A SURVEY OF SOLUTIONS: CURTAILING THE OVER-USE OF THE STATE SECRETS PRIVILEGE THROUGH "IN CAMERA" REVIEW

Elizabeth Elayne Alderson*

I. INTRODUCTION

A B-29 bomber, secrecy, and veiled truths. In 1948, a B-29 Airforce aircraft was on a research and development flight.[1] The plane exploded, killing most of those onboard.[2] Five years later, three widows of deceased crewmembers brought suit in hopes of finding out what really happened.[3] The executive branch used the "state secrets privilege" to withhold a report regarding the crash, thus barring the case from litigation.[4] When the report was declassified in the 1990s, the report did not contain any information significant to national security—only information which exposed the government to liability for faulty equipment.[5] Since the mid-1900's, the Supreme Court has held that a plaintiff's claim may be barred if the government asserts the state secrets privilege.[6] Today, the state secrets privilege is overused by the executive branch and under-evaluated by the judiciary.

 Juris Doctor Candidate, Stetson University College of Law; B.S. in Political Science, University of Central Florida, 2020; B.M.E. in Music Education, University of Central Florida, 2016. Managing Editor 2023–24, Articles & Symposia Editor 2022–23, *Stetson Law Review*; President of Phi Delta Phi International Legal Honors Society 2023–24, Stetson University College of Law. Thank you to my writing advisor, Professor Louis Virelli, and my Notes & Comments Editor, Setyo Laksono, for their feedback and guidance throughout the preparation of this Article. Thank you to all the Editors and Associates of *Stetson Law Review* for not only their hard work on this Article, but for the continued support and friendship throughout my law school career. And thank you to my husband, who as a member of the United States Coast Guard has inspired my interest in national security.

1. LOUIS FISHER, IN THE NAME OF NATIONAL SECURITY: UNCHECKED PRESIDENTIAL POWER AND THE REYNOLDS CASE 1 (2006).
2. *Id.*
3. *Id.* at 3.
4. United States v. Reynolds, 345 U.S. 1, 6–7 (1953).
5. FISHER, *supra* note 1, at xi.
6. Mohamed v. Jeppesen Dataplan, Inc., 614 F.3d 1070, 1077–78 (9th Cir. 2010).

There is an obvious need to keep matters of national security classified and highly guarded. Military strategies and secrets, new technologies, and other highly sensitive government information are often correctly classified as a state secret[7] in the name of protecting the "survival of the state."[8] However, what if the executive branch decides a matter is a state secret to prevent the information from being discoverable in court? What are the limits? Who enforces the boundaries?

The state secrets privilege allows for evidence to be barred from discovery when the government asserts, through a sworn affidavit from a high-ranking agency official, that the disclosure of such material would threaten national security.[9] The privilege prevents private parties from gaining access to documents that are potentially material to their case.[10] In the case establishing the parameters of the state secrets privilege—*United States v. Reynolds*—the Supreme Court held that the judiciary "should not jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence, even by the judge alone, in chambers."[11] The executive branch is using the privilege in its prosecutorial strategy because it has become precedent for the judiciary to acquiesce, thus allowing a complete bar to discovery. The final assessment of the documents purported to be a "state secret" should not be left to the same branch of government asserting the privilege.[12] This Article shows that the boundaries of the state secrets privilege are inherently vague, which has allowed the executive branch to expand the scope of the privilege such that it is being applied to situations widely outside of its intended initial scope. The factors established in *Reynolds* have provided ambiguous guidance. This Article encourages the use of in camera review and provides courts with ways to approach the state secrets privilege.

---

7. *Id.* at 1079.

8. William G. Weaver & Robert M. Pallitto, *State Secrets and Executive Power*, 120 POL. SCI. Q. 85, 92 (2005).

9. Anthony John Trenga, *What Judges Say and Do in Deciding National Security Cases: The Example of the State Secrets Privilege*, 9 HARV. NAT'L SEC. J. 1, 6–8 (2018).

10. *See generally* Louis Fisher, *State Your Secrets*, LEGAL TIMES, June 26, 2006, at 1, 1 https://sgp.fas.org/jud/statesec/fisher.pdf (discussing the state secrets privilege and cautioning its use as an absolute bar to judicial review).

11. 345 U.S. 1, 9–10 (1953).

12. FISHER, *supra* note 1, at 8.

This Article explains the "*Reynolds* factors"—their shortcomings, improper interpretation in subsequent cases, and an analysis of potential future uses. The need for an updated procedure is highlighted by a discussion of contemporary case law and statutes, an acquiescence of judicial and congressional authority, and a policy argument for expanded judicial intervention. This Article presents a survey of solutions in which the judiciary can derive strengthened authority to review the asserted documents via in camera review.

II. THE ORIGINS OF THE STATE SECRETS PRIVILEGE

There has long been debate regarding the exercise of unenumerated powers by the executive branch throughout history. For example, *Marbury v. Madison* describes presidential privileges that are not be delineated in the Constitution, establishing a structural analysis for interpreting the Constitution.[13] In English precedent, the state secrets privilege was titled the "public interest immunity."[14] This immunity is broad, with the English government claiming the immunity "*sua sponte*," without the prosecution first bringing the claim.[15] Understanding the history, in the United States and comparatively, sets an important foundation for evaluating the state secrets privilege as a common law evidentiary privilege.

A. American History of the State Secrets Privilege

Aaron Burr's 1807 trial for treason is often claimed to be the introduction of the state secrets privilege to the United States.[16]

---

13. *See* Marbury v. Madison, 5 U.S. 137, 176 (1803).

> To what purpose are powers limited, and to what purpose is that limitation committed to writing if these limits may, at any time be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished if those limits do not confine the persons on whom they are imposed. . . .

Id.

14. Sudha Setty, *Litigating Secrets: Comparative Perspective on the State Secrets Privilege*, 75 BROOK. L. REV. 201, 239 (2009) (stating that English court's "public interest immunity" is synonymous with United States courts upholding the state secrets privilege).

15. *Id.* at 227–28 n.145. This historical English precedent demonstrates the broad privilege, also known as "Crown Privilege," which is defined by Blackstone as "those [powers] which [the crown] enjoys alone." *Id.* (quoting WILLIAM BLACKSTONE, COMMENTARIES 266, 269 (London, A. Stranahan & W. Woodfall, 12th ed. 1793–95)).

16. FISHER, *supra* note 1, at 212.

Burr sought to compel the government to produce a private letter from General Wilkinson to President Jefferson. The government objected to producing the letter, citing that it contained information that "ought not to be disclosed."[17] Chief Justice John Marshall presided over the case, acknowledging that the government's interest in secrecy regarding military matters may allow for the suppression of evidence that would otherwise be relevant.[18] The Chief Justice held that the government must declare narrow and specific reasons for invoking the state secrets privilege; therefore, the Court must decide whether to compel disclosure.[19] *United States v. Burr* has been cited in many federal court opinions, arguably laying the groundwork for executive agencies to withhold critical information in the name of national security.

American jurisprudence has framed, molded, and expanded the state secrets privilege. In 1789, the "Housekeeping Statute" gave cabinet secretaries authority over the records of their respective departments.[20] This conferral of regulatory power is not a conferral of privilege. The Housekeeping Statute, now codified in 5 U.S.C. § 301, narrowly states that executive agencies may centralize control over their records via the head of the agency.[21] This statute evolved into a mechanism for executive agencies to

17. United States v. Burr, 25 F. Cas. 30, 36 (D. Va. 1807); *see also* Reuters Staff, *From Burr to Clinton: Supreme Court Takes History Tour in Trump Wealth Case*, REUTERS (July 9, 2020, 2:53 PM), https://www.reuters.com/article/uk-usa-court-trump-text/from-burr-to-clinton-supreme-court-takes-history-tour-in-trump-wealth-case-idUKKBN24A34J. Chief Justice John Marshall rejected the claim that the president was immune from delivering discovery solely because the subject matter may contain state secrets, elaborating that no fair construction of the constitution allowed for such an overarching rule and would tarnish the reputation of the Court. FISHER, *supra* note 1, at 213.

18. Michael C. Dorf, *The Scope and Nature of the State Secrets Privilege,* VERDICT: LEGAL ANALYSIS & COMMENT. FROM JUSTIA (Mar. 15, 2022), https://verdict.justia.com/2022/03/15/the-scope-and-nature-of-the-state-secrets-privilege.

