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# Our Very Privileged Executive: Why the Judiciary Can (and Should) Fix the State Secrets Privilege

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**OUR VERY PRIVILEGED EXECUTIVE:  
WHY THE JUDICIARY CAN (AND SHOULD) FIX THE  
STATE SECRETS PRIVILEGE**

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*In United States v. Reynolds, the Supreme Court shaped the state secrets privilege (the “Privilege”) as one akin to that against self-incrimination. In recent litigation, the government has asserted the Privilege in motions for pre-discovery dismissal, thus transforming the Privilege into a form of executive immunity. This Article argues that courts must step in to return the Privilege to a scope more in keeping with its status as a form of evidentiary privilege.*

*After reviewing the doctrinal origin of the Privilege, this Article explores three types of issues implicated by the government’s invocation of the Privilege. The government, in calling for judicial deference to executive assertions of the Privilege, often relies on (1) separation of powers arguments or on (2) arguments sounding in institutional competence. Courts are often swayed by such arguments and thus give relatively little consideration to the (3) conflict of interest inherent in the government’s assertion of the Privilege and the impact of the successful invocation of the Privilege on the rights of individual litigants.*

*This Article then proceeds to address arguments that Congress can provide a check on executive abuse of the Privilege. The Article argues that, assuming that Congress has constitutional authority, it lacks the will or the institutional competence to provide a proper solution to the problems raised by the Privilege. Instead, the Article contends that since courts created the Privilege, courts are best positioned to rein it in. The final section of the Article provides examples drawn from case law illustrating mechanisms whereby courts can protect state secrets while also giving litigants adverse to the government their day in court.*

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#### INTRODUCTION

In *United States v. Reynolds*,<sup>1</sup> the U.S. Supreme Court for the first time recognized—and established the contours of—what has since been known as the “state secrets privilege” (the “Privilege”).<sup>2</sup> As *Reynolds* established, the Privilege applies when there is a “reasonable danger” that production of evidence in litigation would result in the disclosure of secret information relevant to national security.<sup>3</sup> In such cases, the party from whom production is sought is not obligated to produce evidence or information protected by the Privilege.<sup>4</sup>

The current litigation trend is for courts to dismiss cases *before discovery* based on the successful invocation of the Privilege.<sup>5</sup> Such an extreme remedy is uncalled for in almost all state secrets cases and simply cannot be reconciled with the *Reynolds* Court’s understanding of the Privilege as being akin to that against self-incrimination.<sup>6</sup> In dismissing cases based on the successful invocation of the Privilege, courts have transformed the Privilege into a new and extraordinarily expansive doctrine of executive immunity<sup>7</sup>—which the government can also invoke to immunize nonstate actors that stand accused of violations of the

1. 345 U.S. 1 (1953).

2. *Reynolds*, 345 U.S. at 6-8.

3. *Id.* at 10.

4. *Id.* at 10-11.

5. See, e.g., *El-Masri v. United States*, 479 F.3d 296, 310-11 (4th Cir. 2007), *cert. denied*, No. 06-1613, 2007 WL 1646914 (U.S. Oct. 9, 2007) (affirming prediscovery dismissal on state secrets grounds of suit brought by German national who alleged that U.S. agents and others had subjected him to torture, unlawful detention, and inhumane treatment); *Sterling v. Tenet*, 416 F.3d 338, 348-49 (4th Cir. 2005) (affirming prediscovery dismissal on state secrets grounds of suit against Central Intelligence Agency for race discrimination under Title VII); *Terkel v. AT&T Corp.*, 441 F. Supp. 2d 899, 917 (N.D. Ill. 2006) (dismissing before discovery challenge to National Security Agency’s warrantless wiretapping program on state secrets grounds); *Edmonds v. U.S. Dep’t of Justice*, 323 F. Supp. 2d 65, 81-82 (D.D.C. 2004) (dismissing before discovery wrongful termination suit against Federal Bureau of Investigation on state secrets grounds), *aff’d without opinion*, 161 F. App’x 6 (D.C. Cir. 2005).

6. See *Reynolds*, 345 U.S. at 8 (calling privilege against self-incrimination analogous to state secrets privilege).

7. See Henry Lanman, *Secret Guarding*, SLATE, May 22, 2006, <http://www.slate.com/id/2142155/> (criticizing Bush administration for transforming Privilege into “doctrine of broad government immunity”).

statutory and constitutional rights of U.S. citizens or of the human rights of foreign nationals, purportedly in furtherance of U.S. foreign policy aims.<sup>8</sup>

While Congress likely has the constitutional authority to regulate the Privilege,<sup>9</sup> it is unlikely to do so. On the other hand, although the courts have made a mess of the Privilege post-*Reynolds*, nothing forecloses the possibility of judicial remedies to problems posed by the Privilege.

This Article proceeds in four parts. Part I reviews the mysterious origin of the Privilege. Part II reviews three types of interests implicated in the executive's invocation of the Privilege: (a) executive power and separation of powers concerns, (b) institutional competence concerns, and (c) individual rights and the self-interested nature of the Privilege. Part III responds to Professor Neil Kinkopf's suggestion that Congress, rather than the judiciary, is the appropriate branch to check claims of executive privilege, either through legislation or through expanded oversight. Finally, Part IV proposes a menu of alternative remedies that courts might impose, short of dismissal, after the successful invocation of the Privilege.

The aim here is not to advocate that the Privilege be abolished. Rather, because there is an ever-present danger that the government will invoke the Privilege in a self-interested manner in order to protect not state secrets but the government itself from embarrassment, it makes sense that, at least some of the time, the government, rather than innocent third parties, ought to bear the litigation costs of the successful invocation of the Privilege.<sup>10</sup> Bearing the cost may mean that the government cannot assert defenses based on privileged information or it may mean that the government must bear the actual monetary costs of facilitating the continuation of the litigation in a manner that protects state secrets. This Article contends that it is up to courts, not Congress, to force the government to bear some of these costs and that the best point of departure for doing so is a return to the *Reynolds* Court's conception of the Privilege as analogous to the privilege against self-incrimination. Moreover, although *Reynolds* certainly left plenty of room for lower courts to experiment with creative solutions to the problems posed by litigation that might force the disclosure of state secrets, *Reynolds* itself is problematic enough to justify the Supreme Court's reconsideration of the approach to the Privilege established in that case.

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8. See, e.g., *El-Masri*, 479 F.3d at 300 (dismissing suit brought by German national against U.S. agents and third-party contractors allegedly complicit in his abduction and extraordinary rendition to Afghani prison); *Terkel*, 441 F. Supp. 2d at 901 (dismissing lawsuit alleging statutory and constitutional violations against telephone service provider in connection with National Security Agency surveillance programs).

9. Neil Kinkopf, *The State Secrets Problem: Can Congress Fix It?*, 80 TEMP. L. REV. 489, 498 (2007).

10. See *infra* notes 80-90 and accompanying text for a discussion of how assertion of the Privilege affects litigants.

I. A NEW LEGAL LOHENGRIN:<sup>11</sup> THE ORIGIN OF THE PRIVILEGE

The origin of the Privilege is significant because the powers of Congress or the courts to regulate the Privilege depend on its origin. If the Privilege is simply a common law doctrine created by the courts, there would be no question that, absent statutory instructions to the contrary, courts can shape the Privilege as they see fit. If, on the other hand, it really does derive from some invisible radiation of Article II of the Constitution, the argument that Congress or the courts have power to rein it in becomes much harder to make.<sup>12</sup> And congressional or judicial power over state secrets could be very narrow indeed if the Privilege arises in a context in which the executive may be said to “personify the federal sovereignty.”<sup>13</sup>

As political scientists William Weaver and Robert Pallitto, authors of a widely cited essay on the Privilege,<sup>14</sup> have argued, there are basically two lines of provenance for the Privilege.<sup>15</sup> While the first line seems to be constitutional in nature and derived from the history of the first Presidents, that line actually is broader than the Privilege, encompassing the more expansive doctrine of executive privilege.<sup>16</sup> The second line is the common law of the United Kingdom, adopted and slightly modified in the 1953 case *United States v. Reynolds*,<sup>17</sup> in which the U.S. Supreme Court for the first time recognized the Privilege.<sup>18</sup>

It may well be that the *Reynolds* Court would have trespassed into the

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11. Speaking of the Alien Tort Statute, 28 U.S.C.A. § 1350 (West 2006), the Second Circuit stated: “This old but little used section is a kind of legal Lohengrin; although it has been with us since the first Judiciary Act, no one seems to know whence it came.” *IIT v. Vencap, Ltd.*, 519 F.2d 1001, 1015 (2d Cir. 1975) (citation omitted); see also Lucien J. Dhooge, *Lohengrin Revealed: The Implications of Sosa v. Alvarez-Machain for Human Rights Litigation Pursuant to the Alien Tort Claims Act*, 28 LOY. L.A. INT’L & COMP. L. REV. 393, 393 n.1 (2006) (noting German legend in which Lohengrin miraculously appears to rescue maiden but mysteriously vanishes upon being asked from whence he came).

12. In his Keynote Address at the Symposium, Marty Lederman noted that even when there is a conflict between the executive and the Congress in matters of foreign affairs, the executive’s power is at its “lowest ebb,” but it is not completely eliminated. Martin S. Lederman, Visiting Professor of Law at Georgetown Univ., Keynote Address at the Temple Law Review Symposium: Executive Power: Exploring the Limits of Article II (Mar. 23, 2007).

13. *Youngstown Sheet & Tube v. Sawyer*, 343 U.S. 579, 636 (1952) (Jackson, J., concurring).

14. William G. Weaver & Robert M. Pallitto, *State Secrets and Executive Power*, 120 POL. SCI. Q. 85, 93 (2005).

15. *Id.* at 93-99.

16. *Id.* at 93.

17. 345 U.S. 1, 7-8 (1953); see also Robert M. Chesney, *State Secrets and the Limits of National Security Litigation*, 75 GEO. WASH. L. REV. 1249, 1271-83 (2007) (reviewing “public interest” privileges in nineteenth and twentieth century Anglo-American common law prior to *Reynolds*). But see LOUIS FISHER, IN THE NAME OF NATIONAL SECURITY: UNCHECKED PRESIDENTIAL POWER AND THE REYNOLDS CASE 71 (2006) (arguing that British precedent is not controlling as “Congress and federal courts have much greater independence than their counterparts in England”); Weaver & Pallitto, *supra* note 14, at 99 (criticizing *Reynolds*’s reliance on English cases as “improvident”).

