite burden of proof. In cases where the classified information is critical to the litigant’s cause of action, invocation of the privilege effectively forecloses the litigant’s case. Thus, “[a]pplied in this way, the privilege permits the executive not only to safeguard a broad class of national security information, but also to minimize liability incurred for invasions of personal rights.”

E. The Amorphous Concept of National Security

The fifth criticism of the *Reynolds* standard is that it provides no guidelines for determining what information should fall within the state secrets privilege. Most importantly, the courts have not developed a precise definition of “national security.” “National security” is considered to be a generic term that covers a wide range of interests. This imprecise definition allows the executive to protect new kinds of information as the nature of the foreign threat changes.

111. Some examples of executive releases of sensitive information are: (1) President John F. Kennedy's release of intelligence photographs showing the installation of short range ballistic missiles in Cuba; (2) President Jimmy Carter's release of information concerning the capabilities of the stealth bomber; (3) President Ronald Reagan's use of intelligence photographs to indicate the presence of a Soviet and Cuban built airstrip on the Island of Grenada; (4) President Ronald Reagan's release of classified recordings and transcripts of the Soviet pilots' radio communications with their ground base before shooting down Korean Airlines Flight 007.

112. See Comment, supra note 14, at 578.

113. See, e.g., Ellsberg v. Mitchell, 709 F.2d at 57 (“Possibly because the state secrets doctrine pertains generally to national security concerns, the privilege has been viewed as both
The problem with this amorphous definition of "national security" is that "there is not much information in the files of the State and Defense Departments . . . which could not with some plausibility be given a security classification, if the executive wished to withhold it on that ground [or on any ground]." When this fact is coupled with the executive's already zealous propensity to be biased in favor of the needs of secrecy, it becomes apparent that the Reynolds standard invites serious abuses of the state secrets privilege.

Furthermore, the courts ordinarily do not mandate any threshold showing of quantity or quality of danger for information to qualify as privileged. There must only be a "reasonable danger" to national security. When such a "reasonable danger" exists, the courts give the utmost deference to the executive's claim that information "can be useful information to a sophisticated intelligence analyst, even if the utility or expected danger has not been shown to the expansive and malleable."); see also Jabara v. Kelley, 75 F.R.D. at 483 n.25. The court stated that

[a]lthough the term "military or state secrets" is amorphous in nature, it should be defined in the light of reason and experience, much in the same way that the term "national defense" has been defined in 18 U.S.C. § 793: i.e., a "generic concept of broad connotations, referring to the military and naval establishments and the related activities of national preparedness."

New York Times v. United States, 403 U.S. 713, 739 (1971) ("national defense" is a generic term not susceptible to precise definition); Gorin v. United States, 312 U.S. 19, 28 (1941); Note, National Security and the Amended Freedom of Information Act, 85 Yale L.J. 401, 409-15 (1978) ("national security" is a concept concerned with intangibles and uncertainties not reducible to concrete definitions); Zagel, supra note 14, at 880-85 (evaluating national defense related secrets requires an ad hoc analysis and lacks standardized criteria).


As one authority has stated in discussing the concept of national security in the context of the state secrets privilege:

Genuine considerations of national security may require secrecy in regard to the character and deployment of certain weapons. In my thirty-five years in foreign affairs, however, I almost never found that the public disclosure of political measures of plans could be truthfully said to jeopardize national security or be more than temporarily inconvenient.

Once national security has come to be accepted as a cloak for the conduct of foreign affairs, it is all too likely that public officials will find it irresistibly convenient for cloaking also some of their more far-out domestic activities. In fact, once they slip into the national security psychosis, they easily begin to equate, as we have so often seen, the nation's security with their own political power or partisan aims.


115. See United States v. Reynolds, 345 U.S. at 10; see also Halkin v. Helms, 598 F.2d at 9 (quoting "reasonable danger" standard in Reynolds); Halkin v. Helms, 690 F.2d at 990 ("reasonably could be seen as a threat to the military or diplomatic interests of the nation"); Jabara v. Kelley, 75 F.R.D. at 484 ("reasonable possibility that military or state secrets would be revealed").
court.” Thus, the courts do not realistically consider what information would reasonably present the possibility of danger to the national security. The end result is that the Reynolds standard, as it is currently formulated, protects secrecy for secrecy's sake rather than essential secrecy. As a result, the Reynolds standard implicitly endorses the proposition that only the executive can determine what is to be disclosed and what is to be retained under a veil of privilege. Thus, as one eminent jurist so keenly warned, “[s]ecurity is like liberty in that many are the crimes committed in its name.”

