

## ARTICLES

### THE STATE SECRETS PRIVILEGE: EXPANDING ITS SCOPE THROUGH GOVERNMENT MISUSE

by  
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*In this Article, the author examines the current use, or rather misuse, as she argues, of the State Secrets Privilege. The author begins with a detailed examination of United States v. Reynolds, which defined the privilege and held that a complaint against the United States could proceed despite the invocation of the privilege. The author then examines how the courts have deviated from the holding of Reynolds. The author traces these deviations through six recent cases where the privilege was invoked, and announces four ways in which current State Secrets Privilege jurisprudence has deviated from Reynolds. She argues that the privilege is (1) being used to completely dismiss cases without review on the merits, (2) expanding into the realm of the Totten privilege, (3) interfering with private constitutional and statutory rights, and (4) interfering with public rights. The author concludes by suggesting three explanations for these deviations from Reynolds and argues that returning to the Reynolds doctrine is the best way to balance government and private interests.*

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## I. INTRODUCTION

The state secrets privilege has been described as the “nuclear bomb of legal tactics”<sup>1</sup> and the “government’s nuclear option when it comes to litigation.”<sup>2</sup> Does the privilege deserve this harsh reputation? Recent cases certainly suggest that it does, and that the use of the privilege, which is frequently described as rarely-invoked, is on the rise. Rather than attempting an empirical examination of the instances the privilege has been invoked to determine if its use is increasing, this paper seeks to explore how the U.S. government has broadened the conception of the privilege and is now applying it inappropriately. In addition, courts that are encountering the privilege seem to have forgotten its original intent and are allowing the government to expand the scope of the privilege by neglecting to undertake a rigorous review of its invocation.

The Supreme Court set the parameters of the privilege in *United States v. Reynolds*,<sup>3</sup> a case from 1953 which defined the privilege in modern times and held that the complaint against the U.S. government could proceed despite the invocation of the privilege. Now, the privilege is being used as a tool to prevent cases that could otherwise be brought in court from receiving review in that forum. It is effectively denying litigants their day in court and interfering with public and private rights. Specifically, the current use and expansion of the privilege has four negative consequences: (1) inconsistency with *Reynolds* by overbroadening its scope and timing the invocation such that its assertion prevents review on the merits; (2) expanding the privilege into the realm of

<sup>1</sup> *State Secrets Privilege Gets a Workout*, SECRECY NEWS, Apr. 23, 2002, <http://www.fas.org/sgp/news/secretcy/2002/04/042302.html>.

<sup>2</sup> Bill Conroy, *DEA Agent’s Whistleblower Case Exposes the “War on Drugs” as a “War of Pretense,”* NARCO NEWS BULL., Sept. 7, 2004, <http://www.narconews.com/Issue34/article1063.html>.

<sup>3</sup> *United States v. Reynolds*, 345 U.S. 1 (1953) (modern and seminal decision validating the state secrets privilege).

*Totten v. United States*,<sup>4</sup> despite the distinct nature of the *Totten* privilege; (3) interfering with private civil liberties and rights that the government should be protecting; and, (4) interfering with public rights and the public's role of providing a check on the power of the government.

This analysis will demonstrate how the government is misapplying the state secrets privilege and how the courts are misconstruing it. This misapplication is having a serious impact on private litigants and public rights, and its consequences may be even more dramatic if allowed to continue.

## II. HISTORY AND DEVELOPMENT OF THE STATE SECRETS PRIVILEGE

### A. *History of the Privilege*

“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.”<sup>5</sup> This quote generally describes the position taken by courts, especially recently, when confronted with an assertion of the state secrets privilege. However, the Supreme Court ruling in *Reynolds*, the seminal case regarding the privilege,<sup>6</sup> indicates that courts need not be so deferential to the privilege and should thoroughly inquire into its assertion before accepting it. Most importantly, *Reynolds* and other cases demonstrate that the privilege need not completely bar a case from adjudication. In fact, the privilege was designed simply to prevent some information from reaching discovery while allowing the case to proceed.

There is little jurisprudence on the privilege, especially when compared to other privileges that also prevent information from being introduced during litigation.<sup>7</sup> And, although the privilege is often described as rarely-invoked or little-known, recently the government seemingly has not hesitated to invoke the privilege. Nevertheless, prior to World War II, the government rarely had occasion to exercise the privilege and as a consequence the scope of the privilege remained in doubt.<sup>8</sup> Its scope, however, has expanded due to jurisprudence from the lower federal courts, along with occasions for its assertion. Importantly, several cases in the 1980s have sharpened the jurisprudence on the privilege although the Supreme Court has not directly addressed the privilege since *Reynolds*.

With that in mind, an assessment of *Reynolds* is critical, but it is important to note that this common-law privilege had a life prior to *Reynolds*. The state secrets privilege seems to have developed from English jurisprudence which

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<sup>4</sup> *Totten v. United States*, 92 U.S. 105, 107 (1875) (barred judicial review of cases dependent on evidence of a secret espionage agreement with the U.S. government).

<sup>5</sup> *Halkin v. Helms (Halkin I)*, 598 F.2d 1, 7 (D.C. Cir. 1978) (discussing the state secrets privilege and its importance).

<sup>6</sup> *Jabara v. Kelly*, 75 F.R.D. 475, 483 (E.D. Mich. 1977).

<sup>7</sup> *Reynolds*, 345 U.S. at 7; see also *Farnsworth Cannon, Inc. v. Grimes*, 635 F.2d 268, 277 n.1 (4th Cir. 1980) (Phillips, J., dissenting).

<sup>8</sup> *Ellsberg v. Mitchell*, 709 F.2d 51, 56 (D.C. Cir. 1983).

contains a similar privilege;<sup>9</sup> when the privilege, however, is asserted in English courts, the matter is considered nonjusticiable.<sup>10</sup> Whether the privilege is derived from the idea of separation of powers (as suggested in *Reynolds*)<sup>11</sup> or from the President's Article II powers as Commander in Chief and leader of foreign affairs (as suggested in *United States v. Nixon*)<sup>12</sup> is unclear. It appears, however, that in the United States the privilege "has its initial roots in Aaron Burr's trial for treason."<sup>13</sup> In the *Burr* case, the government objected to the production of a letter from General Wilkinson to President Thomas Jefferson, asserting that the letter might contain state secrets which could not be divulged without endangering the national security.<sup>14</sup> The court did not need to resolve the issue of production of the letter, but stated that if the letter did contain information which would be imprudent to disclose, and the Executive did not wish the information to be disclosed, the information could be suppressed.<sup>15</sup> Despite these early references to a privilege to protect state secrets, a "[f]ull-scale treatment of the privilege" did not occur until 1953 by the Supreme Court in *Reynolds*.<sup>16</sup>

In *Reynolds*, the Court granted certiorari in order to address the "important question of the Government's [ability] to resist discovery," i.e. the state secrets privilege.<sup>17</sup> The facts of *Reynolds* concern the crash of an Air Force aircraft which was testing secret electronic equipment and had on board four civilian observers and nine military crew members.<sup>18</sup> Three of the civilian observers were killed in the crash, and the widows of these men brought suit against the U.S. under the Tort Claims Act.<sup>19</sup> The widows sought discovery of the official accident report from the Air Force and statements from three surviving crew members taken during the official investigation; the government, however, moved to quash this discovery claiming the information was privileged against disclosure based on Air Force regulations.<sup>20</sup> The federal district court initially had rejected the Air Force's claim of privilege, but subsequently allowed a rehearing on the issue, and the Secretary of the Air Force formally filed a

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<sup>9</sup> *Reynolds*, 345 U.S. at 7 (citing *Duncan v. Cammell, Laird & Co.*, [1942] A.C. 624 (H.L.) (English case reviewing English precedent on the privilege)).

<sup>10</sup> *Recent Developments—Evidentiary Privilege of "State Secrets" in Contract Action*, 55 COLUM. L. REV. 570, 571 (1955) (citing *Duncan*, [1942] A.C. 624).

<sup>11</sup> *Halkin v. Helms (Halkin I)*, 598 F.2d 1, 14 n.9 (D.C. Cir. 1978) (citing *Reynolds*, 345 U.S. at 6 n.9).

<sup>12</sup> *United States v. Nixon*, 418 U.S. 683, 710 (1974) (Bazelon, J., dissenting from denial of rehearing en banc).

<sup>13</sup> *In re United States*, 872 F.2d 472, 474–75 (D.C. Cir. 1989) (citing *United States v. Burr*, 25 F. Cas. 30, 31 (C.C.D. Va. 1807)).

<sup>14</sup> *Edmonds v. U.S. Dep't of Justice (Edmonds I)*, 323 F. Supp. 2d 65, 70 (D.D.C. 2004) (citing *Burr*, 25 F. Cas. at 31).

<sup>15</sup> *Id.* (citing *Burr*, 25 F. Cas. at 31).

<sup>16</sup> *Ellsberg v. Mitchell*, 709 F.2d 51, 56 n.21 (D.C. Cir. 1983).

<sup>17</sup> *United States v. Reynolds*, 345 U.S. 1, 3 (1953).

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*; see 28 U.S.C. § 2674 (2000).

<sup>20</sup> *Reynolds*, 345 U.S. at 3–4.

“Claim of Privilege.”<sup>21</sup> The district court rejected the formal claim and ordered the documents be produced; but, the government refused and the court entered final judgment for plaintiffs on the grounds that the refusal to produce the documents established the Air Force’s negligence.<sup>22</sup> The federal appeals court affirmed and the government appealed.<sup>23</sup>

On appeal, the Supreme Court determined that the issue rested on whether the government’s claim of privilege was valid and noted that the positions of both sides had “constitutional overtones.”<sup>24</sup> The Court stated that the privilege against revealing military and state secrets is “well established in the law of evidence” (citing *Totten* among other cases), but judicial experience with the privilege is limited.<sup>25</sup>

Importantly, the Court determined several procedural measures that must be observed for the privilege to be invoked. First, the privilege belongs only to the government and must be asserted by it; it cannot be claimed or waived by a private party.<sup>26</sup> Second, the privilege “is not to be lightly invoked.”<sup>27</sup> Third, 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.”<sup>28</sup>

The Court continued that when confronted with the privilege, courts must determine whether the circumstances are appropriate for the claim but “do so without forcing a disclosure of the very thing the privilege is designed to protect . . . ,” namely the state secrets.<sup>29</sup> The Court emphasized that the decision to rule out the documents is the decision of the judge, and it is the judge who controls the trial—not the Executive.<sup>30</sup> Importantly, the Court analogized this privilege to the privilege against self-incrimination, noting that a compromise must be applied in these situations and that “[j]udicial control over the evidence in a case cannot be abdicated to the caprice of executive officers.”<sup>31</sup>

A critical aspect of the *Reynolds* holding is the Court’s formulation of a balancing test, which should be applied on a case-by-case basis when addressing the privilege.<sup>32</sup> Essentially, courts are to weigh the showing of necessity made by those seeking the information against the appropriateness of the government’s invocation of the privilege.<sup>33</sup> When the showing of necessity is strong, the claim of privilege should not be lightly accepted; however, even a

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<sup>21</sup> *Id.* at 4.

<sup>22</sup> *Id.* at 5.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 6.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 7.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 7–8.

<sup>29</sup> *Id.* at 8.

<sup>30</sup> *Id.* at 8 n.21 (citing *Duncan v. Cammell, Laird & Co.*, [1942] A.C. 624 (H.L.)).

<sup>31</sup> *Id.* at 9–10 (emphasis added).

<sup>32</sup> *Id.* at 11.

<sup>33</sup> *Id.*

most compelling necessity will not overcome the privilege when the court is convinced that secrets are at stake.<sup>34</sup> But, when necessity is dubious, the privilege will prevail.<sup>35</sup> In fact, the Court applied the balancing test to the facts of the case concluding that the showing of necessity was weak since the widows had alternate means for gathering information which they had not pursued.<sup>36</sup>

The Court ultimately determined that the state secrets privilege should be upheld and the documents need not be produced; but, the Court *did not dismiss the complaint in its entirety*.<sup>37</sup> The Court remanded the case in order that the widows might continue to pursue their claim, but without the Air Force report or the survivors' official statements.