18. See FISHER, *supra* note 17, at xi (characterizing *Reynolds* case as having “formalized the state secrets privilege”); Amanda Frost, *The State Secrets Privilege and Separation of Powers*, 75 FORDHAM L. REV. 1931, 1936 (2007) (noting that U.S. Supreme Court first recognized the Privilege in *Reynolds*).

realm of executive power over foreign affairs and national security if it had held that the executive can *never* rely on the Privilege to avoid its discovery obligations. Since courts have created the Privilege, however, it is hard to see how the Constitution would prevent them from shaping that Privilege as they see fit in order to protect the state interest in preserving its secrets while also protecting the rights of individual litigants.<sup>19</sup>

In *Reynolds*, the survivors of civilians who were killed when a military aircraft crashed sued the government for negligence in connection with the crash.<sup>20</sup> The government disclosed that the aircraft was testing new electronic equipment.<sup>21</sup> The plaintiffs sought the Air Force's official accident investigation report pursuant to Rule 34 of the Federal Rules of Civil Procedure.<sup>22</sup>

The U.S. Supreme Court treated the Privilege as properly invoked<sup>23</sup> and noted that the government, while trying to avoid disclosure of the Air Force investigation report, had offered to make three surviving witnesses available to plaintiffs.<sup>24</sup> The *Reynolds* Court held that the plaintiffs should have taken the government up on its offer.<sup>25</sup> Because these witnesses were available, and because there was a "reasonable danger" that disclosure of the report would entail the disclosure of secret information relevant to national security, the Court ruled that the government should not be forced to produce the report.<sup>26</sup>

One of the most peculiar things about the Privilege is that the *Reynolds* Court was the first to misapply the *Reynolds* procedure for determining whether the Privilege applies.<sup>27</sup> *Reynolds* held that the invocation of the Privilege is appropriate when it is "possible to satisfy the court, *from all the circumstances of the case*, that there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be

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19. *Reynolds*, 345 U.S. at 9-10 (noting that "[j]udicial control over the evidence in a case cannot be abdicated to the caprice of executive officers" but also cautioning that "the court should not jeopardize the security which the privilege is meant to protect").

20. *Id.* at 3.

21. FISHER, *supra* note 17, at 1-2 (stating that public relations officer at plane's air base told reporters that bomber that crashed had been on mission to test secret electronic equipment).

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

23. *See id.* at 7-8 (setting forth requirements for invocation of Privilege and finding procedural steps to be met). Louis Fisher sets out the full history of the *Reynolds* case, making clear that the Privilege was not properly invoked at the trial or appellate level. FISHER, *supra* note 17, at 29-91. Rather, at the district court level, the government withheld the Air Force's official accident investigation report based on the Housekeeping Statute, 5 U.S.C. § 22 (1789) (current version at 5 U.S.C. § 301 (2000)), and various hearsay objections. *Id.* at 36. Before the Third Circuit, the government relied on the Housekeeping Statute and on "executive immunity." *Id.* at 64-69.

24. *Reynolds*, 345 U.S. at 5.

25. *Id.* at 11.

26. *Id.* at 10.

27. *See* FISHER, *supra* note 17, at 112 (quoting Justice Vinson's admonition that judicial control over evidence "cannot be abdicated to the caprice of executive officers" but then pointing out that judge would never know if executive officer acted capriciously under procedure adopted in *Reynolds* (quoting *Reynolds*, 345 U.S. at 9-10)); Weaver & Pallitto, *supra* note 14, at 101 (contending that "practical effect" of *Reynolds* has been to foster very abdication of control over evidence against which *Reynolds* Court warned).

divulged.”<sup>28</sup> The Court then concluded, *without reviewing the report*, that there certainly was “a reasonable danger that the accident investigation report would contain references” to secret information.<sup>29</sup> Because witnesses were available who could provide information similar to that contained in the report, the Court decided that it did not need to review the report to see whether that “reasonable danger” was realized.<sup>30</sup> The accident report, which has now been declassified, contained no secret information<sup>31</sup> and would have supported plaintiffs’ negligence claim<sup>32</sup> had they been permitted access to it.

Some commentary on *Reynolds* suggests that the case does a good job of articulating a workable solution to the problem courts confront in state secrets cases while bungling the application of the doctrine to the facts at hand.<sup>33</sup> But the test articulated in *Reynolds* may also be fundamentally incoherent. On the one hand, the Court stated that where a plaintiff can make “a strong showing of necessity, the claim of privilege should not be lightly accepted.”<sup>34</sup> On the other hand, in a footnote, the Court acknowledged *Totten v. United States*,<sup>35</sup> a case brought by the survivors of a purported Civil War spy, in which the Court held that a person may not sue the government to enforce a secret agreement to engage in espionage.<sup>36</sup> In so doing, the Court embraced *Totten’s* ruling that “where the very subject matter of the action . . . was a matter of state secret,” the action must be dismissed on the pleadings.<sup>37</sup> Plaintiffs are thus presented with a Hobson’s choice. If they downplay the importance of the information sought, courts are likely to accept the invocation of the Privilege without in camera inspection.<sup>38</sup> If they stress the importance of the evidence in an attempt to get courts to “probe in satisfying itself that the occasion for invoking the privilege is appropriate,”<sup>39</sup> courts are more likely to determine, as they now routinely do, that the information sought constitutes the very subject matter of the litigation

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28. *Reynolds*, 345 U.S. at 10 (emphasis added).

29. *Id.*

30. *Id.*

31. See FISHER, *supra* note 17, at 166-67 (reporting that daughter of one of civilians killed in plane crash at issue in *Reynolds* ordered accident report from website in 2000 and “was disappointed that it made no mention of the secret project”).

32. According to the plaintiffs, “[t]he declassified documents . . . identify the main cause of the accident as the Air Force’s failure to comply with two technical orders that mandated changes to the exhaust manifold assemblies to eliminate a fire hazard.” *Id.* at 178.

33. Chesney, *supra* note 17, at 1288 (proposing “clear and convincing” standard in place of *Reynolds’s* “reasonable danger” test but otherwise endorsing *Reynolds’s* approach and arguing that Court’s failure to notice that investigation report contained no state secrets illustrates “folly” of reasonable danger standard).

34. *Reynolds*, 345 U.S. at 11.

35. 92 U.S. 105 (1875).

36. *Totten*, 92 U.S. at 107.

37. *Reynolds*, 345 U.S. at 11 & n.26 (citing *Totten*, 92 U.S. 105).

38. Weaver & Pallitto, *supra* note 14, at 101 (calculating that courts required in camera inspection in less than one-third of reported cases in which Privilege has been invoked).

39. *Reynolds*, 345 U.S. at 11.

and dismiss the case.<sup>40</sup>

*Reynolds* thus has a sort of dual legacy. On the one hand, it establishes the Privilege and the procedures that are intended to protect both the government and litigants in cases in which the Privilege is invoked. That portion of its legacy is largely uncontroversial. That is, litigants seem to recognize the need for the Privilege and understand that the Privilege, if properly invoked, is and ought to be absolute. On the other hand, *Reynolds* is emblematic of the government's bad faith in invoking the Privilege—and also emblematic of courts' refusal to challenge executive claims of secrecy.

## II. INTERESTS IMPLICATED IN THE INVOCATION OF THE PRIVILEGE

Three types of arguments ought to be considered in evaluating the Privilege. The strong case in favor of the Privilege is both constitutional and prudential, relying first on theories of executive power and the separation of powers and second on arguments relating to institutional competence. As Neil Kinkopf points out, in its strongest form, relying on a version of unitary executive theory, such an argument could prevent any check on executive claims of privilege.<sup>41</sup> I agree with Neil Kinkopf that such an expansive theory of the unitary executive distorts the doctrine of separation of powers and threatens the principle of checks and balances that is also central to our form of government. Moreover, the Privilege implicates a third set of concerns about which courts have had far too little to say. Courts have been inexplicably obtuse in ignoring the conflict of interest inherent in the government's invocation of the Privilege and inexcusably callous in dismissing the rights of individual litigants who cannot vindicate their rights due to the Privilege.

### A. *The Executive Power and Separation of Powers Argument for an Expansive Privilege*

In *United States v. Reynolds*,<sup>42</sup> both plaintiffs and the government claimed that the Constitution mandated a ruling in their favor.<sup>43</sup> The Court found it unnecessary to address the government's constitutional claim that "executive department heads have power to withhold any documents in their custody from judicial view if they deem it to be in the public interest," as it was able to decide

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40. See, e.g., *Sterling v. Tenet*, 416 F.3d 338, 346 (4th Cir. 2005) (affirming district court finding that information sought formed "the very basis of the factual disputes in this case" and concluding that there was "no way for Sterling to prove employment discrimination without exposing at least some classified details of the covert employment that gives context to his claim"); *Black v. United States*, 62 F.3d 1115, 1119 (8th Cir. 1995) (finding information subject to Privilege to be "at the core of Black's claims" and concluding that litigation could not be tailored so as to proceed without information subject to Privilege); *Terkel v. AT&T Corp.*, 441 F. Supp. 2d 899, 918 (N.D. Ill. 2006) (concluding that Privilege precluded defendant from affirming or denying activities alleged in complaint).

41. Kinkopf, *supra* note 9, at 494-96.

42. 345 U.S. 1 (1953).

43. *Reynolds*, 345 U.S. at 6.



the case on narrower grounds.<sup>44</sup> In its recent memoranda in support of various motions invoking the Privilege, the U.S. government has again argued that the Privilege is constitutional in origin.<sup>45</sup>

The conclusion that the Privilege is constitutional in origin would be a surprising result, since, as I have already noted, the Privilege was not officially recognized until 1953.<sup>46</sup> The stronger view seems to be that the origin of the Privilege lies in the common law but that the common law rules have been developed to protect some essential constitutional core.<sup>47</sup> But the nature of that constitutional core remains obscure. The *Reynolds* Court rather evasively suggested in a footnote that the Privilege is rooted in the separation of powers.<sup>48</sup> The Supreme Court in *United States v. Nixon*<sup>49</sup> was somewhat more direct, stating that, “[t]he privilege is fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution.”<sup>50</sup> Still, the precise derivation of the Privilege from Article II is never spelled out.

Even if the Privilege implicates the executive branch’s constitutional powers, the Supreme Court has repeatedly made clear that it retains an oversight role, even in the area of foreign affairs<sup>51</sup> and specifically in the realm of state secrets.<sup>52</sup> The Constitution does not articulate an absolute separation of powers.<sup>53</sup> If the separation of powers argument is asserted too energetically, it

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44. *Id.*

45. Chesney, *supra* note 17, at 1261; *see also* Memorandum of Points and Authorities in Support of the Motion by Intervenor United States to Dismiss or, in the Alternative, for Summary Judgment at 4, *El-Masri v. Tenet*, 437 F. Supp. 2d 530 (E.D. Va. 2006) (No. 1:05-cv-01417-TSE-TRJ), available at [http://www.aclu.org/pdfs/safefree/govt\\_mot\\_dismiss.pdf](http://www.aclu.org/pdfs/safefree/govt_mot_dismiss.pdf) (calling Privilege “without peer among governmental privileges” and “a manifestation of the President’s Article I [sic] powers”).