19. *From Burr to Clinton: Supreme Court Takes History Tour in Trump Wealth Case*, *supra* note 17 (stating that Marshall's decision to compel disclosure was halted when Burr was acquitted on other grounds.); *see* Holly Wells, *The State Secrets Privilege: Overuse Causing Unintended Consequences,* 50 ARIZ. L. REV. 967, 972 (2008) (citing *Burr*, 25 F. Cas. 30 at 31–32) (stating that the need for the evidence should be "weighed against the government's need for secrecy and that if the letter contained information that 'would be imprudent to disclose, which it is not the wish of the Executive to disclose . . . if it be not immediately and essentially applicable to the point, [would], of course be suppressed'").

20. William Bradley Russell Jr., *A Convenient Blanket of Secrecy: The Oft-Cited But Nonexistent Housekeeping Privilege*, 14 WM. & MARY BILL RTS. J. 745, 746 (2005).

21. *Id.* (citing United States *ex rel* Touhy v. Ragen, 340 U.S. 462, 467–68 (1951)).

withhold documents from Congress, the courts, and the public.[22] The need for reform spurred legislative and judicial action. The first of many initiatives was the Freedom of Information Act (FOIA) in 1966.[23] FOIA permits a judge to conduct a review of documents in camera, but not of classified documents.[24] Classified documents, known as "Exemption 1" in the statute, protect disclosure of information that has been deemed classified in the interest of national defense, as derived from criteria established by the executive branch itself.[25] The exemption remained because the Department of Justice unilaterally decided federal courts were "not equipped to subject to judicial scrutiny Executive determinations" to matters of foreign relations and national defense.[26] Upon President Gerald Ford's response, courts were allowed to inspect classified documents, but were required to uphold the classification if reasonably supported.[27] In 2016, President Barack Obama signed the FOIA Improvement Act[28] with the intention of limiting agency discretion to withhold records. However, the Act has failed to provide the intended results of creating a "presumption of disclosure."[29] The Senate Judiciary Committee at the initial congressional hearing of FOIA in 1966 said it best: "[a] government by secrecy benefits no one."[30]

22. FISHER, *supra* note 1, at 124. In a peculiar illustration of the invocation of this statute, an Air Force telephone recording offered weather reports to anyone who called a public phone number but ended the call with a warning that the information was classified. *Id.* (citing 104 Cong. Rec. 6564 (1958) (statement by Rep. Wright)).

23. *Overview of the Federal Freedom of Information Act,* GEO. L. LIBR., https://guides.ll.georgetown.edu/c.php?g=320807&p=2146492 (last visited Sept. 8, 2023).

24. 1974 Amendments to the Freedom of Information Act, Pub. L. No. 93-502, 88 Stat. 1561 (1974) (codified as amended at 5 U.S.C. § 552(a)); M. David Lasher, *The Freedom of Information Act Amendments of 1974: An Analysis*, 26 SYRACUSE L. REV. 951, 951–52 (1975).

25. *FOIA Exemptions and Exclusions,* U.S. DEP'T OF HEALTH & HUM. SERVS., https://www.hhs.gov/foia/exemptions-and-exclusions/index.html (last visited Sept. 8, 2023).

26. FISHER, *supra* note 1, at 137 (citing H. Rept. No. 93-876, 93d Cong., 2d Sess. 2 (1974)).

27. *Id.* (citing 1 Pub. Papers 375 (1974)); *see* Veto Battle 30 Years Ago Set Freedom of Information Norms, THE NAT'L SEC. ARCHIVE (Nov. 23, 2004), https://nsarchive2.gwu.edu/NSAEBB/NSAEBB142/index.htm.

28. *History of FOIA*, ELEC. FRONTIER FOUND., https://www.eff.org/issues/transparency/history-of-foia (last visited Sept. 17, 2023).

29. *Id.*; *see* Eric Schewe, *America's State Secrets and the Freedom of Information Act*, JSTOR DAILY (Mar. 3, 2017), https://daily.jstor.org/americas-state-secrets-freedom-information-act/. "Many agencies effectively deny FOIA requests by nitpicking the details of the request or by charging large fees for copying." *Id.*

30. FISHER, *supra* note 1, at 140 (citing S. Rept. No. 1497, at 1).

B. A Comparative Analysis

In addition to the historical foundation within American history, the state secrets privilege is derived from English common law. The English Treatises of Evidence circulated through American jurisprudence throughout the 1800s.[31] In 1826, Thomas Starkie published a treatise that explained possible privileges for the exclusion of evidence.[32] Starkie described numerous categories in which this exception would apply, namely, when "particular evidence is excluded [because] disclosure might be prejudicial to the community."[33]

Coined the "crown privilege," this English precedent originated during the reign of Charles I of England.[34] The crown privilege was based on the rationale of public interest: keeping secrets from the public prevented courts from expanding their jurisdiction to habeus corpus claims of prisoners.[35] Commentators argued at the time that this privilege was abusive, putting the government at significant risk of overreach.[36]

C. The State Secrets Privilege and the Federal Rules of Evidence

The Federal Rules of Evidence do not discuss the procedure of handling the state secrets privilege. However, there have been attempts to establish such a rule. Federal Rules of Evidence 501 and 502 discuss privileges.[37] While other privileges are specifically

31. A. W. B. Simpson, *The Rise and Fall of the Legal Treatise: Legal Principles and the Forms of Legal Literature*, 48 U. CHI. L. REV. 632, 633 (1981).

32. *See* THOMAS STARKIE, A PRACTICAL TREATISE ON THE LAW OF EVIDENCE 36 (1826) ("It is a general rule of evidence already adverted to, that evidence of an *inferior degree* shall not be admitted whilst evidence of a *higher* and more satisfactory degree is attainable.").

33. *Id.* at 42–43; DAVID M. O'BRIEN & GORDON SILVERSTEIN, CONSTITUTIONAL LAW AND POLITICS: VOLUME 1: STRUGGLES FOR POWER AND GOVERNMENTAL ACCOUNTABILITY 350 (11th ed. 2020); *but see* Rex v. Watson (1817) 171 Eng. Rep. 591, 604 (K.B. 1817); Jonathan M. Lamb, *The Muted Rise of the Silent Witness Rule in National Security Litigation: The Eastern District of Virginia's Answer to the Fight Over Classified Information at Trial*, 36 PEPP. L. REV. 213, 222 n.48 (2008) (stating that "factual information" the government wished to keep secret from public notice based on security rationales may be barred).

34. Setty, *supra* note 14, at 227.

35. *Id.*

36. *Id.*

37. FED R. EVID. 501; FED R. EVID. 502.

named, the state secrets privilege is not.[38] The authority to identify the state secrets privilege as an evidentiary bar is described in John Henry Wigmore's 1940 treatise on evidence. This treatise asserts that there is a need for state secrets within the executive branch; however, it is up to the courts to decide whether the material in question is secret and therefore privileged.[39]

The attempts to establish the privilege within the Rules have not succeeded nor did any of the attempts explain a clear definition of a state secret. For example, an Advisory Committee on Rules of Evidence in 1965 proposed Rule 509, which defined a state secret as: "information not open to or therefore officially disclosed to the *public* concerning the national defense or international relations of the United States."[40] The Committee further explained that the chief officer of the agency claiming the privilege must write a statement of reason and scope to the judge. The judge may hear discussion in chambers, but all parties were entitled to attend.[41]

Proposed Federal Rule of Evidence 509 defined a state secret as a "secret relating to the national defense or the international relations of the United States."[42] The Justice Department urged the inclusion of the vague term "official document" codified within the rule.[43] Although unsuccessful, this attempt provoked a fiery debate within Congress.[44] A 2011 report to the House Committee on the Judiciary noted that Federal Rule of Evidence 501 eliminates all specific rules on privileges. The history of indecision and debate by multiple branches of government regarding the enumeration of the privilege demonstrates the need for judicial

38. FED R. EVID. 502; *see* Bryan A. Garner & Antonin Scalia, *A Dozen Canons of Statutory and Constitutional Text Construction*, JUDICATURE, Autumn 2015, at 80, 80. *Expressio unius est exclusio alterius*, also known as the negative-implication canon, states that the expression of one thing implies the exclusion of others. *Id.*

39. Louis Fisher, *Hiding Behind Secrecy*, L.A. TIMES (June 14, 2006, 12:00 AM), https://www.latimes.com/archives/la-xpm-2006-jun-14-oe-fisher14-story.html. "A court that '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.'" *Id.*; FISHER, *supra* note 1, at 48–49; Louis Fisher, *The State Secrets Privilege: Relying on* Reynolds, 122 POL. SCI. Q. 385, 402 (2007).

40. FISHER, *supra* note 1, at 140 (citing 46 F.R.D. 272 (1969) (emphasis added)).

41. *Id.* at 141 (citing 46 F.R.D. 273 (1969)).