In the *Reynolds* decision, the Court established a normative baseline and standards that should be followed when the state secrets privilege is asserted. The Court also gave guidelines to the lower federal courts for handling an invocation of the privilege.

These standards and guidelines established in *Reynolds* should be the normative framework for a variety of reasons. When *Reynolds* is actually followed, both by the government asserting the privilege and the court considering its assertion, a complaint is not barred from consideration or completely dismissed. Adhering to *Reynolds* allows a claim to go forward, simply without the information that is excluded. This outcome, which the application of the *Reynolds* standards allows, is beneficial because it assures that violations of private rights can be pursued and individuals can seek redress of the potential wrongs that may have occurred. Another beneficial outcome from the *Reynolds* decision is the opportunity for violations of public rights to be pursued, such as preventing government abuses of power and performing a check by the people on the activities of the government.

A normative framework that allows the vindication of violations of private and public rights—especially those rights outlined in the Constitution—to be addressed in the courts is supported by the Constitution.<sup>38</sup> In the U.S., the government usually does not want to deny its citizens the opportunity to seek redress of grievances in the courts, even against the government. While there are exceptions, such as sovereign immunity, Congress has waived sovereign immunity in many areas.<sup>39</sup> In *Reynolds* and the cases discussed later in this paper, sovereign immunity is not a consideration and does not foreclose the opportunity for suit. Thus, the claims can still be pursued even when the claims are against the government. Most importantly, *Reynolds* conforms to a normative framework that allows for private and public rights to be adjudicated

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<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 12.

<sup>38</sup> U.S. CONST. art. III, § 2.

<sup>39</sup> RICHARD H. FALLON, DANIEL J. MELTZER & DAVID L. SHAPIRO, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 946–47 (5th ed. 2003) (expressed waiver of sovereign immunity by Congress is generally needed).

in the courts and creates a balanced approach to adjudicating these rights in light of countervailing government interests.

Although *Reynolds* is the only direct consideration by the Supreme Court of the state secrets privilege, and the Court recently reaffirmed the *Reynolds* standards in dicta in *Tenet v. Doe*<sup>40</sup>, lower federal courts and the government have deviated from the normative standards of *Reynolds*. This deviation is problematic because it forecloses the opportunity for redress of violations of private rights and public rights in the courts, which is critical in preventing the government or a private party from committing these violations in the future. In other words, adhering to *Reynolds* provides a deterrent effect on the government and private parties from committing wrongs by assuring that these wrongs will be addressed by the courts. The standards of *Reynolds*, therefore, achieve a balance that allows claims to be adjudicated, and not be dismissed at the outset, while still protecting state secrets.

*B. Further Development of, and Deviation from, the Privilege*

After the Court's decision in *Reynolds*, several points were presumably clear regarding the privilege, namely: (1) it belongs to the government and must be asserted by it; (2) formal procedures for invoking the privilege are required (formal invocation by head of department after personal consideration); (3) judicial review of its assertion is critical; and, (4) invocation of the privilege need not be a complete dismissal of the entire complaint. Despite these points which seemed to be clear, and other points which did not, subsequent considerations of the privilege by the lower courts have resulted in various views about its application, standard of review, scope and outcome. Some of these lower court decisions have deviated markedly from the standards of *Reynolds*, ultimately leading to the current manifestation of the state secrets privilege which is causing cases to be completely dismissed with no opportunity for adjudication in any forum.

It is important to explore these variations and deviations from the original holding in *Reynolds* in order to demonstrate how the government is able to misuse the privilege and how courts have come to misconstrue its application. That said, some clarification of the privilege has been useful: appellate review of a decision on the privilege is de novo;<sup>41</sup> review of the privilege is to be narrow in order to attempt to permit discovery;<sup>42</sup> the privilege is only an evidentiary privilege, distinct from other statutory national security privileges;<sup>43</sup> and, review of the privilege should be on a case-by-case basis and

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<sup>40</sup> *Tenet v. Doe*, 544 U.S. 1, 9 (2005).

<sup>41</sup> *Trulock v. Lee*, 66 F. App'x 472, 475 (4th Cir. 2003).

<sup>42</sup> *In re United States*, 872 F.2d 472, 478 (D.C. Cir. 1989) (since all "evidentiary privileges . . . hinder the ascertainment of the truth, and may even torpedo it entirely, their exercise 'should . . . be limited to their narrowest purposes'" (citation omitted)); *Kinoy v. Mitchell*, 67 F.R.D. 1, 14 (S.D.N.Y. 1975); *Kasza v. Browner*, 133 F.3d 1159, 1166 (9th Cir. 1998); *Halkin v. Helms (Halkin I)*, 598 F.2d 1, 9, 12 (D.C. Cir. 1978) (Bazelon, J., dissenting from denial of rehearing en banc).

<sup>43</sup> *Kinoy*, 67 F.R.D. at 14 (evidentiary privilege); *Farnsworth Cannon, Inc. v. Grimes*,

fact-specific.<sup>44</sup> Also, the government need not be an original party to the litigation in order to assert the privilege and can intervene as a plaintiff or defendant and assert the privilege.<sup>45</sup> Also notable is that the privilege has been invoked by numerous agency and department heads, and in cases against a wide variety of government agencies, indicating that potentially any government agency which has classified information may invoke the privilege.<sup>46</sup>

Other discussions have also been helpful in determining the parameters of the privilege. For example, the privilege can extend to information relating to military secrets, state secrets, diplomatic relations, foreign affairs and intelligence sources, methods and identities.<sup>47</sup> The government need not demonstrate that injury from the disclosure of information will inevitably result from disclosure, but that there is a reasonable danger that harm will result.<sup>48</sup> Also, to justify its assertion of the privilege, the government may present unclassified, open affidavits; classified affidavits *in camera* and *ex parte*; or both.<sup>49</sup> It is up to the court to determine which affidavits are required, and if the government needs to present affidavits beyond those which are unclassified in order to justify the assertion of the privilege.<sup>50</sup> In fact, the court may need to examine the underlying materials sought to be withheld.<sup>51</sup> Specifically, if the litigant will lose the claim if the information is withheld, and the government's

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635 F.2d 268, 272 (4th Cir. 1980) (citing *Spock v. United States*, 464 F. Supp. 510, 519 (S.D.N.Y. 1978) ("state secrets privilege is only an evidentiary privilege")); *Kasza*, 133 F.3d at 1165 (privilege is a common law evidentiary privilege); *Halkin v. Helms* (*Halkin II*), 690 F.2d 977, 995 (D.C. Cir. 1982) (state secrets privilege fundamentally differs from decision to claim a FOIA [national security] exemption).

<sup>44</sup> *In re United States*, 872 F.2d at 479 (item-by-item determination of the state secrets privilege will accommodate government's concerns and the privilege largely turns on the facts of the case); see also *Jabara v. Kelly*, 75 F.R.D. 475, 495 (E.D. Mich. 1977) (each specific interrogatory and discovery request evaluated in light of the state secrets privilege to make determination); see generally *United States v. Reynolds*, 345 U.S. 1, 11 (1953) (in each case, government will have to show necessity to invoke the privilege).

<sup>45</sup> *Trulock*, 66 F. App'x at 475 (government intervened as a defendant to dismiss the case under blanket assertion of state secrets privilege, which was upheld and the case was dismissed); *DTM Research, L.L.C. v. AT&T Corp.*, 245 F.3d 327, 330 (4th Cir. 2001) (government intervened as a plaintiff to quash subpoena from AT&T).

<sup>46</sup> The privilege has been invoked in cases against the National Security Agency (NSA), Central Intelligence Agency (CIA), Defense Intelligence Agency (DIA), Federal Bureau of Investigation (FBI), Drug Enforcement Agency (DEA), Secret Service, Department of Defense (DOD), Department of the Navy, and Department of the Air Force, just to name a few. The government has invoked the privilege in cases involving claims of violations of the First Amendment, the Fourth Amendment, the Fifth Amendment, the Ninth Amendment, Title VII of the Civil Rights Act of 1964, the Torture Victim Protection Act, and in contract disputes.

<sup>47</sup> *Halkin II*, 690 F.2d at 990 n.53; see also *Jabara*, 75 F.R.D. at 483 n.25; *Ellsberg v. Mitchell*, 709 F.2d 51, 57 (D.C. Cir. 1983); *In re United States*, 872 F.2d at 476.

<sup>48</sup> *Ellsberg*, 709 F.2d at 58 (citing *Reynolds* and noting that other courts have used different language to describe the required probability of injury).

<sup>49</sup> See generally *id.* at 57-64; *Halkin II*, 690 F.2d at 992.

<sup>50</sup> *Ellsberg*, 709 F.2d at 58-59 & n.37 (citations omitted); *Halkin II*, 690 F.2d at 992.

<sup>51</sup> *Ellsberg*, 709 F.2d at 59 n.37 (citations omitted).



assertions are dubious, careful in camera examination of the materials is not only appropriate but obligatory.<sup>52</sup>

Still other discussions of the privilege have resulted in differing views (often depending on the federal circuit involved) of its scope, standard of review, and procedures to be used in assessing it—in some cases opening the door for deviations from the *Reynolds* standards and complete dismissal of claims. For example, the Fourth Circuit has noted that courts are too ill-equipped to become steeped in foreign intelligence matters to serve effectively in the review of secrecy classification.<sup>53</sup> On the other hand, while acknowledging that courts are not experts on intelligence matters, the District of Columbia Circuit has stated that whenever possible, sensitive information must be disentangled from nonsensitive information to allow for the release of the latter.<sup>54</sup> The D.C. Circuit added that it is essential for courts to continue to examine critically instances where the privilege has been invoked to ensure that the privilege is asserted no more frequently or sweepingly than necessary.<sup>55</sup> This latter view suggests that even though courts are not experts in foreign intelligence, their role is critical in the assessment of the privilege. In fact, as previously noted, courts may examine the underlying materials and documents over which the privilege is asserted when considering the invocation.<sup>56</sup> Thus, one view imagines a relatively passive court seemingly deferring to an assertion of the privilege; while another view imagines a more active court protecting the rights of litigants against overbroad assertions by the government. The latter view of a court able to assess the information, and, in fact, required to assess carefully the invocation of the privilege is generally the view of the D.C. Circuit and consistent with *Reynolds*.<sup>57</sup>

Even the formal procedures outlined in *Reynolds* have been tweaked. For example, *Reynolds* requires that the privilege be lodged by the head of the department which has control over the matter after “actual personal consideration by that officer.”<sup>58</sup> One court, however, decided that personal

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<sup>52</sup> *Id.* (citing *Jabara*, 75 F.R.D. at 468, for proposition that review of underlying materials is appropriate; citing *ACLU v. Brown*, 619 F.2d 1170, 1173 (7th Cir. 1980) (en banc), for proposition that review is obligatory).

<sup>53</sup> *United States v. Marchetti*, 466 F.2d 1309, 1318 (4th Cir. 1972).

<sup>54</sup> *Ellsberg*, 709 F.2d at 57 (citing *Jabara*, 75 F.R.D. at 492); *In re United States*, 872 F.2d 472, 476 (D.C. Cir. 1989).

<sup>55</sup> *Ellsberg*, 709 F.2d at 58.

<sup>56</sup> *Id.* at 58–59 & n.36.

<sup>57</sup> *Id.* at 58–59; *In re United States*, 872 F.2d at 475 (validity of government’s assertion of the privilege must be judicially assessed); *Molerio v. FBI*, 749 F.2d 815, 822 (D.C. Cir. 1984) (court must not merely unthinkingly ratify the Executive’s assertion of the absolute privilege, let it inappropriately abandon its important judicial role); *Edmonds v. U.S. Dep’t of Justice (Edmonds I)*, 323 F. Supp. 2d 65, 78 (D.D.C. 2004) (court issued order to government requiring further explanation as to why sensitive information could not be disentangled from nonsensitive information, demonstrating court’s role in critical assessment of privilege); *accord Kasza v. Browner*, 133 F.3d 1159, 1166 (9th Cir. 1998) (court must assess invocation of the privilege and government must disentangle nonsensitive information from sensitive information for release of the former).