46. *See* *Ellsberg v. Mitchell*, 709 F.2d 51, 56 (D.C. Cir. 1983) (noting that scope of Privilege had remained “somewhat in doubt” before World War II as government had rarely invoked it).

47. Chesney, *supra* note 17, at 1310 (describing Privilege as “having a potentially inalterable constitutional core surrounded by a revisable common-law shell”); *id.* at 1271 (noting that, beginning in 1970s, opinions discussing Privilege invoked theme of separation of powers, “suggesting a constitutional foundation to reinforce the common law origins of the doctrine”); Frost, *supra* note 18, at 1935 (calling Privilege common law evidentiary privilege deriving from President’s national security authority and thus infused with “constitutional overtones” (quoting *Reynolds*, 345 U.S. at 6)).

48. *Reynolds*, 345 U.S. at 6 n.9.

49. 418 U.S. 683 (1974).

50. *Nixon*, 418 U.S. at 708; *see also* *Halkin v. Helms (Halkin I)*, 598 F.2d 1, 14 n.9 (D.C. Cir. 1978) (Bazelon, J., dissenting from denial of rehearing en banc) (arguing that constitutional basis for Privilege is unclear and noting that *Nixon* Court “appears to have derived the privilege from the President’s Article II duties as Commander in Chief and his responsibility for the conduct of foreign affairs”).

51. Most recently, in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), the Court stated: “Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake.” *Hamdi*, 542 U.S. at 536.

52. *See Nixon*, 418 U.S. at 706 (refusing to accept arguments that doctrine of separation of powers or need for confidentiality in executive communications justify broad doctrine of executive immunity from judicial oversight).

53. *See* THE FEDERALIST NO. 48, at 18 (James Madison) (E.H. Scott ed., 1898) (arguing that unless branches of federal government “be so far connected and blended as to give each a

gives rise to concerns relating to our constitutional system of checks and balances. As the Supreme Court stated in *Nixon*:

The President's counsel . . . reads the Constitution as providing an absolute privilege of confidentiality for all Presidential communications. Many decisions of this Court, however, have unequivocally reaffirmed the holding of *Marbury v. Madison*, 1 Cranch 137 (1803), that "[i]t is emphatically the province and duty of the judicial department to say what the law is."<sup>54</sup>

To the extent that government arguments about the Privilege raise checks and balances concerns, some combination of judicial and legislative oversight of the Privilege is mandated.<sup>55</sup>

Courts and Congress must not go too far in restricting the executive branch from pursuing the foreign affairs strategies it believes necessary for national security, but those branches also must maintain sufficient power to check the executive and protect individual rights.<sup>56</sup> To the extent that the Privilege implicates either separation of powers concerns or Article II powers, judicial deference to executive determinations in the area is appropriate.<sup>57</sup> But when state secrets arise in the context of litigation, we are not in an area of exclusive executive power, and therefore the courts and Congress may serve as a constitutional check on the abuse of the Privilege, so long as they do so in ways that are consistent with the exercise of executive foreign affairs powers.<sup>58</sup>

#### B. *The Institutional Competence Argument for an Expansive Privilege*

A second justification of the Privilege is not constitutional but prudential. As Weaver and Pallitto have put it, "[a]lthough judges occasionally ground the privilege in separation of powers, the ultimate reason for upholding its use is on

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constitutional control over the others, the degree of separation which the maxim requires, as essential to a free government, can never in practice be duly maintained").

54. *Nixon*, 418 U.S. at 703 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

55. See *Frost*, *supra* note 18, at 1933 (arguing that, in seeking dismissal of state secrets cases, executive strips Congress "of its ability to collaborate with the judiciary to curb executive power"); *id.* at 1955 (criticizing executive arguments suggesting that state secrets decisions be left to "political branches" for overlooking role of Congress, "one of the political branches," in granting courts jurisdiction to determine legality of executive conduct).

56. See *Webster v. Doe*, 486 U.S. 592, 604 (1988) (remarking on district courts' ability to control discovery process to balance one party's need for access to proof in support of colorable claims against government's need to protect confidentiality); FISHER, *supra* note 17, at 258 (rejecting broad judicial deference to executive branch as undermining "the judiciary's duty to assure fairness in the courtroom and to decide what evidence may be introduced"); Weaver & Pallitto, *supra* note 14, at 90 (contending that Privilege prevents courts from exercising their constitutional duty to oversee executive).

57. See *Ellsberg v. Mitchell*, 709 F.2d 51, 58 (D.C. Cir. 1983) (noting that trial judges "should accord considerable deference to recommendations from the executive department"); *Halkin v. Helms (Halkin I)*, 598 F.2d 1, 9 (D.C. Cir. 1978) (urging courts to accord "utmost deference" to executive assertions of Privilege (quoting *Nixon*, 418 U.S. at 710)).

58. In insightful comments at the Symposium, Marty Lederman said that he was not sure that Congress has constitutional authority to limit the scope of the Privilege. Nevertheless, he claimed that Congress had in fact done so without eliciting strong objections from the executive branch. Lederman, *supra* note 12.

the practical grounds that it is necessary to the survival of the state.”<sup>59</sup> In order to protect national security, certain matters must not be disclosed through litigation, and the executive is far better positioned than are the courts to determine when litigation implicates national security secrets.<sup>60</sup>

The executive has unique competence to identify state secrets and to recognize dangers that might arise from the disclosure of such secrets.<sup>61</sup> Various agencies within the executive branch engage, on a daily basis, in activities relating to national security where the maintenance of state secrets is a high priority.<sup>62</sup> As the Supreme Court has recognized, however, while the executive might have superior competence in intelligence and national security matters, it is not as if the judiciary is completely unequipped to address matters that touch on secrecy:

We cannot accept the Government’s argument that internal security matters are too subtle and complex for judicial evaluation. Courts regularly deal with the most difficult issues of our society. There is no reason to believe that federal judges will be insensitive to or uncomprehending of the issues involved in domestic security cases.<sup>63</sup>

Moreover, courts can accord the executive the “utmost deference”<sup>64</sup> when it comes to executive contentions that documents sought in discovery contain state secrets whose disclosure would constitute a reasonable danger<sup>65</sup> to national security and still be free to fashion an appropriate remedy that will preserve litigants’ rights.<sup>66</sup>

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59. Weaver & Pallitto, *supra* note 14, at 92; *see also* Claudio Ochoa, *Federalism and Separation of Powers: The State Secrets Privilege: Necessary Evil?* ENGAGE, Feb. 2007, at 66, 67 (observing that courts are reluctant to challenge executive assertions of Privilege out of deference to executive expertise in area of national security).

60. *See* Brief of Defendant-Appellee at 11, *El-Masri v. United States*, 479 F.3d 296 (4th Cir. 2007) (No. 06-1667), 2006 WL 2726281 (describing decision to invoke Privilege as “policy judgment” and remarking that Privilege is based on prediction of effect of disclosure on foreign states or nonstate actors).

61. *See Hamdi v. Rumsfeld*, 542 U.S. 507, 583 (2004) (Thomas, J., dissenting) (contending that courts lack information and expertise to challenge presidential decisions relating to national security and foreign affairs); *El-Masri v. Tenet*, 437 F. Supp. 2d 530, 536 (E.D. Va. 2006) (admonishing courts to “bear in mind” executive branch’s authority over military and diplomatic affairs and its expertise in predicting effect of disclosure on national security).

62. *See, e.g., Spacil v. Crowe*, 489 F.2d 614, 619 (5th Cir. 1974) (observing that executive “resources and expertise in foreign affairs far outstrip those of the judiciary”); *United States v. Marchetti*, 466 F.2d 1309, 1317 (4th Cir. 1972) (noting that Central Intelligence Agency is executive agency regularly engaged in conduct of foreign affairs and national defense and that its clarification processes are beyond judicial review).

63. *United States v. U.S. Dist. Court (Keith)*, 407 U.S. 297, 320 (1972); *see also Hepting v. AT&T Corp.*, 439 F. Supp. 2d 974, 995 (N.D. Cal. 2006) (recognizing and respecting executive’s duty “to protect the nation from threats” but refusing to abdicate court’s duty to adjudicate disputes in face of blanket assertions of secrecy).

64. *United States v. Nixon*, 418 U.S. 683, 710 (1974).

65. *United States v. Reynolds*, 345 U.S. 1, 11 (1953).

66. *See infra* Part IV for a discussion of judicial alternatives for proceeding with cases despite successful claims of privilege.

Bobby Chesney, Wake Forest law professor and national security expert, has suggested one way around the institutional competence issue that judges face by advocating the creation of a specialized court—along the lines of Foreign Intelligence Surveillance Act<sup>67</sup> Court<sup>68</sup> (“FISC”)—to adjudicate state secrets claims.<sup>69</sup> The FISC is a secret federal court established by the Foreign Intelligence Surveillance Act (“FISA”) that reviews applications for surveillance warrants from federal agencies. Chesney proposes that Congress could create a classified judicial forum in which Article III judges could hear matters in camera and then have the proceedings permanently sealed.<sup>70</sup> The problem with the FISA model that Chesney proposes is that the FISC has not historically constituted much of a check on executive authority. It first began reviewing applications in 1979 and did not refuse a request for a warrant until 2003.<sup>71</sup>

There are good reasons why the FISC invariably grants the government the warrants it seeks—the judges on the FISC likely believe that they owe the executive a great deal of deference in matters of national security. The political branches have spoken, through the FISA statute, and made clear their desire that the executive be empowered to engage in foreign intelligence surveillance, albeit with a check on executive authority so as to protect individual rights.<sup>72</sup> FISC judges also likely believe that they ought to defer to the institutional competence of the executive agencies that seek such warrants. But this suggests that a FISC-like state secrets privilege court would not really address the

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67. Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1783 (codified as amended at 50 U.S.C. §§ 1801-1811 (2000), 8 U.S.C. § 1101 (2000), 47 U.S.C. §§ 605-606 (2000), and in scattered sections of 18 U.S.C.), amended by Intelligence Authorization Act for Fiscal Year 2000, Pub. L. No. 106-120, 113 Stat. 1606 (1999).