F. In Camera Review is Not Mandated in All Situations

The sixth criticism of the Reynolds standard is that it does not mandate in camera review of the material at issue, “from all the circumstances of the case, . . . there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged.”

The weakness of this standard is that, “[w]hile having the virtue of forcing attention upon the purpose underlying the privilege, this description is frustrating in its imprecision.” The executive can almost always forward a plausible argument that there is a “reasonable danger” that a particular disclosure will adversely affect national security. Moreover, in circumstances where such a “reasonable danger” exists, courts have interpreted the Reynolds standard as requiring “utmost deference” to the executive’s assertion that a particular disclosure falls within the privileged category. Consequently, as the Reynolds standard currently exists, the “from all the circumstances” test often results in courts upholding the executive’s claim of the state secrets privilege without the safeguard of in camera review, a result with dangerous ramifications. One scholar has stated that:


117. See, e.g., United States v. Ahmad, 499 F.2d 851, 855 (3d Cir. 1974) (“The passage of time has a profound effect upon such matters, and that which is of utmost sensitivity one day may fade into nothing more than interesting history within weeks or months.”).

118. 2 D. LOUISELL & C. MUELLER, supra note 14, § 226, at 965.


120. United States v. Reynolds, 345 U.S. at 10.

121. 2 D. LOUISELL & C. MUELLER, supra note 14, § 226, at 965.

122. See supra notes 115-17 and accompanying text.

A court which abdicates its inherent function of determining the facts upon which the admissibility of evidence depends will furnish to bureaucratic officials too ample opportunities for abusing the privilege. The lawful limits of the privilege are extensible beyond any control if its applicability is left to the determination of the very official whose interest it may be to shield a wrongdoing under the privilege. Both principle and policy demand that the determination of the privilege shall be for the court.124

However, under the current formulation for evaluating claims of the state secrets privilege, the Reynolds admonition that judicial control over the privilege cannot be abdicated to the caprice of the executive officers is mere surplusage.

G. The Reynolds Standard Violates the Separation of Powers

The final criticism of the Reynolds standard is that it violates the separation of powers. In Reynolds, the Court suggested that the state secrets privilege was rooted in the separation of powers.125 However, in United States v. Nixon,126 the Court explicitly derived the state

124. 8 J. WIGMORE, supra note 5, at § 2379; see also A.C.L.U. v. Brown, 619 F.2d at 1173. ("Any other rule would permit the Government to classify documents just to avoid their production even though there is need for their production and no true need for secrecy."). Proponents of the view that the executive's assertion of the state secrets privilege should be taken as conclusive without further in camera review base this contention in part on the belief that in camera review could result in a security breach. See supra notes 100-03 and accompanying text. But as one author has observed:

The only argument against this procedure [in camera review] seems to be that there are some things which even a judge cannot be permitted to see. It is strongly urged that such material is relatively rare; no reported case has involved such material. Since the most intimate and shadowed operations of the nation are revealed in detail to Congressmen and their staffs in executive session, it should be no more dangerous, and probably less so, to make the same disclosure to a judge sitting in chambers.

Zagel, supra note 14, at 886.

The author further notes that

[i]f the government has any doubt as to the trustworthiness of a judge, a change of docket could be requested. The lack of direct political pressure on a judge should also be compared to that on a Congressman.

A Congressman is more likely than a judge to have political motives for revealing or suggesting what he has learned in executive session. Congressional hearings may turn into fishing expeditions as Congressmen do not have to show good cause for discovery as does a private litigant.

Id. at 886 n.42; see also Jabara v. Kelley, 75 F.R.D. at 488 n.40, where the court stated:

It is significant also to note that the district judge in the Kinoy case recognized that in a case such as this the courts are competent and indeed required to make a judgment as to whether the material in question is a military or state secret and that "Reynolds does not require the court . . . to rely solely on the affidavit of the Attorney General," but may also consider the underlying in camera documents.