<sup>58</sup> *United States v. Reynolds*, 345 U.S. 1, 7–8 (1953).

consideration need not be over every item of information and it is acceptable to invoke the privilege over categories of information.<sup>59</sup>

Two potentially important areas of contention are the degree to which courts are to defer to an assertion of the privilege and the nature of the balancing test to be applied when the privilege is asserted. As to the degree of deference, most courts have stated that they should accord “utmost deference” to executive assertions of the privilege.<sup>60</sup> At least one judicial opinion, however, has questioned the validity of “utmost deference,” arguing that this standard is derived from FOIA jurisprudence and is inappropriate.<sup>61</sup> In his opinion, Judge Bazelon points out that by applying this standard, a FOIA requester, who may have no special need for the requested information, has broader access to government information than a plaintiff who requires the information in order to pursue a claim of violation of constitutional rights.<sup>62</sup> Thus, while utmost deference may be valid for an assertion of the national security exception to FOIA requests, the level of deference accorded to executive assertions of the state secrets privilege should be lower. This view gained support in *Ellsberg v. Mitchell*, where the court indicated that the degree of deference to be accorded an assertion of the privilege is “considerable deference” instead of “utmost deference.”<sup>63</sup> This difference is potentially substantial but other courts have not incorporated the considerable deference standard into their evaluations of the state secrets privilege. The “utmost deference” standard, however, which is not mentioned in *Reynolds*, sets up the opportunity for disallowing the claim to proceed and preventing the litigants from having their day in court.

Finally, most federal courts note that when reviewing the privilege, the court should apply a balancing test of the necessity of the litigant in obtaining the information against the appropriateness of the government in asserting the privilege. The Court of Appeals for the Federal Circuit, however, has stated that the balancing test is not a test performed by the court to determine the validity of the privilege and whether it should be upheld; but, a balance to determine how deeply the court should probe into the underlying documents when the privilege is asserted.<sup>64</sup> In other words, the balance is only about whether the court should examine more than just an affidavit from the government asserting the privilege, and perhaps examine the underlying

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<sup>59</sup> *Kasza*, 133 F.3d at 1169.

<sup>60</sup> *Halkin v. Helms (Halkin I)*, 598 F.2d 1, 9 (D.C. Cir. 1978); *In re United States*, 872 F.2d at 475; *In re United States*, No. 374, 1993 U.S. App. LEXIS 14977, at \*22 (Fed. Cir. Apr. 30, 1993); *Black v. United States*, 62 F.3d 1115, 1119 (8th Cir. 1995); *Kasza*, 133 F.3d at 1166; *Sterling v. Tenet (Sterling II)*, No. 03-CV-329, slip op. at 7 (E.D. Va. Mar. 3, 2004).

<sup>61</sup> *Halkin I*, 598 F.2d at 16 (Bazelon, J., dissenting from denial of rehearing en banc) (arguing against application of utmost deference standard).

<sup>62</sup> *Id.*

<sup>63</sup> *Ellsberg v. Mitchell*, 709 F.2d 51, 58 (D.C. Cir. 1983)

<sup>64</sup> *In re United States*, 1993 U.S. App. LEXIS 14977, at \*25–26; *but see* *Jabara v. Kelly*, 75 F.R.D. 475, 479–81 (E.D. Mich. 1977) (balancing of interests of plaintiffs against defendants, initially weighing the balance in favor of discovery of all the information needed for fair adjudication of the dispute).

document over which the privilege is asserted. The litigant's need for the information, in this court's view, plays no part in the balancing test and no role in upholding or denying the privilege.<sup>65</sup>

The Federal Circuit's view of the balancing test, however, seems to alter the balancing test created in *Reynolds*. The Supreme Court in *Reynolds* specifically noted that the showing of necessity by the litigant determines how far the courts should probe into the appropriateness of the invocation.<sup>66</sup> The Court added that when the showing of necessity is strong, the claim of privilege should not be lightly accepted; but, when the necessity is dubious, the claim of privilege will prevail.<sup>67</sup> These statements certainly seem to create a balancing test where necessity is weighed against the claim of privilege. While the Court acknowledges that even the most compelling necessity cannot overcome an assertion of the privilege when the information being sought is truly a state secret, the Court also crafts a role for all the courts in determining whether the privileged information is truly secret by allowing courts to review the underlying documents if necessary.<sup>68</sup> This role in potentially reviewing the underlying information to determine if the privilege is validly being asserted is further evidence that the balancing test is a balance of the necessity of the litigant against the appropriateness of the assertion of the privilege. Most lower federal courts have recognized this view of the balancing test. But, since the Supreme Court has not expounded on the *Reynolds* balancing test since *Reynolds*, and lower courts have made varying interpretations, the exact nature of the balancing test is potentially at issue.

Finally, the lower federal courts have developed a view of the state secrets privilege and its relation to the *prima facie* case that was not discussed in *Reynolds*, but is used as a justification in complete dismissal of a case. The Fourth Circuit seems to be one of the first courts to establish that if deletions of information through the state secrets privilege are so severe that a *prima facie* case cannot be made out, plaintiff will lose and the case can be dismissed based on the assertion of the privilege.<sup>69</sup> The court constructs this new conception of the privilege despite acknowledging that assertion of the privilege need not result in a complete dismissal of the case.<sup>70</sup> The court creates this conception of the privilege without citing to *Reynolds*. Five years later in another case, the Fourth Circuit reinforces this idea by citing to its earlier decision, *Farnsworth Cannon v. Grimes*, and noting that when the very question upon which the case turns is itself a state secret, the case will be dismissed.<sup>71</sup> The court adds that

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<sup>65</sup> *In re United States*, 1993 U.S. App. LEXIS 14977, at \*25–26.

<sup>66</sup> *United States v. Reynolds*, 345 U.S. 1, 11 (1953); *see generally* *Tenet v. Doe*, 544 U.S. 1, 9 (2005) (reaffirming that a balancing test is to be applied when the state secrets privilege is asserted but not further describing the balancing test to be applied).

<sup>67</sup> *Reynolds*, 345 U.S. at 11.

<sup>68</sup> *Id.* at 10–11.

<sup>69</sup> *Farnsworth Cannon, Inc. v. Grimes*, 635 F.2d 268, 273 (4th Cir. 1980). This case was ultimately dismissed on the grounds that plaintiff could not make a *prima facie* case without use of classified information protected by the privilege.

<sup>70</sup> *Id.* at 271.

<sup>71</sup> *Fitzgerald v. Penthouse Int'l, Ltd.*, 776 F.2d 1236, 1240 (4th Cir. 1985).

sometimes secrets are so central to the subject matter of the litigation that any attempt to proceed will threaten disclosure of the privileged matter.<sup>72</sup> The problem is that the court is citing to propositions and the language from *Totten*, rather than *Reynolds*. *Totten* is distinguishable from *Reynolds* (see discussion below), and the court is fashioning a conception of the privilege that is not grounded in *Reynolds* and is inconsistent with the normative baseline of *Reynolds*. This conception garners further support in other federal circuit courts, which cite to the Fourth Circuit decisions but also cite to *Totten*.<sup>73</sup>

The overall problem with this conception of the state secrets privilege and the *prima facie* case is that it is inconsistent with *Reynolds* and a deviation from its framework. That said, there are certainly instances where the core of a case—the *prima facie* case—may rest on a state secret such as in *Totten*.<sup>74</sup> In those instances, it may be appropriate to dismiss the complaint. Even the courts, however, acknowledge that these occasions will be rare and that the resultant dismissals are “draconian” and “drastic remedies.”<sup>75</sup> Nevertheless, the courts opened the door to these dismissals with this conception of *Reynolds* and its relation to the *prima facie* case without the necessary support from *Reynolds*. Importantly, this conception undermines the standards of *Reynolds* which allows for cases generally to proceed even when the privilege is invoked, simply by removing the classified information.

### C. Though “Rarely Invoked,” Also Rarely Defeated

An exact number of instances when the government has invoked the state secrets privilege is difficult to discern. Finding the figure via a search in electronic legal repositories is impossible since not all cases are reported; thus, some assertions of the privilege may not arise in a search. In addition, the government sometimes threatens to invoke the privilege and cites *Reynolds* and *Totten* in its briefs without ever formally invoking it.<sup>76</sup> On the other hand, finding instances when the privilege has been defeated is easier since the occurrences are rare.

At least one commentator has offered that the privilege has “been stymied only five times,”<sup>77</sup> but this figure is subject to interpretation. There are

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<sup>72</sup> *Id.* at 1241–42.

<sup>73</sup> See *In re United States*, 872 F.2d 472, 476 (D.C. Cir. 1989) (if information is essential to establishing *prima facie* case, dismissal is appropriate, citing *Farnsworth Cannon*); *Kasza v. Browner*, 133 F.3d 1159, 1166 (9th Cir. 1998) (citing *Totten* and *Reynolds*, 345 U.S. at 11 n.26, which is a citation to *Totten*).

<sup>74</sup> *Totten v. United States*, 92 U.S. 105, 107 (1875).

<sup>75</sup> *In re United States*, 872 F.2d at 477 (dismissal of a suit in this fashion is draconian); *Fitzgerald*, 776 F.2d at 1242 (complete denial of a forum via dismissal of the case is a drastic remedy that is rarely invoked).

<sup>76</sup> Interview with Mark Zaid, Partner, Krieger & Zaid, in Chevy Chase, Md. (Oct. 27, 2004); see also *Stillman v. Dep’t of Defense*, 209 F. Supp. 2d 185, 222–23 (D.D.C. 2002) (court chastises the government for citing state secrets privilege cases without invoking it, but expecting the same results).

<sup>77</sup> Andrew Zajac, *Bush Wielding Secrecy Privilege to End Suits*, CHI. TRIB., Mar. 3, 2005, <http://www.chicagotribune.com/news/nationworld>.

instances when the privilege has initially been defeated; but frequently, the government gets a second bite at the apple and the privilege is upheld. For example, in *Sterling v. Tenet* (*Sterling I*), the federal district court in New York rejected the government's assertion of the privilege; but, once the case was transferred to Virginia, the government reasserted the privilege and prevailed.<sup>78</sup> Also, in *Halkin v. Helms* (*Halkin I*), the federal district court rejected the government's assertion of the privilege, but the Court of Appeals for the District of Columbia reversed the ruling and maintained the privilege.<sup>79</sup>

In at least two rare instances, courts rejected the privilege on the grounds that it was not properly asserted with regards to procedures.<sup>80</sup> In *Kinoy v. Mitchell*, the New York federal district court determined that the privilege had not been properly asserted since the Attorney General had not personally considered the materials at issue.<sup>81</sup> In *Yang v. Reno*, the court found that an invocation of the privilege by the executive secretary of the National Security Council (NSC) failed to meet the requirements of invocation by a head of a department or agency, and failed due to a lack of personal consideration of the material.<sup>82</sup> In both cases, however, the courts allowed the government to reassert the privilege using proper procedures. Thus, even though the privilege may initially be defeated, it does not mean that the privilege remains defeated.

### III. GOVERNMENT MISUSING AND COURTS MISCONSTRUING THE PRIVILEGE

The government is misapplying and misusing the state secrets privilege as a tool that effectively dismisses a complaint in its entirety and eliminates the possibility of court review of the merits of the case. Similarly, the courts have forgotten or are ignoring the parameters set out in *Reynolds* and its description of the correct manner to review the invocation of the privilege. Specifically, the current overbroad and blanket invocation of the state secrets privilege is undermining the normative baseline of *Reynolds* 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*

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<sup>78</sup> *Sterling v. Tenet* (*Sterling I*), No. 01 Civ. 8073, slip op. at 12 (S.D.N.Y. Jan. 23, 2003) (state secrets privilege defeated; decision initially filed under seal but subsequently redacted and released); *Sterling v. Tenet* (*Sterling II*), No. 03-CV-329, slip op. at 15 (E.D. Va. Mar. 3, 2004) (reassertion of state secrets privilege prevails).