68. See 50 U.S.C. § 1803 (providing that Chief Justice of United States shall designate eleven federal judges “who shall constitute a court which shall have jurisdiction to hear applications for and grant orders approving electronic surveillance” in accordance with Act).

69. Chesney, *supra* note 17, at 1313.

70. *Id.*

71. Electronic Privacy Information Center, Foreign Intelligence Surveillance Act Orders, 1979-2006, [http://www.epic.org/privacy/wiretap/stats/fisa\\_stats.html](http://www.epic.org/privacy/wiretap/stats/fisa_stats.html) (last visited Dec. 17, 2007). In its first twenty-five years of existence, the FISC approved over 20,000 applications. *Id.* After holding steady in the 475-635 range from 1982 to 1993, the number of such applications doubled between 1993 and 2000 and doubled again between 2000 and 2005. *Id.* In 2005, the FISC approved more surveillance warrants than were issued by all other federal and state courts combined. Jameel Jaffer, *Panel Report: Secret Evidence in the Investigative Stage: FISA, Administrative Subpoenas, and Privacy*, 5 CARDOZO PUB. L., POL’Y & ETHICS J. 7, 7 (2006).

72. The Senate Judiciary Committee that drafted the FISA expressed the need to establish checks on executive authority even in the area of national security:

[T]he Executive Branch of Government should have, under proper circumstances and with appropriate safeguards, authority to acquire important foreign intelligence information by means of electronic surveillance. The committee also believes that the past record and the state of the law in the area make it desirable that the Executive Branch not be the sole or final arbiter of when such proper circumstances exist. [FISA] is designed to permit the Government to gather necessary foreign intelligence information by means of electronic surveillance but under limitations and according to procedural guidelines which will better safeguard the rights of individuals.

S. REP. NO. 95-604, pt. 1, at 9 (1978), as reprinted in 1978 U.S.C.C.A.N. 3904, 3910.

institutional competence concerns addressed above. In addition, as the deliberations of a state secrets privilege court modeled on the FISC would be secret, a FISA model does little to address concerns about open government.<sup>73</sup> Finally, the FISA model does nothing to address the self-interested nature of the Privilege, a topic explored in the next subpart. That subpart also provides my own suggestion for an institutional check on the Privilege, which I think more satisfactorily addresses all of the interests implicated by the Privilege.<sup>74</sup>

C. *The Self-Interested Invocation of the Privilege and Individual Rights*

The Privilege also implicates a third series of concerns relating to conflicts of interest and the protection of individual rights. In *Reynolds*, the Supreme Court specified that the Privilege is properly invoked by the head of the executive department controlling the evidence subject to the Privilege.<sup>75</sup> So, if like Khaled El-Masri, you are suing the Director of the Central Intelligence Agency (“CIA”), you can expect to see an affidavit from the Director of the CIA stating that all information relating to your claim and in possession of the United States is classified and could not be disclosed without a reasonable danger of harming national security.<sup>76</sup> In fact, under the mosaic theory<sup>77</sup> and related

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73. See 4 JOHN HENRY WIGMORE, A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 2375, at 3341 (1905) (stating that requiring officials “to justify their acts is the chief safeguard against oppression and corruption”); Weaver & Pallitto, *supra* note 14, at 89-90 (observing that openness in government and checks and balances are hallmarks of liberal-democratic political tradition). In a letter criticizing a revised draft of proposed Federal Rule of Evidence 509 on the Privilege, the Department of Justice acknowledged “that a basic principle of our democratic form of government is that most information in control of the Executive Branch should be readily and fully available to the public generally and to individual litigants.” Letter from Richard Kleindienst, Attorney Gen., to Judge Maris, Chairman of the Comm. on Practice and Procedure of the Judicial Conference (Aug. 9, 1971), 117 CONG. REC. 33,651 (1971), reprinted in 26 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5661, at 430 n.45 (1992).

74. See *infra* notes 95-103 and accompanying text for a discussion of a model adopted from Delaware corporations law as a solution.

75. *United States v. Reynolds*, 345 U.S. 1, 7-8 (1953).

76. See *El-Masri v. United States*, 479 F.3d 296, 301 (4th Cir. 2007), cert. denied, No. 06-1613, 2007 WL 1646914 (U.S. Oct. 9, 2007) (describing two sworn declarations submitted by then-Director of CIA explaining United States’ reasons for asserting Privilege).

77. The *locus classicus* for mosaic theory seems to be *United States v. Marchetti*, 466 F.2d 1309 (4th Cir. 1972), in which the Fourth Circuit stated:

The significance of one item of information may frequently depend upon knowledge of many other items of information. What may seem trivial to the uninformed, may appear of great moment to one who has a broad view of the scene and may put the questioned item of information in its proper context. The courts, of course, are ill-equipped to become sufficiently steeped in foreign intelligence matters to serve effectively in the review of secrecy classifications in that area.

*Marchetti*, 466 F.2d at 1318. The D.C. Circuit expanded on the topic in *Halkin I*:

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

doctrines,<sup>78</sup> the Privilege can be invoked even if a small portion of the information to which the Privilege applies is classified.<sup>79</sup>

As of 2001, the Privilege was invoked in over fifty cases, and in only four of those cases did the courts reject the assertion of the Privilege.<sup>80</sup> That means that the government can invoke the Privilege with considerable confidence that it will thereby squelch plaintiffs' attempts at discovery. Moreover, the invocation of the Privilege would appear to be relatively costless,<sup>81</sup> as there are no reported cases in which the government is sanctioned for improper invocations of the Privilege. As Weaver and Pallitto note, "[i]t is hardly surprising that such an effective tool would tempt presidents to use it with increasing frequency and in a variety of circumstances."<sup>82</sup> The Court of Appeals for the Third Circuit has recognized this danger, warning that "the privilege against disclosure might gradually be enlarged by executive determinations until . . . it embraced the whole range of governmental activities."<sup>83</sup>

Moreover, because the Privilege is absolute, courts are unmoved by the hardship its invocation imposes on individual litigants.<sup>84</sup> Indeed, courts may even withhold from plaintiffs the grounds for the dismissal of their suit.<sup>85</sup> In *Edmonds v. U.S. Department of Justice*,<sup>86</sup> Judge Walton, to his credit, engaged in some soul searching in dismissing plaintiff's claims "with great consternation."<sup>87</sup> Before doing so, he stressed that he was "[m]indful of the need for virtual unfettered

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

78. For example, in affirming the district court's dismissal of claims under the Federal Tort Claims Act and *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), the Eighth Circuit combined an institutional competence theory with the mosaic theory and concluded that the court must accord executive agencies the "utmost deference" because courts are "uninitiated" when it comes to determining whether particular disclosures would compromise national security. *Black v. United States*, 62 F.3d 1115, 1119 & n.5 (8th Cir. 1995) (quoting *Zuckerbraun v. Gen. Dynamics Corp.*, 935 F.2d 544, 547 (2d Cir. 1991)). The Fourth Circuit dismissed a case on state secrets grounds where it was concerned that the contours of state secrets would be revealed if the government were to allow an expert witness to answer some questions but object to others. *Fitzgerald v. Penthouse Int'l, Ltd.*, 776 F.2d 1236, 1243 (4th Cir. 1985).

79. Weaver and Pallitto describe the mosaic theory as holding that "even unclassified, seemingly banal information may be protected by the privilege because the sum of a large number of unclassified disclosures may add up to an overall picture of classified operations and capabilities." Weaver & Pallitto, *supra* note 14, at 104.

80. *Id.* at 101-02.

81. *See id.* at 86 (concluding that only possible cost to government of excessive assertions of Privilege is "bad publicity").

82. *Id.* at 102.

83. *Reynolds v. United States*, 192 F.2d 987, 995 (3d Cir. 1951), *rev'd*, 345 U.S. 1 (1953).

84. *See United States v. Reynolds*, 345 U.S. 1, 11 (1953) (pronouncing that necessity cannot overcome Privilege when military secrets are at stake); *In re Under Seal*, 945 F.2d 1285, 1289 (4th Cir. 1991) (expressing "discomfort" in depriving litigant of judicial forum but "not so reluctantly" concluding that district court's grant of summary judgment was correct).

85. *See El-Masri v. United States*, 479 F.3d 296, 312 (4th Cir. 2007), *cert. denied*, No. 06-1613, 2007 WL 1646914 (U.S. Oct. 9, 2007) (noting that it must be frustrating to plaintiff that reasons for dismissal of his suit are classified).

86. 323 F. Supp. 2d 65 (D.D.C. 2004).

87. *Edmonds*, 323 F. Supp. 2d at 81-82.

access to the judicial process in a governmental system integrally linked to the rule of law.”<sup>88</sup> In *Sterling v. Tenet*,<sup>89</sup> the Fourth Circuit was forthright in recognizing “that our decision places, on behalf of the entire country, a burden on Sterling that he alone must bear.”<sup>90</sup> While the court may be correct that “a nation without sound intelligence is a nation at risk,”<sup>91</sup> it does not follow that the government should not bear at least some of the costs necessary for the protection of state secrets in the litigation context.

The *Reynolds* Court created the Privilege by analogy to the privilege against self-incrimination.<sup>92</sup> While the privilege against self-incrimination is accepted as necessary to protect the individual against the inquisitorial power of the state,<sup>93</sup> there is no justification for the self-interested invocation of the state secrets privilege in *favor* of the government when it is adverse to persons who are seeking enforcement of statutory or constitutional rights.<sup>94</sup>

Instead of a model based on the FISC, as Professor Chesney suggests, a model adapted from Delaware corporations law could provide a solution that would address both institutional competence and conflict-of-interest concerns. Pursuant to Delaware Court of Chancery Rule 23.1, when shareholders seek to hold corporate officers, directors, or both accountable for mismanagement, self-dealing, fraud, or illegality, they must make a demand on the board to pursue litigation on behalf of the corporation against the malfeasant officers, directors, or both.<sup>95</sup> Since the shareholders are basically asking the board members to sue themselves or their close associates, demand can be excused where making such demand would be futile.<sup>96</sup> In order to reduce the volume of frivolous law suits filed against corporations and making allegations intended to get around the demand requirement, state law permits corporate boards to create special

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88. *Id.* at 81.

89. 416 F.3d 338 (4th Cir. 2005).

90. *Sterling*, 416 F.3d at 348.

91. *Id.*

92. *United States v. Reynolds*, 345 U.S. 1, 11 (1953).

93. See KENNETH S. BROUN, 1 MCCORMICK ON EVIDENCE 513 (6th ed. 2006) (explaining that innocent suspect “may be unduly prejudiced by his own testimony for reasons unrelated to its accuracy”).