42. 56 F.R.D. 251 (1971).

43. *Id.*; 5 U.S.C. § 552. Official information was defined as information possessed by an executive agency and which the disclosure would be against the public interest.

44. Robert M. Chesney, *State Secrets and the Limits of National Security Litigation*, 75 GEO. WASH. L. REV. 1249, 1292 (2007) (stating that in the early 1970s, Congress had a "vigorous debate" on whether the Federal Rules of Evidence should include a state-secrets provision).

review in this situation: in camera review will balance the congressional interests of not disclosing the information to the public while honoring a plaintiffs' right to a fair trial.

D. The Incorrect Application of the "*Totten* Bar"

The "*Totten* bar" is often conflated with the state secrets privilege.[45] However, the *Totten* bar is more restrictive because it applies only to government contracts for secret services.[46] *Totten v. United States* held that any claim against the government regarding a contract for clandestine services which relies on the disclosure of secret information may not be maintained and must be dismissed.[47] In *Totten*, President Lincoln retained a spy to obtain information on the Confederate militia.[48] When the spy died, his estate sued the government for compensation and the government denied the claim.[49] The Supreme Court held that the spy's contract must not be disclosed because public policy prevented justiciability.[50] The Court focused on the nature of the contract for which the parties "must have understood that the lips of the other were to be [forever] sealed respecting the relation of either to the matter."[51] The Supreme Court later expanded the *Totten* decision to encompass contracts "with the government when, at the time of creation, the contract was secret or covert."[52] Today, the *Totten* bar is sparingly used in its original context. The

45. Steven D. Schwinn, *The State Secrets Privilege in the Post-9/11 Era,* 30 PACE L. REV. 778, 781 (2010). While *Totten v. United States* and *Reynolds v. United States* share somewhat common themes, they "represent two entirely distinct principles." *Id. See generally* Tenet v. Doe 544 U.S. 1 (2005) (holding that application of the *Totten* bar, read broadly, could mean any lawsuit premised on espionage agreements and activity).

46. Schwinn, *supra* note 45, at 781.

47. Thomas R. Spencer & F.W. Rustmann, Jr., *The History of the State Secrets Privilege*, INTELLIGENCER: J. U.S. INTEL. STUD., Winter/Spring 2010, at 7, 9. *See generally* Totten v. United States, 92 U.S. 105, 107 (1875).

48. *Totten*, 92 U.S. at 106.

49. *Id.* at 105–06.

50. *Id.*; *cf.* El-Masri v. United States, 479 F.3d 296, 306 (4th Cir. 2006) (reinforcing that *Totten* deals with a narrow baseline of justiciability and can be separated from the issue of the state secrets privilege).

51. *Totten*, 92 U.S. at 106; *see* Douglas Kash & Matthew Indrisano, *In the Service of Secrets: The U.S. Supreme Court Revisits Totten*, 39 J. MARSHALL L. REV. 475, 480 (2006); Daniel L. Pines, *The Continuing Viability of the 1875 Supreme Court Case of* Totten v. United States, 53 ADMIN. L. REV. 1273, 1275 (2001). "The service stipulated by the contract was a secret service; the information sought was to be obtained clandestinely, and was to be communicated privately; the employment and the service were to be equally concealed." *Id.*

52. Guong v. United States, 860 F.2d 1063, 1065 (Fed. Cir. 1988).

Totten bar was superseded within the context of the state secrets privilege by *United States v. Reynolds* in 1953. *Totten* is a decision far removed from *United States v. Reynolds*. In *Totten*, the matter is nonjusticiable, unlike *Reynolds* where the matter was justiciable, yet a private litigant may still face documents barred from discovery under restrictive grounds.[53]

The Supreme Court has regularly applied *Totten* in cases regarding contract disputes that would inevitably lead to the disclosure of state secrets.[54] Despite *Totten*'s limited scope, it has been increasingly applied in a broader, more expansive context. From 1875 to 1951, the *Totten* bar has been cited only six times.[55] Between 1951 and 2001, it has been cited over sixty-five times—many of those cases having little relevance with government contracts for secret services.[56] The holding in *Totten* should be narrowly interpreted to focus on contractual spy cases—as per its intended scope—and should not be applied to the state secrets privilege.[57]

III. UNITED STATES V. REYNOLDS

The modern interpretation of the state secrets privilege can be traced to *United States v. Reynolds*. On October 6, 1948, a Boeing B-29 Superfortress (a strategic bomber aircraft) was scheduled to fly five hours from Warner Robins Airforce Base in Georgia to a landing base in Florida.[58] The aircraft had four civilians on board.[59] The trip's purpose was to test secret electronic equipment.[60] While in the air, a fire broke out in an engine of the aircraft, killing six of the nine crew members and three of the four civilians.[61] The widows of the three civilians who died in the crash initiated a lawsuit against the government for compensation due to the

53. FISHER, *supra* note 1, at 222.

54. Gen. Dynamics Corp. v. United States, 563 U.S. 478, 486 (2011); FBI v. Fazaga, 142 S. Ct. 1051, 1056 (2022).

55. FISHER, *supra* note 1, at 223 (citing Sean C. Flynn, *The Totten Doctrine and Its Poisoned Progeny,* 25 VT. L. REV 793, 793–94 (2001)).

56. *Id.*

57. Mohamed v. Jeppesen Dataplan, Inc., 614 F.3d 1070, 1084 (9th Cir. 2010) (citing Tenet v. Doe, 544 U.S. 1, 11 (2005)).

58. FISHER, *supra* note 1, at 1; Frank Cantelas, NAT'L OCEANIC & ATMOSPHERIC ADMIN., *Discovering a World War II B-29 Superfortress* (July 9, 2016), https://oceanexplorer.noaa.gov/okeanos/explorations/ex1605/logs/jul9/welcome.html.

59. FISHER, *supra* note 1, at 1.

60. United States v. Reynolds, 345 U.S. 1, 3 (1953).

61. *Id.*

"negligent and wrongful acts and omissions of the officers and the employees of the defendant while acting within the scope of their office and employment."[62] The Court decided the case on limited grounds: rather than creating a clear standard of judicial review when the government invokes the state secrets privilege, the Court only opined on the question of whether there was a valid claim of privilege under the Federal Tort Claims Act.[63] The Supreme Court attempted to create a formula of compromise, without going so far as to articulate one.[64] Chief Justice Vinson specifically stated he would "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."[65]

The Court held that the government must assert the state secrets privilege in court, and the judge has the right to determine whether the privilege has been properly raised and reasonably demonstrated.[66] *Reynolds* initiated a potential evidentiary bar within civil suits against the government.[67] The *Reynolds* balancing test provides a wide latitude for interpretation—and an unexpected ending.[68]

The 1953 decision of *Reynolds* provides guidance for the use of the state secrets privilege outside the scope of contractual disputes by creating a five-step approach to evaluate whether the state secrets doctrine should be invoked:[69]

> (a) [T]he claim of privilege must be formally asserted by the head of the department charged with responsibility for the information;

62. FISHER, *supra* note 1, at 3 (first citing Transcript of Record, Supreme Court of the United States, October Term, 1952, No. 21; and then United States v. Reynolds, 345 U.S. at 5).

63. *Reynolds*, 345 U.S. at 4; *see also* Federal Tort Claims Act, Pub. L. 79-601, §§ 401–424, 60 Stat. 812, 842–47 (1946); FISHER, *supra* note 1, at 15–18.

64. *Reynolds*, 345 U.S. at 9.

65. *Id.* at 10.

66. *Id.* at 7–8, 10–11.

67. *Id.* at 6.

68. Anthony Trenga, *What Judges Say and Do in Deciding National Security Cases: The Example of the State Secrets Privilege*, 9 HARV. NAT'L SEC. J. 1, 23 (2016) (citing Jabara v. Kelley, 75 F.R.D. 475, 480 (E.D. Mich. 1977)). "The *Reynolds* privilege, like all evidentiary privileges, is to be 'narrowly construed.'" *Id.*

69. *ArtII.S3.4.3 State Secrets Privilege*, CONST. ANNOTATED, https://constitution.congress.gov/browse/essay/artII-S3-4-3/ALDE_00013379/ (last visited Sept. 4, 2023).