<sup>79</sup> *Halkin v. Helms* (*Halkin I*), 598 F.2d 1, 11 (D.C. Cir. 1978); *see also In re United States*, No. 374, 1993 U.S. App. LEXIS 14977, at \*1-2, 22 (Fed. Cir. Apr. 30, 1993) (lower federal court rejected invocation of state secrets privilege but appeals court upheld the privilege); *see generally* *Ellsberg v. Mitchell*, 709 F.2d 51, 51-52 (D.C. Cir. 1983) (court rejected government's invocation of state secrets privilege with regards to names of two Attorney Generals, but upheld invocation over other information).

<sup>80</sup> *Kinoy v. Mitchell*, 67 F.R.D. 1 (S.D.N.Y. 1975); *Yang v. Reno*, 157 F.R.D. 625 (M.D. Pa. 1994).

<sup>81</sup> *Kinoy*, 67 F.R.D. at 9.

<sup>82</sup> *Yang*, 157 F.R.D. at 633-34.

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.

Several cases that have been decided within the last several years are prime examples of the misuse of the privilege and an overbroad invocation inconsistent with *Reynolds*. In every instance but one, the state secrets privilege has resulted in a complete dismissal of the complaint. More importantly, the cases demonstrate the four negative results that are following from incorrect application and review of the privilege. In order to analyze the negative results, it is first necessary to understand the facts and background of these cases. Each case, therefore, will be described and followed by an analysis of the improper use and review of the privilege.

*Sterling v. Tenet*<sup>83</sup>

Jeffrey Alexander Sterling, an African-American male, served with the Central Intelligence Agency (CIA) from 1993 until 2001 as a covert operations officer in the CIA's Directorate of Operations, Near East and South Asia Division.<sup>84</sup> Sterling alleges that during his employment, he suffered from several incidents of racial discrimination, continued disparate treatment, and retaliation against him after he initiated Equal Employment Opportunity (EEO) proceedings at the CIA.<sup>85</sup> In 2001, he brought his complaint *pro se* in the United States District Court for the Southern District of New York<sup>86</sup>, alleging that despite speaking Farsi and gaining skills as a covert operative, CIA management told him that he could not be operationally inconspicuous based on his size, skin color, and speaking a language not typically spoken by African-Americans.<sup>87</sup> Sterling sought declaratory relief, damages and costs pursuant to Title VII of the Civil Rights Act of 1964.<sup>88</sup>

After the suit was filed, Director of Central Intelligence (DCI) George Tenet moved to dismiss the complaint for improper venue,<sup>89</sup> or alternatively, to transfer venue to the Eastern District of Virginia based on an invocation of the state secrets privilege.<sup>90</sup> In an opinion initially filed under seal and later released with numerous redactions, the New York federal district court denied the motion to dismiss for improper venue, stating that invocation of the state

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<sup>83</sup> *Sterling I*, No. 01 Civ. 8073 (S.D.N.Y. Jan. 23, 2003); *Sterling II*, No. 03-CV-329 (E.D. Va. Mar. 3, 2004)

<sup>84</sup> *Sterling II*, No. 03-CV-329, slip op. at 3.

<sup>85</sup> *Id.* at 4.

<sup>86</sup> *Id.*

<sup>87</sup> Gordon Platt, *The Spy Who Sued Me*, AM. LAW., Dec. 2003, at 83, 84 (quoting Sterling's complaint which is unavailable at this time).

<sup>88</sup> *Sterling I*, No. 01 Civ. 8073, slip op. at 4; see 42 U.S.C. § 2000 et seq. (2000).

<sup>89</sup> See Fed. R. Civ. P. 12(b)(3).

<sup>90</sup> *Sterling I*, No. 01 Civ. 8073, slip op. at 4 (citing defendants' memorandum of law in support of a motion to dismiss for improper venue).

secrets privilege was inappropriate in this case.<sup>91</sup> Thus, the case could proceed, but the court granted the motion to transfer.<sup>92</sup>

Once transferred to Virginia, Tenet and the government again invoked the state secrets privilege moving to dismiss the complaint for failure to state a claim upon which relief can be granted.<sup>93</sup> As required, the court treated the motion as a motion for summary judgment, and the court ultimately concluded that the state secrets privilege was properly invoked such that Sterling could not prove his *prima facie* case without the use of secret information. Thus, the court ordered a complete dismissal of the complaint, justifying its decision on the invocation of the state secrets privilege.<sup>94</sup> Sterling appealed the district court's decision to the United States Court of Appeals for the Fourth Circuit, but his complaint suffered the same fate it received in the lower court.<sup>95</sup> Sterling further appealed to the Supreme Court, but the petition for writ of certiorari was denied.<sup>96</sup>

*Tilden v. Tenet*<sup>97</sup>

The facts of this case are obscured by the lack of background information in the rulings from the Virginia federal district court regarding the case. It is clear, however, that a female, covert employee of the CIA brought a complaint of sex discrimination against Tenet—in his capacity as DCI—in approximately 2000.<sup>98</sup> Even the true name of the employee was withheld in the complaint, and the plaintiff was assigned a pseudonym to protect her identity.<sup>99</sup> It is also clear that the court completely dismissed the complaint after the DCI invoked the state secrets privilege.<sup>100</sup> In typical fashion, the government moved to dismiss for failure to state a claim upon which relief can be granted,<sup>101</sup> based on the invocation of the state secrets privilege.<sup>102</sup> The court treated the motion as a motion for summary judgment and based its decision on an unclassified affidavit and classified materials filed *in camera* and *ex parte*.<sup>103</sup> After determining that the privilege had been properly invoked in terms of formal procedures, the court noted that it was not its place to second-guess an assertion of the privilege, and the only question remaining was whether the case could

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<sup>91</sup> *Id.* at 12.

<sup>92</sup> *Id.* at 12.

<sup>93</sup> *Sterling II*, No. 03-329-A, slip op. at 6 (citing FED. R. CIV. P. 12(b)(6)).

<sup>94</sup> *Id.* at 3, 6.

<sup>95</sup> *Sterling v. Tenet (Sterling III)*, 416 F.3d 338, 341 (4th Cir. 2005) (affirming the dismissal of the complaint based on the state secrets privilege).

<sup>96</sup> *Sterling v. Goss*, 126 S.Ct. 1052, 1053 (2006).

<sup>97</sup> *Tilden v. Tenet*, 140 F. Supp. 2d 623 (E.D. Va. 2000).

<sup>98</sup> *Id.* at 626.

<sup>99</sup> *Id.* at 624 n.1.

<sup>100</sup> *Id.* at 627–28.

<sup>101</sup> *See* FED. R. CIV. P. 12(b)(6).

<sup>102</sup> *Id.* at 626.

<sup>103</sup> *Id.*

proceed at all.<sup>104</sup> The court determined that it could not, and dismissed the case in its entirety.

*Edmonds v. Department of Justice*<sup>105</sup>

The case of Sibel Edmonds has received a great deal of attention in the media. The Federal Bureau of Investigation (FBI) hired Edmonds, who is fluent in three Middle Eastern languages, in December 2001 as a contract linguist to perform translation services in the wake of September 11.<sup>106</sup> After reporting breaches in security, lax translation services, incompetence and willful misconduct to FBI management, the FBI fired Edmonds, although she only worked for 52 days. The FBI explained that she was being terminated for the government's convenience.<sup>107</sup> Edmonds believed she was fired in retaliation for her whistleblower conduct and initially contacted former Attorney General John Ashcroft, FBI Director Robert Mueller and Senator Charles Grassley seeking relief and an investigation of her allegations.<sup>108</sup> In July 2002, Edmonds filed a complaint in the District Court for the District of Columbia alleging violations of the Privacy Act, violations of her First Amendment rights to report the allegations without retaliation, and violations of her Fifth Amendment rights to procedural due process and liberty.<sup>109</sup>

In conjunction with her complaint against the FBI and Department of Justice (DOJ) regarding her termination, Edmonds also filed a lawsuit against the FBI under the Freedom of Information Act (FOIA),<sup>110</sup> seeking documents relating to her employment and termination.<sup>111</sup> Edmonds received many pages of documents under her FOIA request, but other documents were withheld under the national security exemption of FOIA.<sup>112</sup>

With regards to Edmonds' constitutional complaint, former Attorney General Ashcroft formally invoked the state secrets privilege and moved to dismiss the complaint (presumably for failure to state a claim,<sup>113</sup> although that is not referenced in the opinion).<sup>114</sup> After completing a thorough review of the history and procedural requirements of the state secrets privilege, the court

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<sup>104</sup> *Id.*

<sup>105</sup> *Edmonds v. U.S. Dep't of Justice (Edmonds I)*, 323 F. Supp. 2d 65 (D.D.C. 2004); *Edmonds v. FBI (Edmonds II)*, 272 F. Supp. 2d 35 (D.D.C. 2003).

<sup>106</sup> *Edmonds I*, 323 F. Supp. 2d at 67; see also *Paula Zahn Now: FBI Whistle-Blowers Speak Out; Interview With Senator Charles Grassley* (CNN television broadcast, Aug. 17, 2004) (transcript available at <http://transcripts.cnn.com/TRANSCRIPTS/0408/17/pzn.00.html>) [hereinafter *Edmonds Interview*].

<sup>107</sup> *Edmonds I*, 323 F. Supp. 2d at 68–69.

<sup>108</sup> *Id.* at 69.

<sup>109</sup> *Id.* at 70.

<sup>110</sup> 5 U.S.C. § 552 (2000).

<sup>111</sup> *Id.* at 68 n.1; *Edmonds II*, 272 F. Supp. 2d at 35 (FBI released many pages of documents, but court held some documents exempted under FOIA's national security exemption).

<sup>112</sup> *Edmonds II*, 272 F. Supp. 2d at 42.

<sup>113</sup> See FED. R. CIV. P. 12(b)(6).

<sup>114</sup> *Edmonds I*, 323 F. Supp. 2d at 68.



ruled that the complaint in its entirety should be dismissed.<sup>115</sup> Even though Edmonds had obtained some information in her FOIA request and additional information had been revealed to the public or to Congress, the court still reasoned that no part of her complaint could proceed and the information she needed to prove her *prima facie* case could not be disentangled from the secret information the government sought to protect.<sup>116</sup>

### *Horn Case*

This case is also clouded in secrecy, and few court documents regarding the case are publicly available, as most are still under seal. A few pieces of information, however, have become public which reveal a little information about the case. Presumably at one point, the case was titled *Horn v. Albright*<sup>117</sup>, filed under seal in 1994 and seemingly stagnant until a decision in 2004 by Judge Royce Lamberth to dismiss the complaint in its entirety based on the state secrets privilege.<sup>118</sup>

The case concerns former Drug Enforcement Agency (DEA) agent Richard Horn, who filed a complaint in the District Court for the District of Columbia in 1994, alleging that the CIA, the State Department and another government agency illegally eavesdropped on his home and his telephone conversations while he was serving in Burma, violating the Fourth Amendment and the Foreign Intelligence Surveillance Act of 1978.<sup>119</sup> Horn arrived in Burma in 1992, but only fifteen months later, before the completion of his tour, he was removed from his post by the State Department; he alleges that the CIA Chief and the State Department Chief of Mission (COM) in Burma at the time conspired to remove him—and planted the bugging devices—after he disagreed with their assessments of the Burmese opium problem.<sup>120</sup> According to one article, twenty-four other DEA agents have joined the complaint—creating a class action—claiming that these agencies have similarly spied on them while they were posted abroad.<sup>121</sup> For fear of reprisals, however, none of the other plaintiffs are named.<sup>122</sup>

The article suggests that the case actually consists of several claims against the CIA Chief and COM personally, and against the government agencies, all of which have been combined.<sup>123</sup> The government has seemingly employed a variety of tactics to get the case dismissed: first, claiming the eavesdropping did not happen; second, claiming that the CIA Chief and COM had qualified

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<sup>115</sup> *Id.* at 81–82.

<sup>116</sup> *Id.* at 76, 78–79.

<sup>117</sup> JANINE M. BROOKNER, *PIERCING THE VEIL OF SECRECY: LITIGATION AGAINST U.S. INTELLIGENCE* 12 n.22, 24 (2003) (citing *Horn v. Albright*, No. 94-1756 (D.D.C. 1994), a case filed under seal and referenced as an instance of Tenet's invocation of the state secrets privilege to dismiss a case).