94. When Justice Stewart asked if there was any “public interest . . . in preserving secrecy with respect to a criminal conspiracy” perpetrated by the government, President Nixon’s counsel attempted to evade the question but eventually answered that the public interest is “to avail the President . . . of a free and untrammelled source of information and advice, without the thought or fear that it may be reviewed at some later time.” Transcript of Oral Argument, *United States v. Nixon*, 418 U.S. 683 (1974) (No. 73-1766), reprinted in 9 SETON HALL CONST. L.J. 1, 51 (1998). Such a sweeping executive privilege to prevent exposure of criminal conduct would eliminate significant constitutional and statutory protections against the exercise of unlimited executive power.

95. See *Grimes v. Donald*, 673 A.2d 1207, 1215 (Del. 1996) (noting that Grimes made demand as required under Delaware law); *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984) (characterizing demand requirement as recognizing “fundamental precept” that directors, rather than shareholders, manage corporations).

96. See *Grimes*, 673 A.2d at 1217 (noting that aim of demand requirement is to deter baseless suits while permitting suit where shareholder can show reasonable doubt that either majority of board is independent or that underlying transaction is protected by business judgment rule).

litigation committees (“SLCs”) comprised of independent directors (or newly appointed directors) who are not implicated in plaintiffs’ allegations.<sup>97</sup> The SLC then undertakes an investigation into the plaintiffs’ allegations and is empowered to move, on behalf of the corporation, to dismiss the suit as detrimental to the interests of the corporation.<sup>98</sup> These recommendations are then reviewed by a court.<sup>99</sup> Crucially, under Delaware law, the review is not highly deferential.<sup>100</sup> The court first looks into the independence of the SLC<sup>101</sup> and the thoroughness of its investigation and then applies its own judgment to determine whether the recommendation of the SLC against allowing the suit to proceed is valid.<sup>102</sup>

Congress could similarly permit the creation of SLCs whose sole purpose is to review invocations of the Privilege. Such SLCs would consist of disinterested people with the requisite expertise and security clearances who would review executive claims that the production of government records or information would create a reasonable danger of disclosure of state secrets that would harm national security. The SLC could also be empowered to make recommendations to the court about how the case ought to proceed even if the privilege is properly invoked. Following the Delaware model, a court would then review such recommendations by conducting its own review of the independence of the SLC and the thoroughness of its investigation.<sup>103</sup> If the SLC is independent and its investigation thorough, the court should accord considerable deference to its recommendation as to whether the Privilege is properly invoked, but the court should still exercise its own judgment as to the reasonableness of the SLC’s

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97. See DEL. CODE ANN. tit. 8, § 141(c) (2001 & Supp. 2006) (permitting boards of directors to delegate authority to committee); *Zapata Corp. v. Maldonado*, 430 A.2d 779, 785 (Del. 1981) (noting that if corporate board were not empowered to recommend dismissal of suits regarded as detrimental to corporation, “a single stockholder . . . might control the destiny of the entire corporation”).

98. *Zapata Corp.*, 430 A.2d at 786.

99. See *id.* at 787 (discussing appropriate standard of review of SLC recommendation).

100. See *id.* (rejecting business judgment rule standard and noting that “directors are passing judgment on fellow directors in the same corporation” and therefore might have some empathy for defendants).

101. Independence in this context entails more than having no personal financial or familial interest in the outcome of the litigation. Rather, Delaware courts have required the members of SLCs to have no significant business or social ties to the defendants in the proposed suit. See *Beam ex rel. Martha Stewart Living Omnimedia, Inc. v. Stewart*, 845 A.2d 1040, 1055 (Del. 2004) (“[T]he SLC has the burden of establishing its own independence by a yardstick that must be ‘like Caesar’s wife’—‘above reproach.’” (quoting *Lewis v. Fuqua*, 502 A.2d 962, 967 (Del. Ch. 1985))); *In re Oracle Corp. Derivative Litig.*, 824 A.2d 917, 920-21 (Del. Ch. 2003) (finding that SLC consisting of members with ties to defendants through various Stanford University connections failed independence test); *Parfi Holding AB v. Mirror Image Internet, Inc.*, 794 A.2d 1211, 1232 (Del. Ch. 2001) (characterizing court’s inquiry into SLC’s independence as coming down to whether director is “incapable of making a decision with only the best interests of the corporation in mind”).

102. See *Zapata Corp.*, 430 A.2d at 789 (concluding that court should apply its own business judgment to evaluate motion).

103. See *id.* at 788 (holding that court must first “inquire into the independence and good faith of the committee and the bases supporting its conclusions,” and imposing on corporation burden of establishing independence, good faith, and reasonableness of investigation).



recommendations regarding how the case is to proceed, as the SLC has no special expertise that would trump the court's own intuitions about how to accommodate the Privilege while also permitting litigants to pursue the vindication of their rights through legal process.

Such a solution would address concerns regarding the self-interested nature of the Privilege and would permit courts to defer to the executive (through deference to the SLC) on matters in which the executive has superior institutional competence, while preserving their own authority over matters where courts are more competent. Moreover, the fact that courts engage in separate review of the independence of the SLC provides a layer of protection against institutional capture that is lacking from the FISA model. Nevertheless, I do not expect such a solution to be proposed by Congress. Nor do I expect that any executive would tolerate such a check on its control of the Privilege, and so only a veto-proof majority of Congress could pass such legislation.

### III. CONGRESS CAN REGULATE OR OVERSEE THE PRIVILEGE, BUT WILL NOT

Neil Kinkopf has focused on the need for congressional action to check executive abuse of the Privilege,<sup>104</sup> and I agree with him that Congress has the constitutional authority to check executive use of the Privilege, so long as it does not do so in ways that would hamper or eliminate the President's ability to carry out his duties under Article II.<sup>105</sup> For the reasons given below, however, I doubt that Congress would be willing to encroach on executive power in connection with the Privilege through either statutory or regulatory oversight mechanisms.

#### A. *Statutory or Regulatory Options*

The basic problem with a statutory solution is that it is hard to imagine what such legislation would look like, and it is difficult to see how legislators or regulators could fashion a solution that would anticipate all the contexts in which the Privilege might be invoked.

The last legislative attempt to do so was proposed Federal Rule of Evidence 509.<sup>106</sup> Although the rule was originally drafted by an Advisory Committee appointed by former Chief Justice Earl Warren<sup>107</sup> and was intended as a codification of *United States v. Reynolds*<sup>108</sup> as to state secrets,<sup>109</sup> the draft rule was rewritten to incorporate the comments of the Department of Justice.<sup>110</sup> The final version of the rule has been characterized as a "capitulat[ion]" by the

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104. Kinkopf, *supra* note 9, at 497-98.

105. I wholly endorse the approach to the problem that Kinkopf lays out in *id.*

106. Preliminary Draft of Proposed FED. R. EVID. 509, 46 F.R.D. 161, 272-74 (1969).

107. 21 WRIGHT & GRAHAM, *supra* note 73, § 5006, at 180.

108. 345 U.S. 1 (1953).

109. See Advisory Committee's Note to Preliminary Draft of Proposed FED. R. EVID. 509, 46 F.R.D. 161, 274-76 (1969) (noting that rule embodies protection of military and state secrets established by law of evidence as noted in *Reynolds*).

110. See 26 WRIGHT & GRAHAM, *supra* note 73, § 5661, at 440-41 (detailing changes in draft rule incorporating suggestions from Department of Justice).

judiciary to the coordinated demands of the executive and its allies in the Senate.<sup>111</sup>

Rule 509, in its final version, likely would have resulted in a broader privilege to the government than *Reynolds* envisioned. Specifically, it treated state secrets similarly to other “official information,”<sup>112</sup> which was defined to include any “intragovernmental opinions or recommendations submitted for consideration in the performance of decisional or policymaking functions” the disclosure of which would be “contrary to the public interest.”<sup>113</sup> So, for example, if former White House Counsel Harriet Miers and presidential advisor Karl Rove do not want to explain what role they played in the decision-making process that resulted in the firing of eight attorneys general,<sup>114</sup> Rule 509 would have permitted them to assert an “official information” privilege to avoid testimony, even if subpoenaed. While Rule 509 is not clear on the level of deference due to such a claim of privilege, the proposed rule did not distinguish between the deference to be accorded the executive when it asserts the Privilege from that to be accorded to invocations of the “official information” privilege. Accordingly, courts would likely have given considerable deference to executive determinations regarding official information.

Under the proposed rule, despite Congress’s attempt to specify the scope of the Privilege, courts would still have to work out the consequences of the successful invocation of the Privilege on a case-by-case basis.<sup>115</sup> The statute provided options ranging from dismissal of a suit against the government to “finding against the government upon an issue as to which the evidence is relevant.”<sup>116</sup> In short, the proposed rule would have provided absolutely no guidance on the crucial issue of how courts were to permit litigation to proceed once the Privilege is successfully invoked.

It is striking that the proposed federal rule, which would have expanded the Privilege as it then existed, was drafted and revised while the Nixon White House was engaged in secret operations that eventually came to light as the

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111. *Id.* § 5661, at 439.

112. Proposed FED. R. EVID. 509(a)(2), reprinted in 26 WRIGHT & GRAHAM, *supra* note 73, at 415-16.

113. *Id.*

114. See Editorial, *Gonzales v. Gonzales*, N.Y. TIMES, Apr. 20, 2007, at A22 (noting strong evidence that Karl Rove, President Bush’s former top political advisor, and Harriet Miers, former White House counsel, were deeply involved in alleged purge of attorneys general). Compare Suzanne Malveaux, *Bush Ready to Fight Lawmakers on U.S. Attorney Firings Flap*, CNN.COM, Mar. 21, 2007, <http://www.cnn.com/2007/POLITICS/03/20/us.attorneys.firings/index.html> (reporting on Bush White House’s opposition, based on executive privilege, to having any of its officials appear before congressional committees), with Stanley I. Kutler, Editorial, *The ‘Executive Privilege’ Dodge*, BOSTON GLOBE, Mar. 29, 2007, at A11 (expressing skepticism regarding applicability of executive privilege doctrine to proposed testimony of Rove and Miers).

115. See Preliminary Draft of Proposed FED. R. EVID. 509(e), 46 F.R.D. 161, 273-74 (1969) (“If a claim of privilege for a secret of state is sustained . . . the judge shall make any further orders which the interests of justice require . . .”).

116. *Id.* at 274.