125. See supra text accompanying note 23.
secrets privilege from the separation of powers. In *Nixon*, the Court specifically excluded "a claim of need to protect military, diplomatic, or sensitive national security secrets" from review *in camera*. Later in the opinion, the Court suggested that the Article II powers of the President would allow him to invoke an absolute privilege against the production of materials for use in criminal litigation on no more than a generalized claim of the public interest in confidentiality of military and diplomatic secrets. Still later, the Court noted that in the area of military and diplomatic secrets, "the courts have traditionally shown the utmost deference to Presidential responsibilities."

However, the Court's discussion of the state secrets privilege in *Nixon* is pure dicta. The issue presented in *Nixon* was the proper standard of review to be accorded claims of executive privilege in the context of criminal litigation, not the state secrets privilege. Moreover, the *Nixon* court discussed the constitutional basis of the state secrets privilege, quoting Justice Jackson's dicta with approval, in *Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp.*:

> The President both as Commander-in-Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports are not and ought not to be published to the world. It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret.

Yet, Justice Jackson, in his dissenting opinion, later recanted from this position in *United States ex rel. Knauff v. Shaughnessy*. Furthermore, in *Pan-American World Airways v. CAB*, the court stated that "though *Waterman* has not been overruled by the Supreme Court, its apparently sweeping contours have been eroded by recent Circuit Court opinions." Thus, the discussion in *Nixon* that the constitutional basis of the state secrets privilege derives from the President's Article II powers, itself pure dicta, is based upon language in precedent which is also dicta, and which has been seriously questioned by many courts.

However, many lower courts have interpreted the language in

127. *See supra* text accompanying note 25.
129. *Id.* at 707.
130. *Id.* at 710.
131. 333 U.S. 103, 111 (1948).
133. 392 F.2d 483, 492 (D.C. Cir. 1968).
Nixon and Waterman as precedent for the proposition that the separation of powers mandates that the court defer to executive assertions of the state secrets privilege without any independent review. Thus, in the majority of cases, invocation of the privilege is left to the "caprice of the executive."

Yet, the separation of powers does not mandate that the courts defer automatically to executive assertions of the state secrets privilege. To the contrary:

When the Government is a party to litigation involving state secrets the separation of powers argument works against the executive, for it is normally a judicial function to determine the existence of a privilege. Giving the executive the final word in determining the existence of a privilege would infringe this traditionally judicial function.

Thus, it is essential that the Reynolds standard be reformulated, in order that a more workable equilibrium between the executive and the judiciary is established.

VI. TOWARDS A QUALIFIED PRIVILEGE

The evaluation of the state secrets privilege presents the courts with two competing considerations. On the one hand, courts are reluctant to delve into executive determinations concerning the state secrets privilege out of judicial deference to the President's constitutional responsibility for military and international affairs. This deference is also based on judicial recognition that the executive is better equipped to make such policy determinations, as well as the plethora of authority that judicial deference is constitutionally mandated.

Yet, on the other hand, there is a need for judicial supervision of the state secrets privilege to ensure that the privilege is neither used as a shield to immunize the executive from liability, nor as a sword which the executive can use to pierce the wall of protection which the Constitution places between the individual and the government. This

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134. See, e.g., Dayton v. Dulles, 254 F.2d 71, 76 (D.C. Cir. 1957), where the court noted: The cases and common sense hold that the courts cannot compel the Secretary to disclose information garnered by him in confidence in this area. If he need not disclose the information he has, the only other course is for the courts to accept his assertion that disclosure would be detrimental in fields of highest importance entrusted to his exclusive care.

Id. at 77.

135. Zagel, supra note 14, at 893; see also note 48 and accompanying text which discusses Reynolds v. United States.
judicial supervision serves to facilitate the private litigant's ability to obtain evidence in the government's possession, and thus to deter future transgressions on civil liberties through private lawsuits when government misconduct is alleged. Thus, the scope of the court's function in determining the validity of a claim of the privilege is the pivotal issue presented in state secrets privilege cases.