<sup>118</sup> Conroy, *supra* note 2.

<sup>119</sup> Mary A. Fischer, *We've Been Bugged!*, *GQ*, Feb. 1999, 181 at 182–83.

<sup>120</sup> *Id.* at 181–86.

<sup>121</sup> *Id.* at 183.

<sup>122</sup> *Id.* at 188.

<sup>123</sup> *Id.*

immunity because Americans overseas are not protected by the Fourth Amendment; and finally, invoking the state secrets privilege.<sup>124</sup> Initially, the case was being heard by Judge Harold Greene, but after his death, it was moved to Judge Lamberth's court.<sup>125</sup> In 1997, it appears that Judge Greene issued an opinion that sufficient evidence of eavesdropping existed and that Fourth Amendment protections do extend to Americans abroad.<sup>126</sup> This opinion, however, is under seal.

Regardless of the prior proceedings, in 2004, Judge Lamberth dismissed the case based on the invocation of the state secrets privilege.<sup>127</sup> Horn is appealing the dismissal.

*Darby v. Department of Defense*<sup>128</sup>

The allegations by Forrest Darby against the Air Force are not as damaging as allegations from Edmonds or Horn, but Darby also brings a whistleblower complaint against the government that was dismissed after the invocation of the state secrets privilege.<sup>129</sup> Darby, a contract employee for the Air Force, contends that after he reported a safety problem linked to Area 51 and other Air Force installations, the Air Force retaliated against him; eventually, he was prevented from obtaining employment at Area 51 and his employer—a government contractor—terminated him.<sup>130</sup> Darby attempted to have his case heard via the DOD administrative hearing process, but when it was denied, he filed a complaint in federal court in Las Vegas.<sup>131</sup> The complaint alleges violations of Darby's First and Fifth Amendment rights, and seeks damages and reinstatement.<sup>132</sup> The federal district court dismissed his claim based on invocation of the state secrets privilege, and subsequently, the Ninth Circuit affirmed the lower court's decision with little review or comment.<sup>133</sup>

*Arar v. Ashcroft*<sup>134</sup>

Finally, another case which has also received some media attention is the complaint brought by Maher Arar relating to his alleged extraordinary rendition from the U.S. to Syria, where he also alleges he was tortured before finally being released to return to Canada, his nation of citizenship.<sup>135</sup> Arar contends

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<sup>124</sup> *Id.*; see also BROOKNER, *supra* note 117, at 12.

<sup>125</sup> Fischer, *supra* note 119, at 190.

<sup>126</sup> *Id.* at 189.

<sup>127</sup> Conroy, *supra* note 2.

<sup>128</sup> *Darby v. U.S. Dep't of Defense*, 74 F. App'x 813 (9th Cir. 2003).

<sup>129</sup> *Darby*, 74 F. App'x at 813.

<sup>130</sup> Keith Rogers, *Men Claim Top-Secret Retaliation by Air Force*, LAS VEGAS REV.-J., May 21, 2000, available at [http://www.reviewjournal.com/lvrj\\_home/2000/May-21-sun-2000/news/13467550.html](http://www.reviewjournal.com/lvrj_home/2000/May-21-sun-2000/news/13467550.html).

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Darby*, 74 F. App'x at 814.

<sup>134</sup> See *Arar v. Ashcroft*, No. CV-04-249 (E.D.N.Y. Feb. 16, 2006).

<sup>135</sup> Complaint and Demand for Jury Trial at 2–3, *Arar*, No. 04-CV-249 (E.D.N.Y. Jan. 22, 2004), available at [http://www.ccr-ny.org/v2/legal/september\\_11th/docs/](http://www.ccr-ny.org/v2/legal/september_11th/docs/)

that he was illegally detained in the U.S. for thirteen days prior to his transfer to Jordan and then to Syria; and, while in Syria, he was repeatedly tortured and interrogated.<sup>136</sup> Arar claims that U.S. government officials have violated the Torture Victim Protection Act, and the procedural and substantive due process requirements of the Fifth Amendment, both by transferring him to Syria and by detaining him in the U.S.<sup>137</sup> After Arar filed his complaint in federal district court in New York, both former Acting Attorney General James Comey and former Secretary of Homeland Security Tom Ridge formally invoked the state secrets privilege and moved for dismissal under summary judgment<sup>138</sup> concerning three counts of the complaint.<sup>139</sup> In February 2006, the court dismissed three of the four counts of the complaint, but based its decision on other grounds rather than the state secrets privilege.<sup>140</sup> In other words, the invocation of the state secrets privilege was rendered moot, and Arar's claim was not defeated based solely on its assertion.<sup>141</sup>

An analysis using the aforementioned cases will demonstrate how the overbroad, blanket assertion of the state secrets privilege is undermining the normative standards of *Reynolds* and undermining the values that *Reynolds* seeks to protect, namely the opportunities for individuals to pursue claims for violations of private or public rights in a judicial forum. Each of these four negative consequences will be considered, drawing predominantly on these cases to reveal how the privilege is being manipulated and misapplied.

A. *Deviation from the Scope and Parameters of Reynolds Causing Cases to Be Completely Dismissed Without Review on the Merits*

The state secrets privilege was not crafted in *Reynolds* to be a complete bar on the adjudication of complaints by the courts; the government, however, is applying the privilege in such a way that complaints are being completely dismissed, denying any forum to plaintiffs for redress. These dismissals are being accomplished by blanket assertions of the privilege over every document, person, and shred of information regarding the case. In other words, the government is expanding the scope of the privilege beyond the parameters dictated in *Reynolds*. It is arguable that every bit of information in a complaint is classified such that none of it can be presented in court. The courts, however, are accepting these wholesale, blanket assertions of the privilege, often without conducting any meaningful review of the invocation of the privilege.

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Arar%20Complaint\_FINAL.pdf [hereinafter Arar Complaint].

<sup>136</sup> *Id.* at 11–16.

<sup>137</sup> *Id.* at 20–24.

<sup>138</sup> *See* FED. R. CIV. P. 56.

<sup>139</sup> Memorandum in Support of the United States' Assertion of State Secrets Privilege at 2–3, *Arar*, No. 04-CV-249 (E.D.N.Y. Jan. 18, 2005), *available at* [http://www.ccr-ny.org/v2/legal/september\\_11th/docs/Arar\\_statesecrets.pdf](http://www.ccr-ny.org/v2/legal/september_11th/docs/Arar_statesecrets.pdf) [hereinafter Arar Privilege Assertion].

<sup>140</sup> *Arar*, No. CV-04-0249 (E.D.N.Y. Feb. 16, 2006), *available at* [http://www.ccr-ny.org/v2/legal/september\\_11th/docs/Arar\\_Order\\_21606.pdf](http://www.ccr-ny.org/v2/legal/september_11th/docs/Arar_Order_21606.pdf).

<sup>141</sup> *Id.*

All of the cases outlined above are examples of overbroad and blanket assertions of the privilege. And even though Edmonds was able to obtain some documents via FOIA requests, her complaint was dismissed once the privilege was invoked. Plaintiffs in *Sterling*, *Tilden*, *Horn*, and *Darby*, however, have been unable to obtain any documents via discovery. Equally alarming is that the government has invoked the privilege even before answering the complaint, and before receiving any requests for discovery.<sup>142</sup>

The overbroad invocation of the privilege goes against *Reynolds*' caution against extremes.<sup>143</sup> These invocations are "extremely extreme," cutting off any opportunity for the court to review the case on the merits. As previously noted, the state secrets privilege was designed to limit discovery, rather than to dismiss the entire case at the outset.<sup>144</sup> The government, however, is accomplishing a complete dismissal before the court even learns what information is at stake. In fact, the D.C. Circuit has cautioned against deciding on the application of the state secrets privilege at an early stage in the proceedings, especially before the relevancy of the requested material has even been determined.<sup>145</sup> Although a district court in the D.C. Circuit eventually dismissed the *Edmonds* case based on the invocation of the privilege, the court did engage in a thorough review and considered the interests and needs of the plaintiffs in evaluating the privilege. The blanket assertion of the privilege still prevailed, however, because the court believed Edmonds could not prove her *prima facie* case without revealing classified information,<sup>146</sup> essentially adopting a view of the privilege that is not grounded in *Reynolds* and is a derivation initially crafted by the Fourth Circuit.

The government seems to have mastered the formal procedures for invoking the privilege (formal claim by head of department after personal consideration), but the government appears to be ignoring the mandate that the privilege is "not to be lightly invoked."<sup>147</sup> Invoking the privilege to shut down simple Title VII complaints (as in *Sterling I*, *Sterling II* and *Tilden*) or Privacy Act complaints (as in *Edmonds*) or complaints seeking job reinstatement (as in *Darby*) indicates that the government is not carefully considering its invocation but unnecessarily invoking it. Even accepting the view that if state secrets are at the heart of the *prima facie* case, the case should be dismissed, it is arguable that state secrets are at the heart of Title VII discrimination complaints. Identities and documents may be classified, but documents can be redacted and

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<sup>142</sup> See *Sterling v. Tenet (Sterling I)*, No. 01 Civ. 8073, slip op. at 4 (S.D.N.Y. Jan. 23, 2003); *Sterling v. Tenet (Sterling II)*, No. 03-CV-329, slip op. at 13; *Tilden v. Tenet*, 140 F. Supp. 2d 623, 625 (E.D. Va. 2000); Arar Privilege Assertion, *supra* note 139, at 2–3.

<sup>143</sup> *United States v. Reynolds*, 345 U.S. 1, 9 (1953).

<sup>144</sup> *Id.* at 2, 7–10 (invocation of privilege upheld only over specific documents requested by plaintiffs and case was remanded and allowed to proceed without these documents, but dismissal of *prima facie* case was not considered); see also *Sterling I*, No. 01 Civ. 8073, slip op. at 11 n.5.

<sup>145</sup> *In re United States*, 872 F.2d 472, 478 (D.C. Cir. 1989).

<sup>146</sup> *Edmonds v. U.S. Dep't of Justice (Edmonds I)*, 323 F. Supp. 2d 65, 79 (D.D.C. 2004).

<sup>147</sup> *Reynolds*, 345 U.S. at 7.

individuals can be assigned pseudonyms, such as the plaintiff in *Tilden*. Importantly, not every person employed by the government is a covert employee, but the blanket assertion of the privilege assumes it to be so and the courts have not challenged this assumption.

Most striking in this regard is the *Sterling* case, where an unclassified, redacted EEO report exists that could potentially be used by Sterling to prove his *prima facie* case.<sup>148</sup> Sterling states that the report contains numerous affidavits from colleagues and other employees acknowledging that Sterling suffered from discrimination.<sup>149</sup> Despite the fact that it was redacted and unclassified by the CIA, the CIA took the EEO report from Sterling's counsel and has refused to return it.<sup>150</sup> It seems illogical that the government prepared an unclassified report on the potential discrimination but then contends that the whole case is classified and warrants complete dismissal. The existence of the unclassified EEO report suggests that the government should be able to disentangle the sensitive information from the nonsensitive information, so that a claim could proceed. Although the D.C. Circuit devised the disentanglement conception,<sup>151</sup> it has not been followed by the Fourth Circuit where Sterling's complaint was adjudicated.

The disentanglement conception seems consistent with *Reynolds*' holding that the case could proceed simply without the classified information, i.e. disentangle the sensitive information from the nonsensitive information and proceed with the latter. Notably, however, the disentanglement view demonstrates how the various interpretations of the privilege and deviations from *Reynolds* are resulting in complete dismissals of complaints at the outset, without even considering that sufficient unclassified information may be available that would allow the complaint to go forward.