“Watergate scandal.”<sup>117</sup> It is more striking that, in the aftermath of the White House’s failed attempt to cover up executive wrongdoing in Watergate, Congress took no action to restrict privileges asserted by the executive branch. Similarly, while the Bush White House is suspected of authorizing massive surveillance programs<sup>118</sup> that may be inconsistent with the Constitution and with federal statutes, including the FISA,<sup>119</sup> it is nonetheless pressing forward with legislation that would revise that Act so as to provide retroactive legislative approval for the alleged violations.<sup>120</sup> Thus far, Congress has not sought to rein in the executive with competing legislation. Given this history of congressional inaction, there seems little hope for congressional regulation of the Privilege.

### B. Oversight Options

If congressional legislation is unlikely to repair the Privilege, is congressional oversight a better option? Recent experience suggests that, especially in times of war—when the Privilege is most likely to be invoked—Congress is unlikely to second-guess executive decisions relating to national security. Congress has generally been inexcusably timid and remiss,<sup>121</sup> even in

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117. See 26 WRIGHT & GRAHAM, *supra* note 73, § 5661, at 444-67 (reviewing legislative history behind proposed Rule 509 with frequent references to progress of Watergate scandal).

118. See James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005, at A1 (detailing secret National Security Agency surveillance program and noting that some officials questioned whether program crossed constitutional limits on legal searches).

119. See *In re* NSA Telecomms. Records Litig., 483 F. Supp. 2d 934, 937 (N.D. Cal. 2007) (recounting allegations that Verizon Communications, Inc. disclosed telephone records to National Security Agency in violation of California residential customers’ privacy rights); *Al-Haramain Islamic Found. v. Bush*, 451 F. Supp. 2d 1215, 1218 (D. Or. 2006) (detailing allegations that National Security Agency engaged in electronic surveillance of communications between plaintiff’s directors and third parties in violation of FISA); *Terkel v. AT&T Corp.*, 441 F. Supp. 2d 899, 901 (N.D. Ill. 2006) (recounting allegations that AT&T provided to National Security Agency records of telephone calls of its customers in violation of Electronic Communications Privacy Act, 18 U.S.C. § 2702(a)(3) (2000 & Supp. IV 2005)); *ACLU v. NSA*, 438 F. Supp. 2d 754, 758 (E.D. Mich. 2006) (summarizing plaintiffs’ constitutional and statutory challenges to National Security Agency’s terrorist surveillance program), *vacated*, 493 F.3d 644 (6th Cir. 2007); *Hepting v. AT&T Corp.*, 439 F. Supp. 2d 974, 978 (N.D. Cal. 2006) (recounting plaintiffs’ allegations that AT&T collaborated with National Security Agency in illegal and massive warrantless surveillance program).

120. The revised definition of the liability defense states that:

[N]o action shall lie or be maintained in any court, and no penalty, sanction, or other form of remedy or relief shall be imposed by any court or any other body, against any person for the alleged provision to an element of the intelligence community of any information (including records or other information pertaining to a customer), facilities, or any other form of assistance, during the period of time beginning on September 11, 2001, and ending on the date that is the effective date of this Act, in connection with any alleged classified communications intelligence activity that the Attorney General or a designee of the Attorney General certifies, in a manner consistent with the protection of State secrets, is, was, would be, or would have been intended to protect the United States from a terrorist attack. This section shall apply to all actions, claims, or proceedings pending on or after the effective date of this Act.

H.R. 3321, 110th Cong. § 5(a) (2007).

121. See Louis Fisher, *Congressional Abdication: War and Spending Powers*, 43 ST. LOUIS U. L.J.

the area of war powers, where its constitutional powers could not be clearer.<sup>122</sup> Congress is thus unlikely to challenge executive authority on state secrets matters over which its constitutional authority is, if anything, more open to question. Congress appears to lack the institutional will to stand up to the President in the realm of foreign affairs.<sup>123</sup>

Another problem with congressional oversight in this area is that, on the rare occasions when Congress does actually perform an oversight function in the foreign affairs realm, it tends to do so behind closed doors to prevent disclosure of sensitive information. Not only is the public not informed of the substance of such meetings, it is not even informed that such meetings take place—as in the case of the partial disclosure of the National Security Agency’s (“NSA”) warrantless wiretap program to select members of Congress.<sup>124</sup> Courts provide a better opportunity for holding the executive accountable to the public for its actions. Even if a court ultimately determines that the Privilege prevents it from reaching the merits of a particular case, courts generally provide written opinions explaining the reasoning underlying their decisions. Whatever reasoning underlies congressional decision making relating to state secrets will remain classified long after the purported secrets to which it relates have been disclosed or have become irrelevant.

My final ground for opposing congressional (as opposed to judicial) checks on executive invocation of the Privilege is that the *executive* has expressed a preference for congressional checks,<sup>125</sup> which leads me to believe that the

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931, 946-1004 (1999) (highlighting evidence of congressional abdication of its war and spending powers).

122. See U.S. CONST. art. I, § 8, cls. 11-14 (empowering Congress to declare war, grant letters of marque and reprisal, raise and support armies, provide and maintain navy, and make rules for government and regulation of armed forces); see also D.A. Jeremy Telman, *The Foreign Affairs Power: Does the Constitution Matter?* 80 TEMP. L. REV. 245, 252-59 (2007) (reviewing PETER IRONS, *WAR POWERS: HOW THE IMPERIAL PRESIDENCY HIJACKED THE CONSTITUTION* (2005); JOHN YOO, *THE POWER OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11* (2005)) (detailing textual and historical arguments for congressional war powers); D.A. Jeremy Telman, *A Truism that Isn't True? The Tenth Amendment and Executive War Powers*, 51 CATH. U. L. REV. 135, 149 (2001) (arguing that Congress is constitutionally empowered to control undeclared and declared war).

123. See Louis Fisher, *Unchecked Presidential Wars*, 148 U. PA. L. REV. 1637, 1637 (2000) (decrying lack of effective check on presidential war powers due to combination of congressional acquiescence and judicial passivity).

124. See Risen & Lichtblau, *supra* note 118 (noting that congressional leaders from both parties and other members of congressional intelligence committees were briefed on NSA surveillance program but did not disclose briefings and declined to be interviewed when *New York Times* investigated matter). Apparently, Senator Jay Rockefeller was troubled by the briefing he received and sent a handwritten letter of protest to Vice President Dick Cheney. Pat M. Holt, *Congress is Partly to Blame for Bush's Warrantless Wiretaps*, CHRISTIAN SCI. MONITOR, Jan. 5, 2006, at 9.

125. “This is not to say there is no forum to air the weighty matters at issue, which remains a matter of considerable public interest and debate, but the resolution of these issues must be left to the political branches of government.” Memorandum of Points and Authorities in Support of the United States’ Assertion of the Military and State Secrets Privilege; Defendants’ Motion to Dismiss or, in the Alternative, for Summary Judgment; and Defendants’ Motion to Stay Consideration of Plaintiffs’ Motion of Summary Judgment, at 49, *ACLU v. NSA*, 438 F. Supp. 2d 754 (E.D. Mich. 2006) (No. 2:06-

executive branch is very confident of its ability to persuade Congress to support the executive on issues arguably relating to national security. In any case, as argued in Part IV.A, courts can protect state secrets while also protecting the rights and interests of litigants with interests adverse to the state by enforcing the Privilege but allowing the cases to proceed.

Before proceeding to a discussion of how courts can address the Privilege on their own, we should take note of Amanda Frost's novel approach, in which the judicial and legislative branches work in tandem as a check on executive power. Frost suggests that the invocation of the Privilege is like a form of jurisdiction stripping by the executive.<sup>126</sup> As such, its invocation encroaches on *congressional* powers to confer jurisdiction on the courts.<sup>127</sup> She suggests that the legislature and the courts could work together to check the executive and that in cases where the Privilege is successfully invoked and results in dismissal, courts should dismiss with the caveat that Congress must now undertake its own confidential investigation into executive conduct. Frost "tentatively" recommends caution that when the executive claims that issues of privilege must be left to the political branches of government:

[C]ourts should not take its assertions at face value, but rather should determine whether Congress would be willing to assume the oversight function through investigation of executive action. Judges should assure themselves that the executive is, in fact, acceding to congressional demands for information about the challenged conduct, and is fully cooperating with the legislative committees seeking to monitor its conduct. Only if satisfied that Congress is holding the executive accountable should the judiciary be willing to forgo hearing whole categories of cases challenging executive authority.<sup>128</sup>

Frost's solution is a bold one, but it is difficult to imagine how a court could indeed satisfy itself of the adequacy of congressional action. Moreover, as argued above, there are reasons for skepticism regarding the likelihood that Congress could provide a robust check on executive invocation of the Privilege even if a court could satisfy itself of Congress's desire to act.

#### IV. ALTERNATIVES TO DISMISSAL

Much of the law of the Privilege as set out in the *United States v. Reynolds*<sup>129</sup> opinion remains uncontroversial. In enforcing the Privilege, courts strive to strike a balance, neither permitting judicial control over evidence to be "abdicated to the caprice of executive officers"<sup>130</sup> nor placing the President's

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cv-10204).

126. See Frost, *supra* note 18, at 1931-32 (acknowledging argument that invocation of Privilege to dismiss entire categories of cases involves "an unwarranted usurpation of judicial power").

127. See *id.* at 1932 (expressing concern that courts' acquiescence in executive arguments urging dismissal of entire categories of cases intrudes on Congress's jurisdiction-conferring authority).

128. *Id.* at 1934.

129. 345 U.S. 1 (1953).

130. *Reynolds*, 345 U.S. at 9-10.

ability to preserve state secrets at the mercy of the courts.<sup>131</sup> There is also general agreement on the procedural approach courts are to take when confronted with invocations of the Privilege.<sup>132</sup> But courts must also determine how cases are to proceed in light of successful invocations of the Privilege.

A. *Creative Courts from Reynolds to Hepting*

As the *Reynolds* case made clear, courts must do their best to permit parties to assert their rights through legal process while also protecting state secrets.<sup>133</sup> While courts have generally been deferential to governmental assertions of the Privilege properly asserted,<sup>134</sup> they have, in the past, been quite creative in fashioning means by which cases could proceed without the missing evidence. The D.C. Circuit, in the 1982 case *Halkin v. Helms (Halkin II)*,<sup>135</sup> adeptly stated this problem:

The question then becomes whether the case is to proceed as if the privileged matter had simply never existed, with the parties bearing the consequent disadvantages (or advantages) of this sudden disappearance, or instead should proceed under rules that have been changed to accommodate the loss of the otherwise relevant evidence. Such changes could compensate the party “deprived” of his evidence by, for example, altering the burden of persuasion upon particular issues, or by supplying otherwise lost proofs through the device of presumptions or presumptive inferences.<sup>136</sup>

Courts have not gone so far as the *Halkin II* court here suggests they might in terms of forcing the government to bear some of the costs of asserting the Privilege. Nevertheless, they have found other ways to permit litigation to proceed while also protecting state secrets.