> (b) the reviewing court has the ultimate responsibility to determine whether disclosure of the information in issue would pose a *"reasonable danger"* to national security;
>
> (c) the court should calibrate the extent of deference it gives to the executive's assertion with regard to the plaintiffs need for access to the information;
>
> (d) the court can personally review the sensitive information on an in camera, ex parte basis if necessary; and
>
> (e) once the privilege is found to attach, it is absolute and cannot be overcome by a showing of need or offsetting considerations.[70]

Once the privilege has been found to attach, a plaintiff cannot introduce the privileged information into their civil suit, and the cases are often dismissed.[71] *Reynolds* held that the state secrets privilege is invoked to exclude information from discovery that would allegedly endanger national security as stated in (b): "the reviewing court has the '*ultimate responsibility'* to determine whether disclosure of the information in issue would pose a reasonable danger to national security."[72] Chief Justice Vinson held that the suit could not proceed because it posed a reasonable danger to national security.[73]

IV. THE NEED FOR AN UPDATED ANALYSIS

In 1999, the *Reynolds* report was declassified. In 2000, it was concluded that the report contained no secret material. In fact, rather than containing secret information, the report explains the poor conditions of the bomber plane.[74] The case in which the analysis of the state secrets privilege was founded upon was itself based on an incorrect use of the privilege. Upon release of the report, Judy Paula Loether, a daughter of a killed civilian, discovered the documents that revealed the truth: the pilot turned

70. Chesney, *supra* note 44, at 1251–52; *see also* John Ames, *Secrets and Lies:* Reynolds' *Partial Bar to Discovery and the Future of the State Secrets Privilege*, 39 N.C.J. INT'L L. 1067, 1073 (2014).

71. O'BRIEN, *supra* note 33.

72. *Id.*

73. Ames, *supra* note 70.

74. O'BRIEN, *supra* note 33, at 350–51; Morning Edition, *Administration Employing State Secrets Privilege at Quick Clip*, NAT'L PUB. RADIO, at 02:18 (Sept. 9, 2005), https://www.npr.org/templates/story/story.php?storyId=4838701.

off the wrong engine, thus creating a spiral of events that led to the crash of the B-29 bomber plane.[75] The executive branch used the once rarely invoked state secrets privilege to cover up poor maintenance and crew error.[76]

In Chief Justice Vinson's majority opinion in *Reynolds*, the Justice asserted that the decision rested on the current geopolitical climate of the 1950s: experience of past wars (World War II) instilled fear, thus overly guarding new technology, even when military strategy is not a material issue in the case.[77] The Chief Justice cited *Totten v. United States*[78]—a case that is categorically different from the issues in *Reynolds* and separate from the larger discussion of the state secrets privilege entirely.

Private citizens face an uphill battle and comparative lack of resources when they decide to sue the government—time, money, persistence, etcetera. Legal battles sometimes go on for years. When the government asserts the state secrets privilege, the government's tight grip on internal documents is "buttressed by a general unwillingness . . . to share documents with anyone, including the coordinate branches of Congress and the judiciary."[79]

Cases regarding the state secrets privilege have become much more common in the last 50 years.[80] More often than not, the government has prevailed—both in the complete dismissal of claims as well as relief from discovery.[81] According to Steven Aftergood, the head of the Federation of American Scientists Project on Government Secrecy, the declassifying of the once-classified material is a call to adopt a more "'probing' and 'rigorous' method for determining whether the government is telling the truth when it claims court review of information would damage national security."[82] This demonstrates that courts should reevaluate the current interpretation of *Reynolds* so litigants' rights can be protected.

---

75. Morning Edition, *supra* note 74, at 02:07.

76. *Id.* at 3:01.

77. United States v. Reynolds, 345 U.S. 1, 9 (1953).

78. *Id.* at 11.

79. FISHER, *supra* note 1, at 4.

80. Chesney, *supra* note 44, at 1297. "After only six opinions considering assertions of the privilege were published in the nineteen-year period from 1974 through the end of 1973, there were sixty-five such published opinions from 1973 through the end of 2001." *Id.*

81. *Id.*; *see also id.* at 1298–99.

82. Hampton Stephens, *Supreme Court Filing Claims Air Force, Government Fraud in 1953 Case*, INSIDE THE AIRFORCE (Mar. 14, 2003), https://sgp.fas.org/news/2003/03/iaf031403.html (quoting Steven Aftergood).

A. Expansion of the State Secrets Privilege

Recent years and current events have brought media attention, and thus public scrutiny, to the government's assertion of the state secrets privilege.[83] The executive branch is pushing the boundaries and limits of the state secrets privilege, and courts are deferring to the executive's assertions. The misuse of the privilege creates an unnecessary hurdle for plaintiffs.

The privilege has been incorrectly applied in cases of discrimination. For example, the CIA invoked the privilege when an African American CIA employee alleged discrimination against the agency. The agency invoked the privilege in a similar situation regarding a case brought by a female employee who filed suit against the agency for sexual harassment and discrimination.[84] The FBI used the privilege to dismiss the whistle-blower claim in *Edmonds v. Department of Justice*.[85] In *Edmonds*, an FBI agent reported "breaches in security, lax translation services, incompetence, and willful misconduct" to the FBI, and she was promptly fired.[86] Then-Attorney General Ashcroft invoked the state secrets privilege, and no reference as to the reason for invocation was described in the complaint.[87] Another whistle-blower complaint, *Darby v. U.S. Department of Defense*, was also dismissed due to the assertion of the privilege.[88] In *Darby*, a contractor who worked at Area 51 alleged retaliation by his employer—a government contractor—after reporting a safety problem. The government succeeded in barring the claim by

83. Wells, *supra* note 19, at 989–91. For example, NSA wiretapping and extraordinary rendition have been largely publicized. *See also id.* at 911 (stating that there has been an increase in scholarly articles discussing the state secrets privilege in the two years after September 11th).

84. Sterling v. Tenet (*Sterling I*), No. 01 Civ. 8073 (S.D.N.Y. Jan 23, 2003); Tilden v. Tenet, 140 F. Supp. 2d 623 (E.D. Va. 2000). Jack B. Weinstein, *The Role of Judges in a Government of, by and for the People: Notes for the Fifty-Eighth Cardozo Lecture,* 30 CARDOZO L. REV. 1, 93 n.415 (2008).

85. *See generally* Edmonds v. U.S. Dep't of Justice, 323 F. Supp. 2d 65 (D.D.C. 2004); FISHER, *supra* note 1, at 249–52.

86. Carrie Newton Lyons, *The State Secrets Privilege: Expanding Its Scope Through Government Misuse*, 11 LEWIS & CLARK L. REV. 99, 114 (2007) (citing *Edmonds*, 323 F. Supp. 2d at 68–69).

87. *Id.* at 114–15. Edmonds had received some information via her FOIA request, as well as additional information from Congress and public knowledge. But the Court nevertheless held that "no part of her complaint could proceed." *Id.*

88. Darby v. U.S. Dep't of Defense, 74 F. App'x 813 (9th Cir. 2003); *see* Lyons, *supra* note 86, at 116.

asserting the state secrets privilege.[89] In 1989, the Ninth Circuit dismissed a case brought by a homosexual employee of a government contractor.[90] The employee alleged the contractor did not submit his application for a security clearance due to his sexual orientation.[91] The motion was dismissed when the Secretary of Defense held that the case could not be litigated without disclosing state secrets.[92] The inapplicable invocation of the privilege may be a factor in the judiciary distancing their rulings from the Reynolds factors because the expansion of the privilege has become both vague and burdensome to courts.

1. The Effects of September 11th on the State Secrets Privilege

There has been a significant increase in the invocation of the privilege since the September 11th terrorist attacks.[93] In the wake of September 11th, programs such as wiretapping and extraordinary extradition were used and the application of the state secrets privilege was broadened, allowing for a growing interpretation of the state secrets privilege by courts, and thus expansion of judicial deference.[94] After September 11th, courts shifted to an analysis more similar to the *Totten* bar than the *Reynolds* factors, giving further deference to the executive branch by completely dismissing plaintiff's cases without evaluating the possibility of observing the evidence in camera.[95] During this period, the government argued that the state secrets doctrine is enumerated in Article II of the Constitution.[96] Because the *Reynolds* factors blended with *Totten*[97], a plaintiff's possibility to proceed with alternative evidence is frustrated because the entire

89. Lyons, *supra* note 86, at 116.
90. Weston v. Lockheed Missiles & Space Co., 881 F.2d 814, 815 (9th Cir. 1989).
91. *Id.*
92. *Id.*
93. O'BRIEN, *supra* note 33.
94. Chesney, *supra* note 44, at 1299–1300. "When the 9/11 attacks ushered in the current era of strategic prioritization of counterterrorism, it thus was inevitable that government secrecy would become a more significant issue in the overall national security debate." *Id.* at 1299; *id.* at 1300 (stating that "judicial timidity" has emboldened the executive branch during this time).
95. Schwinn, *supra* note 45, at 809.
96. *Id.* at 813–14. *See generally* El-Masri v. Tenet, 437 F. Supp. 2d 530 (E.D. Va. 2006).
97. Lyons, *supra* note 86, at 120.