Federal courts are also ignoring the mandate of *Reynolds* that they engage in a critical review of the privilege. The Supreme Court repeatedly stated in *Reynolds* that the decision to rule out the information is for the judge and that judicial control cannot be abdicated to executive officers.<sup>152</sup> But, some courts are abdicating their role to the Executive and accepting these assertions with barely any review. *Tilden* is a prime example of a lack of thorough review, and *Sterling II* is not far behind. The review in *Darby* is equally as terse. As noted, the court in *Edmonds I* did engage in a thorough review factoring in all the points of *Reynolds*, but it seems to have given additional weight to the government's position in light of the specter of terrorism.<sup>153</sup> This additional weight may not necessarily be inconsistent with *Reynolds*, but *Reynolds* was

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<sup>148</sup> Opposition to Defendant's Motion to Dismiss and to Proceed *In Camera* and *Ex Parte* at 20, *Sterling v. Tenet (Sterling II)*, No. 03-CV-329 (E.D.Va. Sep. 16, 2003) [hereinafter "Sterling Opposition"]; see *Sterling II*, No. 03-CV-329, slip op. at 13; *Sterling I*, No. 01 Civ. 8073, slip op. at 6.

<sup>149</sup> Sterling Opposition, *supra* note 148, at 20, 26–30.

<sup>150</sup> *Id.* at n.1.

<sup>151</sup> See *Ellsberg v. Mitchell*, 709 F.2d 51, 57 (D.C. Cir. 1983); *In re United States*, 872 F.2d at 476.

<sup>152</sup> *Reynolds*, 345 U.S. at 8 n.21 (citation omitted), 9–10.

<sup>153</sup> *Edmonds I*, 323 F. Supp. 2d at 77.

decided after World War II during the Cold War and national security at that point in time was surely as important as it is now. In fact, the *Reynolds* court noted that “this is a time of vigorous preparation for national defense.”<sup>154</sup>

The *Edmonds* court, however, seems to have given short shrift to the fact that some information had already been released to Edmonds in FOIA requests and had been briefed to uncleared members of Senator Grassley’s staff.<sup>155</sup> With these considerations in mind, it seems reasonable that Edmonds could have been able to at least present her *prima facie* case using the information she had acquired; thus, dismissal was inappropriate.

Alongside a lack of a thorough review by the courts is a lack of application of the *Reynolds* balancing test. Although this balancing test has been viewed differently by various courts, the recent Supreme Court dicta in *Tenet* reaffirms that courts are to balance the showing of necessity by those seeking the information against the appropriateness of the invocation of the privilege.<sup>156</sup> The courts in *Tilden*, *Sterling II*, and *Darby* evidenced no indication of engaging in the balancing test. Other cases have also followed this pattern and the courts have essentially rubber-stamped the privilege.<sup>157</sup>

Finally, and most importantly, it must be emphasized that the case in *Reynolds* was not dismissed based on the privilege, but allowed to proceed simply without the privileged documents. The Supreme Court stated and lower courts have reiterated that the privilege should be applied on a case-by-case basis, and at least one lower federal court reviewed the invocation of the privilege as applied to specific interrogatory questions and on an item-by-item basis.<sup>158</sup> A blanket assertion of the privilege at the outset of the case precludes any consideration of the privilege on a case-by-case or item-by-item basis. This type of early dismissal is simply inconsistent with *Reynolds* and weakens its underlying value, namely to provide a forum for cases containing classified information while still protecting this information.

#### B. *Expanding the Privilege into the Realm of Totten*

By extension of the above discussion, it is evident that the government’s blanket assertion of the state secrets privilege to dismiss complaints is treading into the realm of *Totten*. Much like instances when *Totten* is asserted, resulting in a complete dismissal of the case, recent incarnations of the state secrets privilege are resulting in similar, complete dismissals. Even though the state secrets privilege may have some roots in the *Totten* decision, an assertion of the

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<sup>154</sup> *Reynolds*, 345 U.S. at 10.

<sup>155</sup> *Edmonds I*, 323 F. Supp. 2d at 77; *Edmonds Interview*, *supra* note 106.

<sup>156</sup> *Tenet v. Doe*, 544 U.S. 1, 9–10 (2005).

<sup>157</sup> *See generally* Burnett v. Al Baraka Inv. & Dev. Corp., 323 F. Supp. 2d 82 (D.D.C. 2004); Trulock v. Lee, 66 F. App’x 472, 476–78 (4th Cir. 2003).

<sup>158</sup> *Reynolds*, 345 U.S. at 11 (case-by-case review necessary); *Tenet*, 544 U.S. at 11 (as opposed to *Totten*, case-by-case review is necessary for state secrets privilege); *In re United States*, 872 F.2d 472, 478–79 (D.C. Cir. 1989) (item-by-item determination); *Jabara v. Kelly*, 75 F.R.D. 475, 495–97 (E.D. Mich. 1977) (each specific interrogatory question and discovery request evaluated item-by-item in light of the privilege).

*Totten* privilege is distinct and distinguishable from the state secrets privilege. And, unlike *Totten*, an assertion of the state secrets privilege need not be a complete and absolute bar to adjudicating a case.

The *Totten* privilege is derived from *Totten v. United States*, an action brought by Totten as the administrator of the intestate William A. Lloyd to recover compensation for services owed under a contract between Lloyd and President Abraham Lincoln.<sup>159</sup> Allegedly, Lloyd contracted to spy on the rebellious southern States by proceeding behind rebel lines and collecting and transmitting information on troop strength and fortifications to the President.<sup>160</sup> At the close of the war, Lloyd claimed that he was only reimbursed for expenses and was not paid the \$200 per month for which he contracted.<sup>161</sup> The Supreme Court first noted that if there were such a contract, the President would have authority to enter it and it would be binding upon the government; but, nevertheless, dismissed the claim in its entirety.<sup>162</sup> The Court reasoned that the service under the contract is a secret service, the employment a secret employment, and that disclosure of such services might compromise or embarrass the government, endanger the person, or injure the character of the agent.<sup>163</sup> The secrecy which such contracts impose precludes any action for their enforcement since litigation could lead to disclosure of matters which the law itself regards as confidential.<sup>164</sup> Thus, complete dismissal of the complaint was required and Totten was unable to obtain any relief.<sup>165</sup> In other words, a valid assertion of the *Totten* privilege is a complete and absolute bar to litigating a case.

The Supreme Court had occasion to revisit *Totten* recently in *Tenet* and reaffirm its holding while continuing to distinguish a *Totten* assertion of privilege from an assertion of the state secrets privilege.<sup>166</sup> At least one lower federal court has also acknowledged that an assertion of *Totten* is distinguishable from an assertion of the state secrets privilege under *Reynolds*.<sup>167</sup> More importantly and more recently, however, in *Tenet*, the Supreme Court distinguished these two cases and the instances where state secrets are at issue.<sup>168</sup> As such, *Tenet* was a valid instance of the application of *Totten*, and the Doe plaintiffs' complaints were completely dismissed and barred because they were based on the potential existence of secret espionage contracts—any adjudication of which would reveal state secrets.<sup>169</sup> In reaching this decision, the Court commented on *Reynolds* and the state secrets privilege,

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<sup>159</sup> *Totten v. United States*, 92 U.S. 105, 105 (1875).

<sup>160</sup> *Id.* at 105–06.

<sup>161</sup> *Id.*

<sup>162</sup> *Id.* at 106.

<sup>163</sup> *Id.*

<sup>164</sup> *Id.* at 107.

<sup>165</sup> *Id.*

<sup>166</sup> *Tenet v. Doe*, 544 U.S. 1, 2 (2005).

<sup>167</sup> *Halpern v. United States*, 258 F.2d 36, 44 (2d Cir. 1958).

<sup>168</sup> *Tenet*, 544 U.S. at 10–11.

<sup>169</sup> *Id.* at 11.

comparing a *Totten* assertion to a *Reynolds* assertion and noting that they are distinct.<sup>170</sup> This distinction is especially relevant since recent invocations of the state secrets privilege appear to be extending the parameters of the privilege such that the privilege is indistinguishable from *Totten*, despite their obvious differences. The Court's comments in *Tenet* also demonstrate that the normative standards set out in *Reynolds* continue to be valid and should be the standards used by the lower courts when addressing the privilege.

Specifically with regards to the state secrets privilege, the Court in *Tenet* noted that *Totten* is not a recasting of the state secrets privilege, or an example of the state secrets privilege, or an early expression of the privilege, but a categorical bar to claims based on secret espionage relationships between an individual and the government.<sup>171</sup> The Court also stated that the holding of *Totten* is broader than the holding in *Reynolds*, such that *Totten*-like claims are altogether barred, while claims encountering the state secrets privilege need not be categorically dismissed.<sup>172</sup> Finally, the Court reaffirmed that lower courts should apply a balancing approach in resolving government assertions of the state secrets privilege.<sup>173</sup> Importantly, the Court's comments on the balancing test clarify which view of the balancing test is correct, namely the view that the necessity of the information being sought should be balanced against the government's invocation of the privilege. Overall, the opinion continues to reinforce the differences between an assertion of the *Totten* privilege and an assertion of the state secrets privilege, and that the latter privilege was not designed to be a complete bar on constitutional claims.

A line in the *Tenet* opinion truly puts the overbroad scope of the current invocation of the state secrets privilege in perspective: "After minimal discovery."<sup>174</sup> The plaintiffs in *Tenet* sought information relating to their claim concerning their secret espionage contract—a claim which should be barred at the outset—and were *allowed* minimal discovery. Plaintiffs, however, such as *Tilden* and *Sterling* have been completely barred from gaining *any* discoverable material due to the blanket assertion of the state secrets privilege. In other words, plaintiffs in a contract claim that should have been dismissed at the outset obtained some discovery despite an invocation of *Totten*, while plaintiffs seeking discovery in their constitutional claims were prevented from gaining any discovery when the lesser state secrets privilege was invoked. This inconsistency clearly demonstrates that the current blanket assertion of the state secrets privilege is becoming another way to assert *Totten*, and that the government is expanding the privilege into *Totten* where it does not belong.

The differences between a *Totten*-like case and a *Reynolds*-like case are especially distinct when the underlying claims are reviewed. A *Totten* case necessarily involves a plaintiff with a secret espionage agreement with the U.S.

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<sup>170</sup> *Id.* at 8–10 (state secrets privilege is not a recast of *Totten*, which is a broader holding and bar, and not an example of the state secrets privilege).

<sup>171</sup> *Id.* at 8.

<sup>172</sup> *Id.* at 9–10.

<sup>173</sup> *Id.*

<sup>174</sup> *Id.* at 5.



government, i.e. a spy. Claims, on the other hand, where *Reynolds* is the appropriate baseline for reviewing the privilege are often constitutional claims; and, the plaintiffs asserting the claims, such as the ones previously discussed, are not spies but employees of the government. These employees may engage in covert operations or work in national security, but their relationship with the U.S. government is not the same as the relationship of the *Doe* plaintiffs. Their employment contracts with the U.S. government, while classified, are not the same as the espionage contract in *Tenet*.<sup>175</sup> In fact, the Supreme Court and the Acting Solicitor General, in oral arguments for the government in *Tenet*, acknowledged these contractual and relationship differences.<sup>176</sup> The Court specifically stated that a suit brought by an acknowledged but covert employee of the CIA, specifically a Title VII complaint, would not be barred from adjudication in the same manner as a suit arising under *Totten*.<sup>177</sup> Employee plaintiffs have an important stake in being able to address wrongs, especially violations of constitutional rights, and *Reynolds*' state secrets privilege allows them to do it. It maintains the availability of pursuing a complaint, while still protecting national security information. The Supreme Court, in the recent *Tenet* decision, continues to recognize this principle and the constitutional problem that would arise should a federal statute, such as Title VII, be construed to deny any judicial forum for a constitutional claim.<sup>178</sup>

C. *Interfering with Private Constitutional and Statutory Rights the Government Should Be Protecting*

When a blanket assertion of the state secrets privilege is invoked by the government and upheld by the courts to dismiss the case, one side is necessarily the winner and the other the loser; the deeper problem, however, is that in recent cases, the loser is the plaintiff who brings a complaint against the government, and the privilege is allowing the government to shield itself and officials from violations that may have occurred. Notably, the government has not answered the complaints in *Tilden*, *Sterling II*, or *Darby* and has thus not denied the allegations. It is therefore conceivable that the allegations actually occurred and that rather than address and rectify the problems, the government has chosen to shield itself from these allegations with the use of the privilege. Granted, it is certainly possible that some information should remain secret and not be presented in court. But, in asserting this blanket privilege to dismiss the complaint, the government is denying the parties any forum under Article III of the Constitution to adjudicate the claims and potentially achieve success. This action interferes with private constitutional and statutory rights which the government should be protecting.