For example, in *Halpern v. United States*,<sup>137</sup> the Second Circuit responded to the assertion of the Privilege by remanding the entire case for an in camera trial.<sup>138</sup> Such a remedy may only be appropriate in cases in which keeping secrets

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131. *El-Masri v. United States*, 479 F.3d 296, 304 (4th Cir. 2007), *cert. denied*, No. 06-1613, 2007 WL 1646914 (U.S. Oct. 9, 2007).

132. After laying out its understanding of the law on the Privilege, the Fourth Circuit noted that the plaintiff whose case it was about to dismiss “essentially accepts the legal framework described.” *Id.* at 308.

133. *See Reynolds*, 345 U.S. at 11 (upholding Privilege while noting that necessity for divulgence of sensitive material was minimized by respondents’ failure to pursue alternative, namely interviewing surviving crew members); *Fitzgerald v. Penthouse Int’l, Ltd.*, 776 F.2d 1236, 1244 (4th Cir. 1985) (noting dismissal is proper “[o]nly when no amount of effort and care . . . will safeguard privileged material[s]”).

134. According to statistics compiled by Bobby Chesney, courts granted thirty-three of the forty-three motions to dismiss filed by the government in state secrets cases. Chesney, *supra* note 17, at 1307.

135. 690 F.2d 977 (D.C. Cir. 1982).

136. *Halkin II*, 690 F.2d at 991.

137. 258 F.2d 36 (2d Cir. 1958).

138. *Halpern*, 258 F.2d at 43 (holding that district court should hold in camera proceeding if it could do so “without running any serious risk of divulgence of military secrets”).

from the plaintiffs or from witnesses is not a significant concern.<sup>139</sup> But simply eliminating the jury and trying the case before a special master may suffice. In *Loral Corp. v. McDonnell Douglas Corp.*,<sup>140</sup> the Second Circuit was persuaded that a jury trial was inappropriate because a “large amount of material properly classified confidential and secret must be submitted to the trier of fact in the case.”<sup>141</sup> The Second Circuit therefore upheld the trial court’s decision to refer the case to a special master pursuant to Rule 53(b) of the Federal Rules of Civil Procedure.<sup>142</sup> Similarly, in the recent case of *Hepting v. AT&T Corp.*,<sup>143</sup> which relates to alleged NSA wiretapping and data-mining programs, the court contemplated the appointment of a special expert “pursuant to [Federal Rule of Evidence] 706 to assist the court in determining whether disclosing particular evidence would create a ‘reasonable danger’ of harming national security.”<sup>144</sup>

In some cases, it may be possible to protect state secrets by adding an attorney to plaintiffs’ legal team who has security clearance or by granting security clearance to one of plaintiffs’ current counsel. For example, in cases relating to the Guantánamo detainees, the District Court for the District of Columbia required that plaintiff have access to counsel with the appropriate level of security clearance,<sup>145</sup> and the court worked out a special framework designed to safeguard national security while also securing the individual right of access to counsel.<sup>146</sup> A court may also issue a protective order, requiring that depositions be conducted in a secure facility and in the presence of government security officers who advise deponents as to what information may be revealed.<sup>147</sup>

Another approach is for courts to place reasonable time restrictions on the

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139. The court was persuaded that trial in camera was feasible in *Halpern* because plaintiff and witnesses were all already familiar with the secret invention at the heart of the case. *Id.*

140. 558 F.2d 1130 (2d Cir. 1977).

141. *Loral Corp.*, 558 F.2d at 1132.

142. *Id.* at 1132-33.

143. 439 F. Supp. 2d 974 (N.D. Cal. 2006).

144. *Hepting*, 439 F. Supp. 2d at 1010 (quoting FED. R. EVID. 706(a)).

145. See *Al Odah v. United States*, 346 F. Supp. 2d 1, 14 (D.D.C. 2004) (requiring that counsel have “security clearance at the level appropriate for the level of knowledge the Government believes is possessed by the detainee”); *In re Guantanamo Detainee Cases*, 344 F. Supp. 2d 174, 178 (D.D.C. 2004) (requiring that petitioners’ counsel receive “necessary security clearance” to gain access to classified information relevant to cases); cf. *Farnsworth Cannon, Inc. v. Grimes*, 635 F.2d 268, 275-76 (4th Cir. 1980) (en banc) (suggesting that parties might identify alternative counsel who could receive necessary security clearance should present counsel be unable to obtain such clearance).

146. See *Al Odah*, 346 F. Supp. 2d at 13-14 (permitting unmonitored meetings between petitioner and counsel but requiring petitioner’s attorney to submit any information derived from such meetings to government classification review if counsel wished to disclose such information to anyone else); *In re Guantanamo Detainee Cases*, 344 F. Supp. 2d at 183-91 (setting forth procedures for counsel access to Guantánamo detainees, including requirements that such counsel have or obtain security clearance).

147. See *In re Under Seal*, 945 F.2d 1285, 1287 (4th Cir. 1991) (noting that trial court granted protective order filed by government that allowed depositions to be conducted in secure facilities and in presence of government security officers).

scope of the Privilege. In *In re United States*,<sup>148</sup> the D.C. Circuit was unconvinced that the disclosure of twenty-year-old secrets relating to government surveillance of a Communist Party member created a reasonable danger to national security,<sup>149</sup> and it expressed its confidence that the district court could “disentangle” the sensitive from the nonsensitive information as the case unfolds.<sup>150</sup> It follows that, even if courts have to dismiss cases on state secrets grounds, they should do so without prejudice to the refiling of the case upon declassification of the relevant information.<sup>151</sup> Courts should suspend any relevant statutes of limitations so as to may permit cases to be brought after the dangers attendant to disclosure lapse.

Other courts have taken a more radical approach, which may indeed push beyond the boundaries of permissible judicial checks on executive powers, but which was not expressly foreclosed by *Reynolds*. In *Black v. Sheraton Corp. of America*,<sup>152</sup> the District Court for the District of Columbia stated that any evidence concerning the government’s illegal acts, and evidence refuting allegations of government illegality, cannot be privileged.<sup>153</sup> Such an approach would clearly prevent the transformation of the Privilege into a form of executive immunity. In *Elson v. Bowen*,<sup>154</sup> the Supreme Court of Nevada found *Reynolds* to be “the key to the roomful of obscurity in this difficult area,” but stressed that case’s caution that “[j]udicial control over the evidence in a case cannot be abdicated to the caprice of executive officers.”<sup>155</sup> In *Elson*, the trial court reviewed the claims of privilege and determined that government security was not endangered by disclosure.<sup>156</sup> The Nevada Supreme Court nonetheless felt compelled to advise the parties as follows: “Government cannot break the law to enforce the law . . . and it follows that government should not be allowed to use the claims of executive privilege and departmental regulations as a shield of immunity for the unlawful conduct of its representatives.”<sup>157</sup> In short, *Reynolds* left a lot of room for courts to be creative—and they were creative—in giving litigants their day in court while also preserving state secrets. Moreover, as *Reynolds* was a negligence suit, it provides little guidance on how the Privilege should operate in cases in which the government or its agents stand accused of

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148. 872 F.2d 472 (D.C. Cir. 1989).

149. *In re United States*, 872 F.2d at 479 (finding itself, for myriad reasons, unable to determine based on its in camera review of government affidavit that disclosure of information relating to decades-old government activities would reveal state secrets).

150. *Id.* (citing *Ellsberg v. Mitchell*, 709 F.2d 51, 57 (D.C. Cir. 1983)).

151. A similar approach is that of the district court in *Hepting*, which refused to allow certain discovery, but invited plaintiffs to revisit the issue, as continuing disclosures regarding the challenged NSA surveillance program might make public the information with respect to which the government was asserting the Privilege. *Hepting v. AT&T Corp.*, 439 F. Supp. 2d 974, 997-98 (N.D. Cal. 2006).

152. 371 F.Supp. 97 (D.D.C. 1974).

153. *Black*, 371 F. Supp. at 101-02.

154. 436 P.2d 12 (Nev. 1967).

155. *Elson*, 436 P.2d at 16 (quoting *United States v. Reynolds*, 345 U.S. 9-10 (1952)).

156. *Id.* at 16-17.

157. *Id.* at 16 (citation omitted).



violating constitutional or statutory rights.

*B. Recent Trends*

Bobby Chesney has argued that the use of the Privilege has not really changed under the Bush administration, either in terms of the frequency with which the Privilege is invoked or in the ways in which it is being used.<sup>158</sup> Nevertheless, Chesney overlooks an important development that really is new—invocations of the Privilege have long been coupled with motions to dismiss, but now the invocations of the Privilege and motions to dismiss come *before* discovery has begun, even in cases in which plaintiffs do not need discovery in order to establish their *prima facie* cases. The Privilege has thus morphed into a form of executive immunity. This change is explained by a confusion of two independent doctrines—the Privilege and the doctrine in *Totten v. United States*.<sup>159</sup> The *Totten* doctrine states that cases may not proceed when the litigation itself constitutes an injury to the government through the threatened disclosure of state secrets.<sup>160</sup>

In *Totten*, the administrator of the estate of a Civil War-era spy sued the government alleging breach of the terms of the espionage agreement.<sup>161</sup> The Supreme Court, assuming that “[b]oth employer and agent must have understood that the lips of the other were to be for ever sealed respecting the relation of either to the matter,”<sup>162</sup> held “that public policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential.”<sup>163</sup> *Totten*’s validity was confirmed and perhaps even expanded in the recent case of *Tenet v. Doe*,<sup>164</sup> in which the Supreme Court ruled that not only claims for breach of contract but all claims relating to secret agreements between the government and third parties are barred under the *Totten* doctrine.<sup>165</sup>

The difference between *Totten* and *Reynolds* once was clear. *Totten* shuts

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158. Chesney, *supra* note 17, at 1252 (contending that “recent assertions of the privilege are not different in kind from the practice of other administrations” in terms of types of information protected, process judges apply, or remedies sought). Chesney also contends that there is no strong evidence suggesting that the Bush administration has asserted the Privilege more frequently than past administrations, *id.* at 1301, or that it has sought dismissal more often than other administrations, *id.* at 1306-07. Amanda Frost disagrees, noting that Chesney’s statistics suggest that the Bush administration has been more aggressive in its use of the Privilege. See Frost, *supra* note 18, at 1939 (“The Bush Administration has raised the privilege in twenty-eight percent more cases per year than in the previous decade, and has sought dismissal in ninety-two percent more cases per year than in the previous decade.”).

159. 92 U.S. 105 (1875).

160. *Totten*, 92 U.S. at 107.