claim is now barred.[98] Cases that should be analyzed under *Reynolds* are being faced with the *Totten* bar—plaintiffs are now incorrectly having to face a complete bar to their case.[99] As of 2001, the government has cited *Totten* approximately sixty-five times.[100] However, most of the citations noting *Totten* are in cases having nothing to do with government contracts for secret services—the original meaning of the *Totten* bar.[101] Two cases after September 11th strongly exemplify the expanded scope of "utmost deference"[102]: *Khaled El-Masri v. United States* and *United States v. Zubaydah*.

a. *Khaled El-Masri v. United States*

A German citizen with Lebanese roots, Khaled El-Masri, was taken for questioning by Macedonian officials who alleged his passport was fake.[103] After being held for three weeks, El-Masri was transferred to the CIA's "rendition team."[104] The agency believed El-Masri had made a trip to Jalalabad, Afghanistan, where he met with Egyptian and Norwegian contacts regarding al-Qaeda.[105] However, El-Masri had never been to Jalalabad.[106] For four months, El-Masri was tortured with extraordinary

98. Schwinn, *supra* note 45, at 781. *See generally El-Masri* 437 F. Supp. 2d 530 (E.D. Va. 2006).

99. Lyons, *supra* note 86, at 120. Currently, the expansive interpretation of the *Reynolds* factors is "undermining the normative baseline" of the doctrine in four ways:

> (1) deviating from the scope and parameters of the privilege via overbroad invocation such that cases are entirely dismissed without review on the merits; (2) expanding the privilege into the realm of *Totten*, despite the distinct nature of the *Totten* privilege; (3) interfering with private constitutional and statutory rights that the government should be protecting; and (4) interfering with public rights and the role of the people as a check on the power of the government.

Id.

100. FISHER, *supra* note 1, at 223.

101. *Id.*

102. Schwinn, *supra* note 45, at 809.

103. El Masri v. United States, 479 F.3d 296, 300 (4th Cir. 2007); *Compensation and Official Apology for Victim of CIA Torture and Secret Rendition*, COUNCIL OF EUR.: IMPACT OF THE EUROPEAN CONVENTION ON HUM. RTS., https://www.coe.int/en/web/impact-convention-human-rights/-/compensation-and-official-apology-for-victim-of-cia-torture-and-secret-rendition- (last visited Aug. 25, 2023) [hereinafter Compensation and Official Apology].

104. *Compensation and Official Apology*, *supra* note 103.

105. *Khaled El-Masri*, THE RENDITION PROJ., https://www.therenditionproject.org.uk/prisoners/khaled-elmasri.html (last visited Feb.17, 2022).

106. *Id.*; *see also* Schwinn, *supra* note 45, at 812–16.

interrogation techniques.[107] El-Masri, in conjunction with the American Civil Liberties Union, filed a lawsuit against the CIA alleging the agency violated universal human rights laws.[108] Quickly after the complaint was filed, the government answered: the state secrets privilege prevented disclosure and requested the court grant a stay.[109] The Fourth Circuit granted the stay and eventually dismissed the case.[110] El-Masri appealed the lower court's assertion that "given the application of the privilege in this case, the United States' motion to dismiss must be . . . granted."[111] The Fourth Circuit evaluated the use of the privilege and dismissal: the court held the dismissal of the claim was proper because, while some of the information was made public, facts regarding the CIA's methods of gathering intelligence could not be disclosed, and thus the plaintiff failed to state a claim.[112] The court compared the state secrets privilege to the broad, constitutional executive privilege by analyzing *United States v. Nixon* within El-Masri's case.[113] The court connected the state secrets privilege incorrectly to the executive privilege, thus expanding the state secrets privilege beyond its foundations.[114] The court cited *Nixon*, reminding litigants that "courts have traditionally shown the utmost deference to Presidential responsibilities" and that the "[e]xecutive's constitutional authority is at its broadest in the realm of military and foreign affairs."[115] Bundling the state secrets privilege with the executive privilege is inherently dangerous.

107. Jamil Dakwar, *New CIA Torture Documents Confirm Chilling Details of Khaled El-Masri's 'Kafka-esque' Ordeal*, ACLU (June 17, 2016), https://www.aclu.org/news/national-security/new-cia-torture-documents-confirm-chilling-details-khaled-el-masris "The investigation makes clear that El-Masri's unlawful rendition and detention were rife with neglect, abuse, incompetence, reaching to the highest levels of the CIA." *Id.*

108. *Khaled El-Masri v. United States*, ACLU (Nov. 6, 2018), https://www.aclu.org/cases/khaled-el-masri-v-united-states.

109. El Masri v. United States, 479 F.3d 296, 301 (4th Cir. 2007); *see El-Masri v. Tenet: Background on the State Secrets Privilege*, ACLU (Nov. 27, 2006), https://www.aclu.org/documents/el-masri-v-tenet-background-state-secrets-privilege. "The CIA claimed that the simple fact of holding proceedings would jeopardize state secrets, notwithstanding the vast amount of information that has already been made public about El-Masri and the United States' 'extraordinary rendition' program." *Id.*

110. *El Masri*, 479 F.3d at 301–02.

111. *Id.* at 302 (citing Order, El-Masri v. Tenet, 437 F. Supp. 2d 530, 541 (E.D. Va. 2006)).

112. *Id.* at 312.

113. *Id.* at 302 (explaining that the Court in *U.S. v. Nixon*, 418 U.S. 683 (1974). recognized the state secrets privilege to be tied to the executive claim privileges found in Article II of the United States Constitution).

114. *Id.*

115. *Id.*

b. *United States v. Zubaydah*

United States v. Zubaydah is another timely example of the overuse of the state secrets privilege. Zayn al-Abidin Muhammad Husayn, also known as "Abu Zubaydah," was mistakenly believed to be a high-ranking member of al-Qaeda.[116] Zubaydah, a Palestinian native, was captured in 2002 and tortured at a CIA black site.[117] Subject to the new enhanced interrogation techniques, Zubaydah was waterboarded more than eighty times and spent over eleven days in a coffin-sized box.[118] The government contended Zubaydah was a high-level al-Qaeda member with intimate knowledge of the September 11th attacks.[119] Today he is detained in the Guantanamo Bay military prison.[120] In 2017, Zubaydah's lawyers sought to obtain two documents regarding Zubaydah's location during his time held by the CIA[121] from former CIA contractors who supervised Zubaydah's interrogation, seeking to hold those who interrogated Zubaydah accountable.[122] By this time, much of the information about the site had been leaked.[123]

116. United States v. Zubaydah, 142 S. Ct. 959, 964 (2022); Amy Howe, *Justices Will Consider Whether Details on Post-9/11 CIA Black Sites are State Secrets*, SCOTUSBLOG (Oct. 5, 2021, 4:02PM) https://www.scotusblog.com/2021/10/justices-will-consider-whether-details-on-post-9-11-cia-black-sites-are-state-secrets/.

117. *Zubaydah*, 142 S. Ct. at 963; *CIA Shuts Down its Secret Prisons*, BBC NEWS (Apr. 9, 2009, 22:10), http://news.bbc.co.uk/1/hi/in_depth/7993087.stm (explaining that a "black site" is a facility operated by the CIA where terrorism suspects were detained, interrogated, and tortured); *see also FAQs: What Are Ghost Detentions and Black Sites*, CTR. FOR CONST. RTS. (Jan. 11, 2010), https://ccrjustice.org/home/get-involved/tools-resources/fact-sheets-and-faqs/faqs-what-are-ghost-detentions-and-black.

118. Ed Pilkington, *'Enemy Combatant' Held at Guantanamo Petitions for Release Because War is Over*, THE GUARDIAN (Dec. 3, 2021, 02:00), https://www.theguardian.com/us news/2021/dec/03/guantanamo-abu-zubaydah-war-is-over-afghanistan-court-filing; *see Abu Zubaydah*, THE RENDITION PROJ., https://www.therenditionproject.org.uk/prisoners/zubaydah.html (last visited Mar. 22, 2023) (stating that Zubaydah was kept in a cold 4m x 4m plain white cell, shackled naked to a chair, and loud music was played on a fifteen-minute loop); Robert Chesney, *No Appetite for Change: The Supreme Court Buttresses the State Secrets Privilege, Twice*, 136 HARV. L. REV. 170, 181 (2010).