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<sup>175</sup> *Id.* at 10.

<sup>176</sup> Transcript of Oral Argument, *Tenet*, 544 U.S. 1 (No. 03-1395), available at [http://supremecourtus.gov/oral\\_arguments/argument\\_transcripts/03-1395.pdf](http://supremecourtus.gov/oral_arguments/argument_transcripts/03-1395.pdf).

<sup>177</sup> *Tenet*, 544 U.S. at 10.

<sup>178</sup> *Id.*

*Sterling* and *Tilden* are prime examples of the government's interference with both constitutional and statutory rights. Both *Sterling* and *Tilden* filed EEO complaints at the CIA and seemed to pursue administrative remedies via the EEO process, as evidenced in their arguments against the invocations of the privilege.<sup>179</sup> When their claims were ultimately dismissed, however, the opportunity to pursue their cases and resolve their complaints was lost. Assuming the affidavits in *Sterling*'s redacted EEO report are true, *Sterling* seems to have suffered from discrimination.<sup>180</sup> He has been denied, however, any chance at seeking redress, compensation, reinstatement, or even simple attorneys' fees based on the assertion of the privilege. Both *Sterling* and *Tilden* filed complaints under Title VII, which was passed in order to eliminate discrimination or at least provide a forum for addressing complaints of discrimination; and the intelligence agencies, specifically the CIA, have not been exempted from this statute.<sup>181</sup> In fact, the CIA has an Office of Equal Employment Opportunity, whose mandate is to ensure a workplace free of discrimination and intervene when complaints of discrimination are reported.<sup>182</sup> The blanket assertion of the state secrets privilege, however, is *de facto* exempting these federal agencies from Title VII and other statutes, and potentially allowing constitutional rights to be violated without accountability.

In *Sterling II*, the court acknowledges that it must be mindful of the potential risk or temptation of the government to encroach on civil liberties and rights and hide behind the curtain of national security or state secrets.<sup>183</sup> Despite this awareness, the court still dismissed the complaint, essentially allowing the "executive branch *carte blanche* to do whatever action it wants—whether legal or not—all in the name of national security."<sup>184</sup> The court has basically enabled the Executive Branch to undermine civil rights and seems to believe that once national security is involved, it has no role in addressing the issue and denying the privilege, unless "it is transparently obvious that the agency is engaging in an abuse of the privilege."<sup>185</sup> This is not the standard announced in *Reynolds* for reviewing the privilege, and even if it were, there are indications that the government may have been engaging in an abuse of the privilege.

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<sup>179</sup> *Sterling v. Tenet (Sterling I)*, No. 01 Civ. 8073, slip op. at 6 (S.D.N.Y. Jan. 23, 2003); *Sterling Opposition*, *supra* note 148, at 26–27; *Tilden v. Tenet*, 140 F. Supp. 2d 623, 627 (E.D. Va. 2000).

<sup>180</sup> *Sterling Opposition*, *supra* note 148, at 26–30.

<sup>181</sup> See generally Civil Rights Act of 1964, 42 U.S.C. § 2000 et seq. (2000) (CIA and other intelligence agencies not exempted from Title VII).

<sup>182</sup> See CIA, Office of Equal Employment Opportunity, [https://www.cia.gov/no\\_fear\\_act/OEEO.htm](https://www.cia.gov/no_fear_act/OEEO.htm).

<sup>183</sup> *Sterling v. Tenet (Sterling II)*, No. 03-CV-329, slip op. at 10 (E.D. Va. Mar. 3, 2004).

<sup>184</sup> *Id.* at 5 (quoting the court's characterization of plaintiff's argument against the privilege).

<sup>185</sup> *Id.* at 11.

For example, in *Sterling I*, the DCI only asserted the privilege with regards to his motion to dismiss for improper venue,<sup>186</sup> arguing that the New York federal court would not be able to determine the extent of the relationship between the alleged discrimination and the chosen venue unless state secrets were revealed.<sup>187</sup> But in *Sterling II* in Virginia, the DCI invoked the privilege as the basis for a motion to dismiss for failure to state a claim under rule 12(b)(6) of the Federal Rules of Civil Procedure.<sup>188</sup> If not an abuse of the privilege, why didn't the DCI invoke the privilege with a 12(b)(6) motion in New York? Additionally, once in Virginia, the government argued that the New York ruling was "inappropriate" but limited solely to the issue of venue, such that *res judicata* would not apply to the 12(b)(6) motion.<sup>189</sup> In the same breath, the government argued that the DCI's classified declaration presented in New York covers the same material and information in the DCI's classified declaration presented in Virginia.<sup>190</sup> If so, the New York ruling against the privilege would seem to also cover a 12(b)(6) motion and similarly defeat that motion under *res judicata* when the motion was made by the government in the Virginia court. The government, however, did not want that to occur so its arguments were inconsistent and contradictory. These circumstances seem to suggest that the government may have abused the privilege, and at least that the Virginia federal court should have given the assertion of the privilege a more rigorous and critical review.

Even if the government did not abuse the state secrets privilege, the court's complete dismissal of the complaint barred Sterling from adjudicating his constitutional claim. He has no forum for seeking redress and he cannot recover for the potential harm he suffered. Tilden is in a similar position, as well as Edmonds. *Reynolds* was simply not conceived as a complete bar on pursuing these types of constitutional claims.

Several courts have acknowledged that complete denial of a forum for adjudicating disputes is extreme. The Supreme Court recently recognized the constitutional problem that would arise if a federal statute (such as Title VII) were construed to deny any judicial forum for a colorable constitutional claim.<sup>191</sup> As previously noted, the Fourth Circuit stated that denying a forum provided under the Constitution for the resolution of disputes is a "drastic remedy that has rarely been invoked;"<sup>192</sup> and, the D.C. Circuit has remarked that dismissal of a suit, and the consequent denial of a forum without giving plaintiff her day in court, is "draconian."<sup>193</sup> A federal district court also commented that the government interest in favoring confidentiality under the cloak of privilege must be tempered by the historical function of the courts in

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<sup>186</sup> See FED. R. CIV. P. 12(b)(3).

<sup>187</sup> *Sterling v. Tenet (Sterling I)*, No. 01 Civ. 8073, slip op. at 7.

<sup>188</sup> *Sterling II*, No. 03-CV-329, slip op. at 6; see FED. R. CIV. P. 12(b)(6).

<sup>189</sup> *Sterling Opposition*, *supra* note 148, at 15.

<sup>190</sup> *Id.*

<sup>191</sup> *Tenet v. Doe*, 544 U.S. 1, 10 (2005).

<sup>192</sup> *Fitzgerald v. Penthouse Int'l, Ltd.*, 776 F.2d 1236, 1242 (4th Cir. 1985).

<sup>193</sup> *In re United States*, 872 F.2d 472, 477 (D.C. Cir. 1989).

providing a process for the production of relevant evidence needed for a fair and just determination of a legal dispute.<sup>194</sup> Prior to *Tenet*, the Supreme Court remarked that constitutional claims against the intelligence agencies can be adjudicated in federal courts and there is no absolute bar to gaining discovery from these agencies.<sup>195</sup> The Court noted that federal courts should consider the private rights at issue and that the courts have latitude to control the discovery process, even if it means “rummaging” into intelligence agency affairs.<sup>196</sup>

Despite these cautions against denying a forum for resolution of disputes, the lower federal courts continue to deny just such a forum and to deviate from the standards of *Reynolds*. Rather than undermining these assertions of constitutional rights and opportunities to seek redress, courts should be upholding and protecting these rights by allowing the claims to be adjudicated. Additionally, the Executive Branch should not be violating these rights or undermining judicial review with blanket assertions of the privilege. If, however, overbroad invocations of the privilege persist, constitutional claims against the government, especially the intelligence agencies, may never be allowed. Surely, the courts should be protecting the right to bring these claims, and when *Reynolds* is correctly applied and reviewed, private constitutional rights are protected and a plaintiff is able to have his day in court.

#### *D. Interfering with Public Rights and the Role of the People as a Check on the Government*

In addition to interfering with private rights derived from the Constitution and statutes, these blanket assertions of the state secrets privilege interfere with public rights—rights that belong to the people and serve as a check on the power of the government. Public rights ensure, for example, that the government is not abusing or ignoring its police power, infringing on the free exercise of religion, or denying the opportunity to vote. These rights belong to individuals, but also belong to the people as a whole, and exist to serve as a watchdog on the government. When the state secrets privilege, however, denies the people the opportunity to know or criticize the actions of the government, it interferes with public rights and eliminates the people’s ability to be a check against an abuse of power by the government.

The *Edmonds*, *Horn* and *Darby* cases are examples of cases concerning individual rights, but also public rights since each case concerns an instance of whistleblowing against the Executive Branch. Whistleblowers are an important check on the government since they reveal unlawful or unconstitutional actions taken by the government. In fact, whistleblowers are so highly regarded that in

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<sup>194</sup> *Jabara v. Kelly*, 75 F.R.D. 475, 480–81 (E.D. Mich. 1977).

<sup>195</sup> *Webster v. Doe*, 486 U.S. 592, 604 (1988) (state secrets privilege was not asserted in this case, a complaint by a covert CIA employee claiming that he was fired for informing the CIA that he was homosexual, in violation of his First, Fifth, and Ninth Amendment rights).

<sup>196</sup> *Id.* at 604–05.

1989, Congress passed the Whistleblower Protection Act to assure that those individuals who do challenge government abuses of power are protected against retaliation.<sup>197</sup> Importantly, even if disclosure of this information is prohibited since classified on national security grounds, an employee is protected if the disclosure is made to the agency chief or delegate, an agency Inspector General, or the U.S. Office of Special Counsel.<sup>198</sup> Thus, when *Edmonds*, *Horn* and *Darby* revealed what was happening within these government agencies, they were protecting the public, and the privilege should not be used to shield the public from knowledge about the incidents that occurred.

The allegations made by Edmonds especially fall within this category since they question the ability of the Executive Branch and the intelligence agencies to adequately evaluate the threat against the U.S. and protect its citizens from this threat. Edmonds' allegations against her colleague in the translation department and against her FBI superiors for covering up and ignoring these deficiencies are extremely serious.<sup>199</sup> For example, Edmonds has alleged that extremely sensitive information was withheld from translation, that another translator had an ongoing relationship with a target of an FBI investigation, that this translator leaked information about the FBI investigation to the target, and that her supervisor assisted the other translator in perpetrating this misconduct.<sup>200</sup> The public arguably has a right and a need to know more about these allegations, and whether the FBI is able to protect the nation in light of these problems.

Additionally, the public has a need to protect whistleblowers when they report these incidents. The FBI has admitted that Edmonds' complaints were part of the reason for her termination,<sup>201</sup> suggesting that rather than protecting and encouraging whistleblowers, the FBI wants to cover up these incidents and its actions. Importantly, the public may also need to know this information in order to engage in a healthy criticism of the government in order to improve it. Invoking the privilege denies groups the information needed for intelligent criticism of the government.<sup>202</sup> While this protection of classified information may have a short-term advantage, it may do grave damage in the long run in terms of the faith the public has in its government and its ability to protect its citizens.<sup>203</sup>

The *Horn* case and *Arar* case are examples of the public right to ensure that the Executive Branch is not abusing its police power. As previously noted,

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<sup>197</sup> Whistleblower Protection Act, 5 U.S.C. § 2302(b)(8) (2000).

<sup>198</sup> Thomas M. Devine, *Whistleblower Protection Act of 1989: Foundation for the Modern Law of Employment Dissent*, 51 ADMIN. L. REV. 531, 532 n.1 (1999), available at <http://www.wulaw.wustl.edu/Students/Courses/Clark/Congclinic/whistle-art.htm>.