However, the current standard for evaluating state secrets privilege claims does not clearly delineate the court's role in deciding whether to uphold claims of the privilege. Because terms such as "from all the circumstances," "reasonable danger," and "national security" are not easy to concretely define, and because of the constitutional implications pervading every state secrets case, the judiciary tends to automatically defer to the executive's assertion of the privilege, without making its own independent review if the circumstances warrant such a privilege. A claim of the state secrets privilege creates almost an irrebuttable presumption that national security interests are at stake. Thus, the time has come for the courts to revamp the standard currently employed to weigh claims of the state secrets privilege, in order to restore the equilibrium to the litigation process between the private litigant and the government. Such equilibrium could be achieved through the use of a qualified privilege for state secrets. A qualified privilege would allow the courts to more effectively balance the litigant's need for discovery against the government's legitimate interest in secrecy.

A. United States v. Nixon - Executive Privilege

In United States v. Nixon, the Supreme Court attempted to define the proper allocation of power between the executive and the judiciary in the determination of executive privilege for confidential communications. In Nixon, seven staff members and political associates of President Nixon were indicted for conspiracy to obstruct justice and other offenses relating to the Watergate break-in. The grand jury also named the President as an unindicted co-conspirator. Upon motion by the Special Prosecutor, the district court issued a subpoena duces tecum to the President to produce tapes and documents relating to specified conversations between the President and

137. Id. at 687.
138. Id.
139. Id. at 688.
his aides. In response to this subpoena, the President released edited transcripts of forty-three conversations, including portions of twenty conversations subject to subpoena. The President then moved to quash the subpoena, claiming an absolute privilege of confidentiality for executive communications. The district court denied the motion and ordered delivery for in camera inspection of the original documents of all subpoenaed items. The decision was affirmed by the District of Columbia Circuit Court of Appeals. The matter was heard by the Supreme Court on an expedited basis.

The Court first rejected the President's contention that "the separation of powers doctrine precludes judicial review of a President's claim of privilege." The Court noted that "each branch of the Government must initially interpret the Constitution, and the interpretation of its powers by any branch is due great respect from the others." However, the Court reasoned that the judicial power "vested in the federal courts by Art. III, § 1, of the Constitution can no more be shared with the Executive Branch than the Chief Executive can share with the Judiciary the veto power, or the Congress share with the Judiciary the power to override a Presidential veto."

The Court concluded that any other decision "would be contrary to the basic concept of separation of powers." In so doing, the Court reaffirmed the holding in Marbury v. Madison that "[i]t is emphatically the province and duty of the judicial department to say what the law is." Thus, the Court, not the Executive, must evaluate claims of presidential privilege.

Next, the Court rejected the President's claim that executive privilege was absolute. In support of this claim of an absolute executive privilege, the President relied upon the need for protection of communications between high government officials and those who as-

140. Id.
141. Id.
142. Id.
143. Id. at 689.
146. Id. at 703.
147. Id.
148. Id. at 704.
149. Id.
150. Id. at 703.
151. Id.
sist them. To the extent that these communications were in the exercise of Article II powers, the Court recognized that the privilege of confidentiality was constitutionally based. Yet, the Court refused to accord the executive an absolute privilege, even though such privilege had a constitutional basis.

The President next asserted, in support of an absolute privilege, that the doctrine of separation of powers "insulates a President from a judicial subpoena in an ongoing criminal prosecution, and thereby protects confidential Presidential communications." However, the Court held that where the claim of privilege is a generalized one, the privilege was only qualified. The Court stated that in a criminal prosecution where there is a strong showing of need for discovery of privileged communications, the court will balance the need for the information shown by the litigant against the President's right of confidentiality. If the demonstrated need for the evidence outweighs the generalized claim of privilege, the court will require the President to submit the evidence for in camera inspection. The Court reasoned that this balancing of competing interests by the Judiciary was essential in order for the Judiciary to maintain its institutional integrity within the tripartite scheme of government created by the Constitution.

B. United States v. Nixon: Civil Litigation Where the Government Defends

In United States v. Nixon, the Court expressly refrained from de-

152. Id. at 705.
153. Id.
154. Id. at 706.
155. Id. As J. Sirica noted in the circuit court decision, the President misconstrued the rationale of the doctrine of separation of powers:

The doctrine of separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy.