119. *Zubaydah*, 142 S. Ct. at 963, 975; *id.* at 986 (Gorsuch, J., dissenting).

120. Howe, *supra* note 116.

121. *See* Chesney, *supra* note 118, at 181–82 (stating that Zubaydah was the first "high-value" detainee in this new CIA program and the location was known as "Detention Site Blue").

122. Howe, *supra* note 116; Dan Schwietzer, *Supreme Court Report: United States v. Zubaydah, 20-827*, NAT'L ASS'N OF ATT'YS GEN. (Mar. 23, 2022), https://www.naag.org/attorney-general-journal/supreme-court-report-united-states-v-zubaydah-20-827/.

123. Chesney, *supra* note 118, at 172.

Then-CIA director Mike Pompeo intervened and asserted the state secrets privilege over the (now publicly known) Polish CIA site.[124] Can the courts still show deference to the executive when the privilege is "de-facto" waived?[125] The Ninth Circuit agreed with the de facto waiver concept,[126] holding use of the privilege was appropriate. The government should attempt to "disentangle" nonprivileged information from privileged information.[127] The Supreme Court reversed.[128] In a 7-2 decision, the Court held that a complete dismissal of the discovery request was required.[129] The majority of Justices believed that any response other than a dismissal of the case would have been an affirmative confirmation of the site's existence.[130] The Court flatly rejected the Ninth Circuit's argument that the state secrets privilege is waived once there is "widespread public awareness" of the material the government is seeking to keep secret.[131] Justice Gorsuch, joined by Justice Sotomayor, dissented.[132] The dissenting Justices commented that, while the location of the CIA black site must remain a secret, the case could be litigated without this fact.[133] Justice Gorsuch highlighted the need for the judiciary to oversee and balance the decisions of the executive branch. The Justice stated that even when the privilege is properly asserted, the

> Should the government really continue to reap the benefits of the privilege (including, in some cases, the ability to fend off litigation altogether regardless of the merits of a person's claims) where everyone who cares about the matters knows full well what happened, based simply on a stubborn refusal by the government to own up to the matter in formal terms?

Id.

124. Howe, *supra* note 116.

125. Chesney, *supra* note 118, at 172. The Court declined to open the door to extended civil possibilities of this waiver and rejected the de-facto waiver of the privilege as a possibility.

126. Chesney, *supra* note 118, at 186.

127. Howe, *supra* note 116.

128. Chesney, *supra* note 118, at 185–86. In fact, the Court "expressly rejected" the Ninth's Circuit's holding of the de-facto waiver concept. *Id.* The Court ruled that widespread public knowledge of a topic does not abrogate the government's right to invoke the privilege. *Id.*; United States v. Zubaydah, 142 S. Ct. 959 (2022).

129. Schwietzer, *supra* note 122.

130. Joseph Margulies, *In* US v. Husayn (Abu Zubaydah)*, the Supreme Court Calls Torture What It Is*, JUST SEC. (Mar. 11, 2022), https://www.justsecurity.org/80649/in-us-v-husayn-abu-zubaydah-the-supreme-court-calls-torture-what-it-is/.

131. Chesney, *supra* note 118, at 186.

132. Schwietzer, *supra* note 122; Chesney, *supra* note 118, at 186. "Much as the Court in *Totten* prioritized enforcement of a promise of secrecy contained in an espionage enforcement contract, so too did the Court in *Zubaydah* prioritized enforcement of a promise of secrecy in an espionage liaison agreement with a foreign service." *Id.*

133. Schwietzer, *supra* note 122.

judiciary should "consider options other than dismissal, including protective orders and other security procedures to allow sensitive governmental information to be shared."[134] The majority disagreed. Justice Breyer, writing for the majority, held that Zubaydah failed to state a claim without asserting the location of the black site.[135] While the Court refrained from making absolute statements regarding the breadth of the privilege,[136] *United States v. Zubaydah* illustrates the Court's preference for dismissing claims without first assessing the government's assertion.

B. Office of the Attorney General Memorandums

Due to the growth of the state secrets privilege throughout the Bush administration, the Obama administration aimed to curb the executive's increasing reliance on the privilege.[137] On September 23, 2009, then-Attorney General Eric Holder issued a memorandum titled "Policies and Procedures Governing Invocation of the State Secrets Privilege."[138] The memorandum was issued with the intention of "greater accountability and reliability in the invocation of the state secrets privilege in litigation . . . to strengthen public confidence that the U.S. government will invoke the privilege in court only when genuine."[139] Included in the memorandum are standards for determination, initial procedures for invocation of the privilege, a state secrets review committee, and the requisite of Attorney General approval.[140] According to the memorandum, the "State Secrets Review Committee" must consist of senior Department of Justice officials who will evaluate whether an invocation of the privilege is warranted on a case-by-case basis.[141] While this demonstrates an effort to tailor the use of the privilege, members of this committee work under the same agency who invokes the privilege. The memorandum states that the Department of Justice

134. *Id.*
135. *Id.*
136. JENNIFER K. ELSEA, CONG. RSCH. SERV., LSB10764, ABU ZUBAYDAH AND THE STATE SECRETS DOCTRINE 2 (2022).
137. Sudha Setty, *Obama's National Security Exceptionalism*, 91 CHI.-KENT L. REV 91, 104 (2016).
138. OFF. OF ATT'Y GEN., POLICIES AND PROCEDURES GOVERNING INVOCATION OF THE STATE SECRETS PRIVILEGE (2009).
139. *Id.* at 1.
140. *Id.* at 1–3.
141. *Id.* at 2–3.

will provide "periodic reports to appropriate oversight committees of Congress."[142] However, there has not been a report to Congress on this matter since the first report in April of 2011. The initial report was the first and the last report to be produced.[143]

On September 30, 2022, Attorney General Merrick Garland issued another memorandum outlining additional rules the Department of Justice must follow when invoking the privilege.[144] This memorandum detailed a framework already specified in *Reynolds*: heads of all executive agencies must submit a personal declaration specifically detailing why the privilege is necessary.[145] If the head of the agency does not have sufficient personal knowledge, then the declaration must be accompanied by "a more detailed declaration based on personal knowledge by a subject-matter or classification expert from the department or agency."[146] Prior to this memorandum, the head of the agency was not required to be a part of the process.[147] While this return to the *Reynolds* balancing factors is a step in the right direction, it is not yet clear if Attorney General Garland's efforts will have the intended effect of gaining public confidence and creating greater scrutiny for the use of the privilege.[148]

---

142. *Id.* at 4.

143. Steven Aftergood, *Secrecy About Secrecy: The State Secrets Privilege*, FED'N OF AM. SCIENTISTS (June 20, 2018), https://fas.org/blogs/secrecy/2018/06/state-secrets-reporting/; *see also* Setty, *supra* note 137, at 105 (stating that legislative reforms lost momentum in the hopes that the 2009 new standards for the Department of Justice would provide more vigorous adherence).

144. Dan McCue, *Garland Sets New Rules for DOJ's Use of State Secrets Privilege*, THE WELL NEWS (Sept. 30, 2022), https://www.thewellnews.com/national-security/garland-sets-new-rules-for-dojs-use-of-state-secrets-privilege/.

145. *Id.*; *see also* OFF. OF ATT'Y GEN., *supra* note 138.

> The Department of Justice is committed to ensuring that the United States invokes the state secrets privilege only when genuine and significant harm to national defense or foreign relation is at stake and only to the extent necessary to safeguard those interests.

Id.

146. OFF. OF ATT'Y GEN., *supra* note 138; McCue, *supra* note 144.

147. McCue, *supra* note 144.

148. *See Covering "State Secrets" Cases Under the Obama Administration's New Policy*, REPS. COMM., https://www.rcfp.org/journals/the-news-media-and-the-law-fall-2010/covering-state-secrets-cases/ (last visited Sept. 4, 2023). When the government is not transparent enough regarding the state secrets privilege, "the public is left with [just] the government's word." *Id.* The public "needs more than the government's word." *Id.*

V. SOLUTIONS

There are many solutions to the problem of overuse and ambiguity of the state secrets privilege. Because the *Reynolds* factors provide a loose framework for courts, the executive branch has taken the lead in determining how the judiciary should react to matters the executive deems a state secret. The balancing test the Supreme Court enumerated in *Reynolds* specifically stated the "showing of necessity by the litigant determines how far the courts should probe into the appropriateness of the invocation" of the privilege.[149] In other words, a court should balance the needs of the litigant with the needs of the government. The Court in *Reynolds* created a way to determine whether the information the government is claiming to protect is truly privileged: by creating a pathway for in camera inspection of the documents.[150] The presented solutions in this Article consist of different ways to lead to the same outcome: less judicial deference via the use of in camera review. In camera review is an essential tool for a judge to use to determine whether the information truly is of national security significance.