<sup>199</sup> *Edmonds v. U.S. Dep't of Justice (Edmonds I)*, 323 F. Supp. 2d 65, 68–69 n.4 (D.D.C. 2004).

<sup>200</sup> *Id.*

<sup>201</sup> *Edmonds Interview*, *supra* note 106.

<sup>202</sup> 3 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE § 509.12 (Joseph M. McLaughlin ed., 2d ed. 2006).

<sup>203</sup> *Id.*

the protections of the Fourth Amendment are sacred but the alleged actions of several government agencies abroad indicate that the Executive Branch, or at least certain agencies, do not believe that these protections extend beyond the borders of the U.S. If the Executive Branch has taken this position, it is surely information the public should know. In addition, the invocation of the privilege in the *Horn* case suggests that the Executive Branch believed the assertion of the privilege, along with sealing all the documents in the case, would guarantee that these allegations never came to light.

In fact, it appears that the privilege may not have been properly invoked, but was still upheld. According to Janine Brookner, DCI Tenet invoked the privilege over a document written and controlled by the State Department, when the Secretary of State should have properly invoked the privilege.<sup>204</sup> The documents seem to be two reports from the State Department Inspector General (IG), which allegedly state that Horn's home was bugged without authorization.<sup>205</sup> If this information is true, the court has seemingly dismissed the case even with the knowledge that these violations occurred. Additionally, the court has prevented Horn and the public from holding the government accountable for these violations. This case has serious implications for open government since not only was the state secrets privilege invoked, but the case was also initially sealed and many documents remain under seal.<sup>206</sup>

*Horn* is especially compelling because the case raises issues as to whether the government is attempting to cover up some violation of the Fourth Amendment. As at least one federal district court has indicated, there is a difference between protecting information from disclosure because its release might reveal an illegal operation and protecting information from disclosure because its release might reveal a state secret.<sup>207</sup> The violations alleged by Horn, both statutory (violations of the Foreign Intelligence Surveillance Act of 1978) and constitutional (violations of the Fourth Amendment), as a result of alleged illegal eavesdropping on his home are especially serious. They bring into question the legality of the government eavesdropping on U.S. citizens while outside the U.S., and whether there is any forum to address these violations. Similar to the COINTELPRO cases in the 1970s and 1980s, where citizens sought redress of violations of their Fourth Amendment rights that were committed in the U.S., the substantive issues of *Horn* are too important to decide merely in the context of a discovery motion.<sup>208</sup> In fact, although the

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<sup>204</sup> BROOKNER, *supra* note 117, at 12.

<sup>205</sup> Conroy, *supra* note 2 (noting that two IG reports were barred from disclosure under the state secrets privilege); Fischer, *supra* note 119, at 188–89 (stating that two State Department IG investigators investigated the case, traveling to Burma, and that other sources in the State Department revealed that the investigators believed that Horn's living room had been bugged).

<sup>206</sup> Conroy, *supra* note 2 (quoting Mark Zaid).

<sup>207</sup> Frost v. Perry, 919 F. Supp. 1459, 1466 (D. Nev. 1996), *aff'd*, Kasza v. Browner, 133 F.3d 1159, 1169 (9th Cir. 1998) (district court dismissing suit based on invocation of state secrets privilege).

<sup>208</sup> See generally Jabara v. Kelly, 75 F.R.D. 475, 480 (E.D. Mich. 1977) (court notes that instances of government wiretapping that implicate Fourth Amendment rights are too

court in *Halkin I* dismissed the case based on the invocation of the privilege, Judge Bazelon stated that by upholding the state secrets privilege, the court comes “dangerously close to an open-ended warrant to intrude on liberties guaranteed by the Fourth Amendment.”<sup>209</sup> Finally, as noted by a DEA agent in reference to the *Horn* case, illegal eavesdropping is both a criminal and civil offense, and “the state secrets privilege has been used to immunize people and agencies from wrongdoing—a far cry from what the United States Constitution intended.”<sup>210</sup>

Lastly, the *Arar* case also presents a potentially serious abuse of the Executive Branch police power if Arar’s allegations of unlawful detention in the U.S. and extraordinary rendition to Syria are true. The public would seem to have a right to know if individuals, even non-citizens, are being detained and shipped out of the country. The action has implications for many U.S. citizens related to non-citizens, who might want to visit the U.S. Regardless of whether extraordinary rendition is lawful, the detention in the U.S. alleged by Arar is likely not lawful, and is certainly an issue worthy of public debate. When the government asserts the privilege, however, and the courts uphold the privilege, the public is denied the opportunity to engage in this public debate, and perform the vital function of serving as a check against abuses of government power.

Many public rights may be implicated when the privilege is asserted and its assertion is especially of concern when constitutional rights are at issue. Unfortunately, when the courts accept a blanket assertion of the privilege, they do not allow the people an opportunity to gain information needed to improve and evaluate the government. If, however, the government was asserting the privilege and the courts were reviewing the privilege in line with *Reynolds*, these claims might be able to be heard. Fortunately, the standards of *Reynolds* do allow these important public rights claims to be adjudicated, if the standards are correctly followed.

#### IV. POTENTIAL REASONS FOR DEVIATING FROM *REYNOLDS*

It is not easy or simple to determine why the lower federal courts are deviating from the baseline originally crafted in *Reynolds* and reaffirmed by the Supreme Court in *Tenet*. Two main reasons, however, seem to be likely suspects and worthy of consideration.

First, there are practical reasons why courts may be deviating from the normative standards of *Reynolds*. It is not often, when compared to other evidentiary privileges, that the state secrets privilege is asserted or that courts have opportunity to consider assertions of the privilege. Thus, courts, especially those outside the D.C. and Fourth Circuits, may be unfamiliar with the

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important to decide in the context of discovery motions).

<sup>209</sup> *Halkin v. Helms (Halkin I)*, 598 F.2d 1, 12 (D.C. Cir. 1978) (Bazelon, J., dissenting from denial of rehearing en banc) (arguing for a different standard for evaluating the state secrets privilege).

<sup>210</sup> Conroy, *supra* note 2 (quoting an unnamed DEA source).

privilege and more willing to defer to the government when it asserts the privilege. Also, jurisprudence on the privilege is varied and the differences can be dramatic, which may result in district courts erring on the side of caution and favoring a blanket assertion of the privilege. Rather than engaging in a critical review of the assertion, which may involve a necessary examination of the underlying materials the privilege seeks to protect, the courts may exercise caution and accept the unclassified or classified affidavits of the government without further review of the materials. While this practice may seem beneficial, it actually goes against *Reynolds*' conceptualization of a balancing test where the needs of the litigants are taken into consideration and may require the underlying documents to be examined.

Additionally, many judges, as evidenced by their opinions, seem to feel that they do not have the expertise to decide these matters. They seem concerned that they are not sufficiently well versed in foreign intelligence matters or even foreign affairs to make a decision on the validity of an assertion. This hesitance seems especially relevant when review of the underlying documents may be necessary. Opinions seem to indicate that judges do not want to make decisions on whether the underlying material was properly classified, and thus whether the privilege was properly asserted. The problem with this position, however, is that when judges defer to a blanket assertion of the privilege, they buy the assumption that all the information in the case is classified. In light of *Reynolds*, accepting this assumption without reviewing the documents is harmful to the plaintiffs and cuts off any form of judicial review of the case on the merits. As *Reynolds* cautions, judges should not abdicate their role to the caprice of the Executive Branch.<sup>211</sup>

Second, there are intuitive or seemingly emotional reasons why courts may be deviating from the normative standards of *Reynolds*. "National security" is an especially powerful buzzword in the aftermath of the events of September 11th, and protecting national security is a compelling reason potentially to depart from *Reynolds*. The balancing test, however, devised in *Reynolds* allows for national security to be thoroughly protected while still allowing for complaints to be adjudicated. In fact, the *Reynolds* standards were established during the Cold War and the Court acknowledged the tense atmosphere surrounding national defense at the time of the decision. The court in *Edmonds I*, however, gave special notice to the threat posed to the nation's security by acts of terrorism.<sup>212</sup> Thus, it seems that courts at this time may be more deferential to invocations of the privilege and the government may be more willing to invoke the privilege given the specter of terrorism.

Further evidence supporting this theory can be derived from the cases adjudicated in the 1970s and 1980s surrounding allegations that the government's COINTELPRO activities violated constitutional rights. Much of the jurisprudence on the privilege came from these cases (previously cited in this discussion), where the government did not usually assert a blanket claim of

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<sup>211</sup> United States v. Reynolds, 345 U.S. 1, 9–10 (1953).

<sup>212</sup> Edmonds v. U.S. Dep't of Justice (*Edmonds I*), 323 F.Supp.2d 65, 77 (D.D.C. 2004).



privilege and actually gave information in discovery. Although the cases were heard during the Cold War era, the threat of terrorism was not in the air. And, while the Cold War certainly had implications for national security, the implications of the COINTELPRO activities were especially alarming in light of the Fourth Amendment, perhaps compelling the courts to undertake vigorous reviews of the invocations of the privilege and compelling the Executive Branch not to assert the privilege unless the information truly warranted protection.

An additional reason why courts may be deviating from *Reynolds* is that “state secrets” carries the connotation that if the information is revealed, lives might be lost or the nation’s borders might be compromised. While this is certainly a possibility that cannot be lightly overlooked if state secrets are truly at issue, it is arguable that all the materials in a Title VII claim, for example, are “state secrets.” Some materials may be classified, but other materials may be unclassified, and a blanket assertion without disentangling the classified information from the unclassified information is premature.

Linguistically, labeling information a “state secret” resonates differently than labeling information “classified material” or a “confidential document.” The potential fallout of an inadvertent revelation of a state secret seems greater perhaps than an inadvertent revelation of a fact from a confidential inter-office memorandum. Thus, in labeling the privilege the “state secrets privilege”, it has weight and implications that arguably would be less if the privilege were called the “confidential documents privilege.” But the label underscores the seriousness of the privilege and why it is not to be lightly invoked. It is only to be invoked to protect truly state secrets and not to cover up illegal or unconstitutional government conduct, or to relieve the government from its obligation to redact and disentangle unclassified information so the case may be adjudicated. Thus, when courts are presented with the privilege, the implications of an inadvertent revelation or the necessity of evaluating the underlying materials seems grave; and, they may be, but the classified and unclassified materials may not be “state secrets”, as defined by *Reynolds*. And, when courts readily abdicate their role to the Executive Branch, they are acting inconsistently with *Reynolds* and the Constitution. Furthermore, the government’s blanket assertion of the privilege is an abuse of its power if state secrets are truly not at issue.

Given the limited opportunity to consider the privilege, the connotation that comes along with the privilege and the current environment, courts seem willing to deviate from *Reynolds* and accept blanket assertions of the privilege. The Executive Branch also seems more willing to assert the privilege and to overbroaden its scope. Both these actions, however, are inconsistent with *Reynolds* and undermine the values carefully balanced in that case.

## V. CONCLUSION

The state secrets privilege can be a useful and necessary tool to protect information that cannot be disclosed without endangering national security. The government, however, by expanding the scope of the privilege and making

blanket assertions to dismiss cases at the outset, is misusing the privilege and deviating from the conception of the privilege outlined in *Reynolds*. Additionally, courts have altered the privilege through their jurisprudence, grafting different standards of review, refashioning the balancing test, and relating the privilege to the *prima facie* case, in a manner that is not well grounded in *Reynolds*. These deviations from *Reynolds* undermine the framework of the decision and its underlying value: allowing complaints involving classified information to be adjudicated while still protecting national security. As a result of these deviations, the privilege is becoming synonymous with *Totten*, a distinguishable case that bars adjudication of claims. Importantly, the new conception of the privilege is also interfering with the opportunity to pursue claims of violations of private and public constitutional rights. This interference seemingly allows the government potentially to shield itself from review, criticism and redress for violations it may have committed by denying a forum in which to present these claims. As the Court has noted, denying any judicial forum for a constitutional claim presents a constitutional problem. The government's current use and courts' acceptance of the state secrets privilege, however, is creating just such a problem. If this trend is allowed to continue, it is questionable whether any constitutional complaint against the government involving classified information will ever be allowed to be adjudicated.