Nixon v. Sirica, 487 F.2d at 715 n.73. J. Sirica also noted that "to leave the proper scope and application of Executive privilege to the President's sole discretion would represent a mixing, rather than a separation of Executive and Judicial functions." Id.

157. Id. at 713.
158. Id. at 706. The Court also reasoned that "[t]he impediment that an absolute, unqualified privilege would place in the way of the primary constitutional duty of the Judicial Branch to do justice in criminal prosecutions would plainly conflict with the function of the courts under Art. III." Id. at 707.
ciding the issue of the balance to be struck between the President's generalized interest in confidentiality and the need for relevant evidence in civil litigation.\textsuperscript{159} However, this issue was directly addressed in \textit{Dellums v. Powell}.\textsuperscript{160}

In \textit{Dellums}, a group of demonstrators filed a class action suit against former President Richard Nixon and former Attorney General John Mitchell. The plaintiffs sought damages for alleged violations of their constitutional rights stemming from their arrest on the steps of the United States Capitol during May Day demonstrations in 1971.\textsuperscript{161} In connection with their civil action, plaintiffs obtained a subpoena \textit{duces tecum} directing the White House counsel to appear before the Court and produce all tapes and transcripts of White House conversations discussing such demonstrations during the period when the relevant events took place.\textsuperscript{162} Mr. Nixon filed a motion to quash the subpoena, which was denied.\textsuperscript{163} The President appealed.\textsuperscript{164}

The majority first rejected Mr. Nixon's contention that "a formal claim of privilege based on the generalized interest of presidential confidentiality, without more, works an absolute bar to discovery of presidential conversations in civil litigation, regardless of the relevancy or necessity of the information sought."\textsuperscript{165} The Court stated that executive privilege, even in the context of civil litigation is presumptive rather than absolute, and that the existence of the privilege was ultimately a determination to be made by the court.\textsuperscript{166}

The majority then focused on Mr. Nixon's main contention, that

\textsuperscript{159} \textit{Id.} at 712 n.19. The Court stated:

We are not here concerned with the balance between the President's generalized interest in confidentiality and the need for relevant evidence in civil litigation, nor with that between the confidentiality interest and congressional demands for information, nor with the President's interest in preserving state secrets. We address only the conflict between the President's assertion of a generalized privilege of confidentiality and the constitutional need for relevant evidence in criminal trials.

\textit{Id.}

\textsuperscript{160} 561 F.2d 242 (1977).

\textsuperscript{161} \textit{Id.} at 244. The court noted: "Plaintiffs — appellees essentially charged that defendants deprived them of liberty without due process of law in violation of the Fifth Amendment, and infringed their rights to freedom of assembly, freedom of speech, and freedom to petition the government for redress of grievances in violation of the First Amendment." \textit{Id.} at 244 n.2 (referring to Brief of Appellees at 26).

\textsuperscript{162} \textit{Id.}

\textsuperscript{163} \textit{Id.}

\textsuperscript{164} \textit{Id.} at 245.

\textsuperscript{165} \textit{Id.} at 245-46 (emphasis added).

\textsuperscript{166} \textit{Id.} at 246.
the recognition for civil litigation of a presumptive executive privilege, would serve as a chill upon high level executive communications subjecting every proposal to public disclosure through civil discovery. Mr. Nixon argued that the constitutional mandate articulated in United States v. Nixon for disclosure of privileged material was limited to criminal litigation. However, the Court disagreed and held that:

[T]here is also a strong constitutional value in the need for disclosure in order to provide the kind of enforcement of constitutional rights that is presented by a civil action for damages, at least where, as here, the action is tantamount to a charge of civil conspiracy among high officers of government to deny a class of citizens their constitutional rights and where there has been sufficient evidentiary substantiation to avoid the inference that the demand reflects mere harassment.

The Court concluded that where plaintiffs in a civil action can make a preliminary showing of necessity for information that is not merely demonstrably relevant but indeed substantially material to their case, their need for discovery will outweigh a generalized claim of executive privilege. The Court reasoned that although plaintiffs had “not established with absolute certainty that conversations concerning the demonstrations actually took place between Mr. Nixon and those with whom he consulted during the time frame embraced by the subpoena,” it was enough that it was “highly likely that such conversations did take place and were recorded, and there is a substantial possibility that Mr. Nixon discussed the matter with Mr. Mitchell. . . .” Consequently, the Court affirmed the lower court decision, and ordered inspection in camera.