A. Encouraging In Camera Review by (Re)-Evaluating the *Reynolds* Factors

In cases analyzed under the *Reynolds* factors, courts "maintain at least the theoretical possibility that a plaintiff's case might move forward based on alternative, non-privileged evidence."[151] Interpretation of the factors provides for options, rather than a categorical bar that is demonstrated today:

> (1) Dismiss the case prior to discovery on the belief that the evidence at issue bars the case as it prevents the plaintiff's ability to establish a prima facie case or bars the defense from creating a valid defense;
>
> (2) Proceed to discovery and conduct an in camera ex parte review of the document, decide that the privileged material is not truly privileged, and allow the suit to continue;

149. Lyons, *supra* note 86, at 109.
150. *Id.* at 106–07.
151. Schwinn, *supra* note 45, at 809.

> (3) Proceed to discovery, review the evidence, determine that it is in fact privileged but does not prevent the suit from continuing without it, and allow the suit to continue; or
>
> (4) Proceed to discovery, review the evidence, and determine that it is not privileged and should be included in the case.[152]

There is flexibility in the term "reasonable danger." As demonstrated above, there are scaffolded options for the judiciary once the executive asserts the state secrets privilege. While dismissing the case solely based on the belief that the evidence bars the claim is an option, it should not be the predominant choice. Rather, by using in camera review, a judge uses their discretion to determine the validity of the government's claim and the practical next steps for the plaintiff's claim.

In writing the majority opinion of *Reynolds*, Chief Justice Vinson opined specifically on the requirement that the information must pose a reasonable danger to national security. The Chief Justice explained that the context surrounding the material is enough evidence to gather whether there is reasonable danger of divulging national security secrets.[153]

The reasonable danger factor of *Reynolds* emphasizes that "the reviewing court has the ultimate responsibility to determine whether disclosure of the information would pose a *'reasonable danger'* to national security."[154] The judiciary should be the final arbitrator in deciding whether information is privileged, and in so doing, must not be swayed by deference to the executive branch.

B. Limiting Judicial Deference to Encourage In Camera Review

Neutrality and consistency are pillars in the judicial system.[155] Judges must seek to "determine what ends the government is

152. Ames, *supra* note 70, at 1073–74. *See generally* El-Masri v. United States, 479 F.3d 296, 304 (4th Cir. 2007).

153. *Reynolds*, 345 U.S. at 10; *see* Chesney, *supra* note 44, at 1288. "Judges in general cannot be expected to have the requisite . . . experience and knowledge necessary to make fine-grained decisions regarding the national security implications of disclosure . . . But these considerations have no application when it comes to deciding whether a given document or other source actually references such sensitive information." *Id.*

154. Chesney, *supra* note 44, at 1251–52 (emphasis added).

155. CLARK M. NEILY III, TERMS OF ENGAGEMENT: HOW OUR COURTS SHOULD ENFORCE THE CONSTITUTION'S PROMISE OF LIMITED GOVERNMENT 129 (2013) (stating that "Judges should not serve as advocates by inventing justifications for government action . . . ").

pursuing and ensure both its ends and means are . . . legitimate."[156] Matters of national security, of course, must be handled with extreme sensitivity and care. But sensitivity does not mean expansive deference. There is not a one-size-fits-all solution when the privilege is invoked. But by limiting judicial deference to the executive through in camera review, the judiciary upholds and adheres to the constitutional need to enforce limits and encourage balance throughout the government. Doing so creates a pathway for private citizens to receive fair and just adjudication. In camera review is, and should continue to be, a viable option judges can securely turn to when handling highly sensitive material. Further, there are additional statutory and common law frameworks that are similar to the *Reynolds* factors. Through these options, judges can derive supplementary authority to handle the state secrets privilege via in camera review.

1. The State Secrets Privilege and FISA Preemption

The Foreign Intelligence Surveillance Act ("FISA") created statutory language for evaluating the use of the state secret privilege in foreign intelligence surveillance claims, compared to the common law evidentiary rule used in other disputes.[157] While FISA only applies to foreign intelligence surveillance claims, it may serve to set forth the groundwork to curbing the general over-use of the state secrets privilege. FISA has created a path toward a more common use of in camera review.

In 2019, the United States Court of Appeals for the Ninth Circuit decided *Fazaga v. FBI*. In *Fazaga*, litigants alleged the Federal Bureau of Investigation used a confidential informant to conduct a covert electronic surveillance program on a religious Islamic center.[158] The FBI's claims were based in the Foreign

156. *Id.* at 129–30.

157. Foreign Intelligence Surveillance Act, 50 U.S.C. § 1806(f); Alexander Berengaut et al., *Supreme Court Holds FISA Does Not Displace the State Secrets Privilege*, COVINGTON: INSIDE PRIV. (Apr. 5, 2022), https://www.insideprivacy.com/surveillance-law-enforcement-access/supreme-court-holds-fisa-does-not-displace-the-state-secrets-privilege/ (stating that FISA creates a system for in camera review in state secrets claims pertaining to electronic surveillance.). While FISA only addresses a narrow question within the realm of national security, the statute's processes and procedures provide a forward-thinking perspective of how to evaluate state secret claims in the future. *Id. But see* Fazaga v. FBI, 916 F.3d 1202, 1254 (9th Cir. 2019) (holding that FISA does not displace the state secrets privilege); *see* FISHER, *supra* note 1, at 145–52.

158. *Fazaga*, 916 F.3d at 1212.

Intelligence Surveillance Act 50 U.S.C. §§ 1801–85(c).[159] The government asserted that the religious claim (the FISA claim) should be dismissed under the *Reynolds* factors. This assertion was supported by a public declaration from then-Attorney General Eric Holder, as well as two classified declarations and memorandums by then-Assistant Director of the FBI's Counterterrorism Division Mark Giuliano.[160] The court analyzed the *ex parte* and in camera procedures set out in 50 U.S.C. § 1806(f)—Use of Information of Electronic Surveillance.[161] The court relied on FISA rather than the government's state secrets claim, asserting the statute did not abrogate the privilege. Prior district courts have held that the FISA statute effectively displaces the evidentiary common law balancing test enumerated in *Reynolds* regarding matters within FISA's purview.[162] The court held that FISA displaces only the common law state secrets privilege in electronic surveillance cases.[163] 50 U.S.C. 1806(f) is as follows:

> Whenever a court or other authority is notified pursuant to subsection (c) or (d) of this section, or whenever a motion is made pursuant to subsection (e) of this section, or whenever any motion or request is made by an aggrieved person pursuant to any other statute or rule of the United States or any State before any court or other authority of the United States or any State to discover or obtain applications or orders or other materials relating to electronic surveillance or to discover, obtain, or suppress evidence or information obtained or derived from electronic surveillance under this chapter, the United States district court or, where the motion is made before another authority, the United States district court in the same district as the authority, shall, notwithstanding any other law, if the Attorney General files an affidavit under oath that disclosure or an adversary hearing would harm the national security of the United States, review in camera and ex parte the application, order, and such other materials relating to the surveillance as may be necessary to determine whether the

159. *Id.* at 1214.
160. *Id.* at 1215.
161. *Id.* at 1216.
162. *Id.* at 1226.
163. *Id.*; *id.* at 1230 ("Before the enactment of FISA in 1978, foreign intelligence surveillance and the treatment of evidence implicating state secrets were governed purely by federal common law."); Kasza v. Browner, 133 F.3d 1159, 1167 (9th Cir. 1998). If "the statute [speaks] *directly* to [the] questions otherwise answered by federal common law," that is sufficient to decide the statute displaces the privilege." *Id.*

> surveillance of the aggrieved person was lawfully authorized and conducted. In making this determination, the court may disclose to the aggrieved person, under appropriate security procedures and protective orders, portions of the application, order, or other materials relating to the surveillance only where such disclosure is necessary to make an accurate determination of the legality of the surveillance.[164]

This statute calls for in camera and *ex parte* review of the application and other materials that may be necessary to make an accurate determination of the materials. Because the statute illustrates that these requirements apply only to electronic surveillance, the obligation of the court to conduct in camera and *ex parte* reviews when the government asserts the state secrets privilege is not mandated within FISA. However, the *Reynolds* factors provide a similar solution. For example, *Reynolds* explains that the court should "calibrate the extent of deference it gives to the executive's assertion with regard to the plaintiff's need for access to the information" and "the court can personally review the sensitive information on an in camera, *ex parte* basis if necessary."[165] While 50 U.S.C. § 1806(f) is not mandatory authority to the state secrets privilege, courts should use the statute as guidance. *Reynolds* is over sixty years older than FISA. Oftentimes, an agency official's statements in the mandatory affidavit are conclusory.[166] It can be difficult to discern from the initial information presented whether there is merit to the claim.[167] Therefore, a judge cannot accept all of the assertions that the government proclaims to be privileged without further inquiry and review.[168] Public policy, dissemination of information, and national security have significantly evolved over the past six decades. Common law is moldable and fluid: if courts were to draw upon the FISA framework when addressing the general use of the state secrets privilege, courts could create a standard of in camera review—therefore protecting litigants' rights by closely analyzing the executive's use of the privilege.