The significance of Dellums is that it firmly establishes that when a civil litigant can make a clear showing of necessity for privileged material, this showing of need will outweigh a generalized claim of executive privilege. Moreover, the litigant need not establish with “certainty” the existence of the privileged matter, but rather, need only establish that it is “highly likely” that such material exists. Fi-

167. Id.
168. Id. at 247.
169. Id.
170. Id. at 249.
171. Id. at 248-49.
nally, it is important to realize that in *Dellums*, there was substantial evidence that the executive had intentionally violated individual constitutional rights, and had attempted to shield that violation behind a cloak of privilege. Consequently, the court employed a qualified privilege in a civil case where the executive was the defendant, in order to facilitate the ability of the private litigant to gain vital discovery against the government for alleged misconduct.

VII. PROPOSAL FOR A QUALIFIED STATE SECRETS PRIVILEGE

So long as the state secrets privilege immunizes the executive from civil discovery, the executive will continue to invoke the privilege indiscriminately. This poses serious ramifications for the continued integrity of the federal judiciary. As two authors have noted, "[i]t would be an unfortunate world, indeed, in which the growth of the powers of state intervention in the affairs of the private citizens and social and political groupings was not accompanied by a corresponding expansion of the powers of impartial adjudicators to check the exercise and prevent the abuse of those powers."\(^{173}\) Moreover, the current deference accorded claims of the state secrets privilege by the courts draws into serious question our constitutional notion of separation of powers.

As a result, the courts should employ the qualified privilege and balancing process formulated in *United States v. Nixon*, and applied to civil litigation against the government in *Dellums v. Powell*. This balancing process would take into account the litigant’s necessity for discovery of the privileged material, the relative sensitivity of the material, and the likelihood of damage to national security if disclosed. In situations where the litigant shows a high degree of necessity for the material and the government opposes discovery for legitimate considerations of national security, the courts can formulate alternatives to discovery to compensate the litigant for the loss of the evidence.\(^{174}\)

This balancing process will lessen the incentive for the executive to over-classify material and oppose discovery on fallacious grounds.


174. For example, secondary evidence of the nonsecret elements of generally secret documents may be offered. Under this alternative, the Government would be allowed to delete privileged matter from a document under court supervision and then present the opposing party with a copy of the document as deleted. See Zagel, *supra* note 14, at 886.
The result will be a more efficient and equitable discovery process. Finally, the courts, by treating the state secrets privilege as qualified rather than as absolute, will restore symmetry between the individual litigant and the government in the litigation process.

VIII. Conclusion

This Comment has analyzed the current standard of review for claims of the state secrets privilege established in United States v. Reynolds. This Comment has asserted that under the Reynolds standard, the degree of judicial involvement in assessing claims of the state secrets privilege by the federal executive is left unresolved. As a result, the federal judiciary has tended to treat claims of this privilege as absolute. In so doing, the courts have abdicated their role of balancing the competing interests of the litigant and the government to the caprice of the executive. This Comment has also set forth seven reasons why the Reynolds standard, as currently formulated, is inadequate in striking an appropriate balance between the interests of the litigant and the government. Finally, this Comment has proposed that, under the rationale of United States v. Nixon, as applied to civil litigation in Dellums v. Powell, the state secrets privilege should be qualified. Under this qualified approach, the decision whether to uphold a specific state secrets privilege claim would be left to the judgment of the federal judiciary, after balancing the need for discovery by the litigant against the government's legitimate interest in secrecy.

Barry A. Stulberg

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175. Moreover, while unfettered executive control over the state secrets privilege poses serious dangers to the judicial process, little is lost if the court makes an independent determination of the validity of the privilege claim:

Limited disclosure to the judge will reduce the loss of secrecy. If the executive is as careful in claiming the privilege as it maintains, it will win in the overwhelming number of cases. . . . While very little is lost by an independent judicial determination of the privilege, a great deal is gained in terms of a fair and efficient legal system.

See Zagel, supra note 14, at 901-02.