164. Foreign Intelligence Surveillance Act, 50 U.S.C. § 1806(f).
165. Chesney, *supra* note 44, at 1252; *see* Ames, *supra* note 70.
166. Steven Aftergood, *Court Requires Review of State Secrets Documents*, FED'N OF AM. SCIENTISTS (Sept. 16, 2014), https://fas.org/blogs/secrecy/2014/09/state-secrets-review/.
167. *Id.*
168. *Id.*

2. Standards for the Executive Branch

By establishing a standard practice within the executive branch of limiting the use of the privilege, judges will be less likely to be faced with unnecessary assertions of the privilege. As per *Reynolds*, the government must formally claim the privilege.[169] This is not "simply an administrative formality"—the assertion must be made by an official who has control over the matter.[170] The claim must reflect the official's personal judgment. The overseeing agency official must have first-hand involvement and knowledge of the facts of the case, the classified information the government is seeking to protect, and why the government believes the assertion of the state secrets privilege is correct.[171] The privilege is not to be "lightly invoked,"[172] especially when the government seeks to dismiss the case entirely. Courts have misinterpreted this requirement. Rather than analyzing each assertion of privilege on a case-by-case basis, courts defer to the executive branch, claiming they "surely cannot legitimately find [themselves] second guessing the Executive in this arena."[173] This interpretation is far from the evidentiary foundation set forth by the Court in *Reynolds*.

3. The Third Circuit Court of Appeals Analysis of Reynolds

The district court and the Third Circuit Court of Appeals arrived at a different solution of balancing state secrets compared to the Supreme Court in *Reynolds*.[174] Upon the government's assertion of the "confidential nature of [the] official aircraft accident reports," the district court judge suggested a hearing be held.[175] The government interpreted the privilege widely, stating that "executive files and investigative reports are confidential and privileged and that their disclosure would not be in the *public*

169. United States v. Reynolds 354 U.S. 1, 10–11 (1953); Fazaga v. FBI, 916 F.3d 1202, 1228 (9th Cir. 2019).

170. *Fazaga*, 916 F.3d at 1228; Mohamed v. Jepessen Dataplan, Inc., 614 F.3d 1070, 1080 (9th Cir. 2010); United States v. W.R. Grace, 526 F.3d 499, 507–08 (9th Cir. 2008); FISHER, *supra* note 1, at 260.

171. *Jepessen Dataplan, Inc*., 614 F.3d at 1080.

172. *Id.* (citing *Reynolds*, 345 U.S. at 7 (footnotes omitted)); *Fazaga*, 916 F.3d at 1228.

173. Al-Haramain Islamic Found. v. Bush, 507 F.3d 1190, 1203 (9th Cir. 2007).

174. *Reynolds*, 192 F.2d at 998.

175. *Id.* at 990.

interest."[176] This assertion sought to expand the state secrets privilege beyond matters of foreign policy and national security: any government document that would not be in the public's interest would not be released. This position is not one for the executive to decide on its own. The district judge ordered the government to produce the documents 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."[177] Because the government failed to produce the requested documents, the district judge ruled in favor of the plaintiffs.[178] The government believed that, while they did not succeed at the trial court, their privilege would be upheld on appeal.[179]

The Third Circuit Court of Appeals agreed with the district court: "the recognition of such a sweeping privilege against any disclosure of the internal operations of the executive departments of the Government [is] contrary to a sound public policy."[180] The Third Circuit issued a cautionary warning of the harms of overusing the privilege:

> 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 in these cases 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.[181]

This guidance demonstrates the court's intention for in camera review. If the government chooses to invoke the privilege then the government must recognize the public interest of a fair

176. FISHER, *supra* note 1, at 53 (quoting Claim of Privilege by the Secretary of the Air Force, Reynolds v. United States, Civil Action No. 10142 (E.D. Pa. 1950) at 2 (emphasis added)).

177. *Reynolds*, 192 F.2d at 990–91.

178. FISHER, *supra* note 1, at 59.

179. *See Reynolds*, 192 F.2d at 993–94. The *Reynolds* case took place during a time of confrontation with the Soviet Union and tensions of a national emergency rising. During these periods, federal judges have historically acquiesced to the executive branch. FISHER, *supra* note 1, at 59; *see* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

180. *Reynolds*, 192 F.2d at 995.

181. *Id.*

trial.[182] In response, the government contended that it should be the sole discretion of the department head to determine the confidentiality of the information, and the court should have no say in the matter.[183] The Third Circuit disagreed.[184] The court required an in camera review of the documents—demonstrating that an evaluation of material the government asserts to be a state secret is a justiciable question. Therefore, to deny courts the ability to determine the validity of the invocation of the privilege would be to "permit the executive branch of the Government to infringe the independent province of the judiciary as laid down by the Constitution."[185]

The district court and Third Circuit prevailed in mandating in camera review. The court would rule in favor of the plaintiff if the government did not comply.[186] While this was not upheld by the Supreme Court, recent laws and memoranda show support for the lower courts' rulings. The lower courts' decisions present the executive branch with a fair proposition: deliver the documents to the court in an in camera proceeding, or the plaintiff automatically wins the suit.

While this analysis is not controlling precedent, this guidance can serve as a foundation for a modern interpretation of the *Reynolds* factors. The warning of overuse and expansion of the privilege should guide the judiciary toward a presumption of validity to the plaintiff's arguments, rather than deference to the executive branch's assertion of the privilege. By shifting the presumption of validity, more plaintiffs may feel successful lawsuits are obtainable. While in camera review is not mandated as it was in the lower courts' holdings in *Reynolds*, the current judiciary can observe options of limited judicial deference from past interpretations.

VI. CONCLUSION

The judiciary has a constitutional duty to provide a fair environment for both parties in a suit. To do so, the judiciary

182. *Id.*
183. *Id.*
184. *Id.*
185. *Id.* at 997 (citing *United States v. Cotton Valley Operators Committee*, 9 F.R.D. 719, 720 (W.D. La. 1949)).
186. *Id.* at 997–98.

cannot acquiesce to the executive branch nor limit its power of judicial review. By using the *Reynolds* factors as a common law framework, this Article is a call to action. This Article develops methods of understanding *Reynolds* within the context of modern-day needs. In camera review is enumerated within the *Reynolds* factors: the court has the option to review the potentially privileged state secret, and only after review by the judiciary can an evaluation of the state secrets privilege be conscientiously made. It is the responsibility and duty of the courts to constrain and balance the executive branch—to determine the validity of the government's claim of the privilege. According to *Reynolds*, courts must assess whether the purported privileged information presents a reasonable danger to national security. This is not possible when courts exercise judicial deference. Analyzing the reasonable danger factor of *Reynolds* can only be completed through in camera review. By explaining why and how courts should use in camera review, this Article surveys solutions that lead toward a future of limited judicial deference.

The government's incorrect assertion of the state secrets privilege in *Reynolds* is a clear demonstration of the need for in camera review: the case that created the precedent of the analysis of the privilege is based in the executive branch asserting the privilege to cover up poor maintenance rather than an issue of national security. An updated analysis is necessary. By providing solutions such as statutory guidance, implementation of standards for the executive branch, and a discussion of prior interpretation of *Reynolds*, this Article provides approaches for courts to limit judicial deference to the executive branch's assertion of the state secrets privilege. These methods arrive at the same conclusion: once the government invokes the privilege, in camera review is a necessity in order to provide litigants with a fair trial.

Public policy necessitates the need for certain documents to remain confidential for reasons of national security. However, public policy and law also dictate that private litigants have the right to access a fair court system. The current limited use of in camera review allows claims to be dismissed without any recourse for plaintiffs. A hearing within a judge's chambers does not affect the confidentiality of a document. In camera review is essential to create an objective environment in which all parties are treated equally.