161. *Id.* at 105-06.

162. *Id.* at 106.

163. *Id.* at 107.

164. 544 U.S. 1 (2005).

165. *Tenet*, 544 U.S. at 8 (noting that *Totten* forbids maintenance of *any suit* requiring disclosure of matters considered legally confidential).

down a case immediately;<sup>166</sup> *Reynolds* simply recognizes an evidentiary privilege that affects discovery,<sup>167</sup> but the impact of the Privilege could not possibly be discerned until discovery is completed. That is, while there may be cases where the successful invocation of the Privilege makes it impossible for plaintiff to establish her claims, a court usually cannot draw such a conclusion until it has determined at the close of discovery that plaintiff will not be able to establish her claims through the use of some evidence not subject to the Privilege.

The *Reynolds* Court's understanding of the Privilege was largely independent of *Totten*. The *Reynolds* Court invoked *Totten* in two contexts. First, it mentioned *Totten* as one of many cases demonstrating that "the privilege against revealing military secrets . . . is well established in the law of evidence."<sup>168</sup> More significantly, although still in a footnote, the Court pointed to *Totten* as authority for the proposition that "even the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that military secrets are at stake."<sup>169</sup> The Supreme Court does not mention that a court can only be "ultimately satisfied" once discovery has taken place. There was no need to, as in *Reynolds* the Privilege was invoked only to bar plaintiffs' request for the Air Force's official accident investigation report.<sup>170</sup> The Court never considered dismissing the claim in *Reynolds*. On the contrary, the *Reynolds* Court was persuaded that the Privilege should apply in that case because the government offered to make surviving crew members available for examination, rendering the accident investigation report unnecessary.<sup>171</sup> Nonetheless, lower federal courts have ignored the procedural posture in *Reynolds* and read it to permit dismissal prior to discovery<sup>172</sup> when in fact *Reynolds* provides no guidance in this area.

Recent trends are alarming,<sup>173</sup> as courts increasingly treat state secrets cases as though they were *Totten* cases and never even give plaintiffs the opportunity to make their case relying on public information not covered by the Privilege. This problem is well-illustrated in three types of cases in which the government has recently invoked the Privilege to win pre-discovery dismissal of cases in which the allegations were largely based on public information or in which less

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166. See *id.* at 9 (noting that under *Totten*, case is "dismissed on the pleadings without ever reaching the question of evidence" (quoting *United States v. Reynolds*, 345 U.S. 1, 11 n.26 (1953))).

167. *United States v. Reynolds*, 345 U.S. 1, 6-7 (1952).

168. *Id.* (citing *Totten*, 92 U.S. at 107).

169. *Id.* at 11 & n.26 (citing *Totten*, 92 U.S. 105).

170. *Id.* at 3.

171. *Id.* at 11.

172. See, e.g., *Tenenbaum v. Simonini*, 372 F.3d 776, 777 (6th Cir. 2004) (affirming pre-discovery dismissal on state secrets grounds in religious discrimination case); *Farnsworth Cannon, Inc. v. Grimes*, 635 F.2d 268, 281 (4th Cir. 1980) (en banc) (affirming pre-discovery dismissal because disclosure of state secrets at trial would have been inevitable); *Edmonds v. U.S. Dep't of Justice*, 323 F. Supp. 2d 65, 81-82 (D.D.C. 2004) (ordering pre-discovery dismissal of all of plaintiff's constitutional and statutory claims upon finding that litigation posed "reasonable danger to secrets of state" (quoting *In re United States*, 872 F.2d 472, 475 (D.C. Cir. 1989))).

173. See *Frost*, *supra* note 18, at 1950-51 (criticizing government for invoking Privilege in seeking dismissal of categories of cases that raise constitutional challenges to government action).

draconian solutions were possible. Plaintiffs in the first type of case are former employees of federal agencies engaged in national security operations who allege wrongful termination. The second type involves recent cases of “extraordinary rendition,” and the final set of cases involves challenges to the NSA’s surveillance programs. The following discussion illustrates the problems that arise upon the invocation of the Privilege in the context of such cases through a discussion of some representative cases.

In *Edmonds v. U.S. Department of Justice*,<sup>174</sup> the plaintiff was a Federal Bureau of Investigation (“FBI”) translator who claimed to have uncovered evidence of willful misconduct and gross negligence that compromised the United States’ ability to carry out law enforcement and intelligence investigations relating to the attacks of September 11.<sup>175</sup> Between December 2001 and March 2002, Ms. Edmonds reported the alleged misconduct to the FBI and to the Acting Assistant Supervisory Agent in Charge.<sup>176</sup> The FBI terminated Edmonds’s employment on March 22, 2002.<sup>177</sup> Her suit against the Department of Justice alleged retaliatory termination in violation of constitutional and statutory protections for whistleblowers.<sup>178</sup> Shortly after the District Court dismissed her case on state secret grounds, the FBI notified Senator Orrin Hatch that the Department of Justice’s Inspector General had completed an investigation into Ms. Edmonds’s case and concluded that her allegations of wrongdoing were “at least a contributing factor” in her termination.<sup>179</sup> The U.S. Supreme Court nonetheless declined to hear the case. The district court apparently did not consider the possibility that the case might proceed in camera or with the aid of counsel with security clearance.<sup>180</sup>

In *El-Masri v. Tenet*,<sup>181</sup> plaintiff was a German national who alleged that he was detained while vacationing in Macedonia, held there for twenty-three days, and then transferred to a U.S. prison in Afghanistan where he was held for four months under conditions that violated human rights treaties to which the United States is a party.<sup>182</sup> According to Mr. El-Masri, CIA officials quickly became aware that they had detained the wrong person, and he remained in detention for weeks after even both then CIA Director, George Tenet, and then National Security Advisor, Condoleezza Rice, were apprised of the fact that the United

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174. 323 F. Supp. 2d 65 (D.D.C. 2004).

175. *Edmonds*, 323 F. Supp. 2d at 67.

176. *Id.* at 68-69.

177. *Id.* at 69.

178. *Id.* at 70.

179. Letter from Robert S. Mueller III, Dir., FBI, to Senator Orrin G. Hatch, Chairman, Comm. on the Judiciary 1 (July 21, 2004), available at <http://www.pogo.org/m/hsp/hsp-040721-Mueller.pdf>.

180. See *Edmonds*, 323 F. Supp. 2d at 77-82 (concluding, after in camera, ex parte review of classified government declarations but no review of purportedly privileged documents and without any discussion of alternatives to dismissal, that successful invocation of Privilege necessitated dismissal).

181. 437 F. Supp. 2d 530 (E.D. Va. 2006), *aff’d sub nom.* *El-Masri v. United States*, 479 F.3d 296 (4th Cir. 2007).

182. *El-Masri*, 437 F. Supp. 2d at 532-35 (E.D. Va. 2006).

States was holding an innocent German citizen.<sup>183</sup> The government, not a party to the El-Masri lawsuit, intervened and moved to dismiss the case on state secrets grounds.<sup>184</sup> El-Masri's attorneys argued that the Privilege was inapplicable or, in the alternative, did not necessitate dismissal, as the CIA's extraordinary rendition program had been widely reported on and acknowledged by the government.<sup>185</sup> In affirming the Eastern District of Virginia's dismissal of the suit, the Fourth Circuit viewed its task as ascertaining "whether an action can be *litigated* without threatening the disclosure of such state secrets."<sup>186</sup> Mr. El-Masri was therefore incorrect to think that the "central facts" of his case were those alleged in the complaint.<sup>187</sup> Rather, in order to decide the case, a court would have to determine that "the defendants were involved in his detention and interrogation in a manner that renders them personally liable to him."<sup>188</sup> Such information could not possibly be provided, the court concluded, without exposing "how the CIA organizes, staffs, and supervises its most sensitive intelligence operations."<sup>189</sup>

Before acknowledging the "heavy burden" imposed on El-Masri by its decision,<sup>190</sup> the Fourth Circuit found it necessary to remind him of the court's role:

El-Masri envisions a judiciary that possesses a roving writ to ferret out and strike down executive excess. Article III, however, assigns the courts a more modest role: we simply decide cases and controversies. Thus, when an executive officer's liability for official action can be established in a properly conducted judicial proceeding, we will not hesitate to enter judgment accordingly. But we would be guilty of excess in our own right if we were to disregard settled legal principles in order to reach the merits of an executive action that would not otherwise be before us—especially when the challenged action pertains to military or foreign policy. We decline to follow such a course, and thus reject El-Masri's invitation to rule that the state secrets doctrine can be brushed aside on the ground that the President's foreign policy has gotten out of line.<sup>191</sup>

Two things are striking about this passage. First, El-Masri never asked the court to brush aside the state secrets doctrine. Rather, as the court acknowledged earlier in its opinion:

El-Masri does not contend that the state secrets privilege has no role in these proceedings. To the contrary, he acknowledges that at least some

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183. Complaint at 12, *El Masri v. Tenet*, 437 F. Supp. 2d 530 (E.D. Va. 2006) (No. 1:05cv1417) available at [http://www.aclu.org/images/extraordinaryrendition/asset\\_upload\\_file829\\_22211.pdf](http://www.aclu.org/images/extraordinaryrendition/asset_upload_file829_22211.pdf).

184. *El-Masri*, 437 F. Supp. 2d at 535.

185. *Id.* at 537-38.

186. *El-Masri*, 479 F.3d at 308.

187. *Id.*

188. *Id.* at 309.

189. *Id.*

190. *Id.* at 313.

191. *El-Masri*, 479 F.3d at 312-13.

information important to his claims is likely to be privileged, and thus beyond his reach. But he challenges the court's determination that state secrets are so central to this matter that any attempt at further litigation would threaten their disclosure.<sup>192</sup>

Second, the rhetoric of the court is that of judicial minimalism. The court will not set aside well-established law to invade the province of the executive. Nevertheless, there is no well-established law that requires the pre-discovery dismissal of a suit that is not a *Totten* case. The El-Masri court is minimalist with respect to the prerogatives of the executive but activist when it comes to narrowing individual access to the courts.

Finally, in a series of cases challenging both NSA wiretaps of international communications and NSA data mining of even domestic telecommunications based on a partnership with telephone service providers, the government has invoked the Privilege to prevent any judicial inquiry into the legality of this practice.<sup>193</sup> In these cases, as in *El-Masri*, the government has asserted the Privilege and sought dismissal of actions, despite the fact that the government has acknowledged many of the allegations and others have been made public through press reports.<sup>194</sup> Here the results have been mixed, with some courts allowing the cases to proceed<sup>195</sup> while others permit the assertion of the Privilege and dismiss actions despite the government's disclosures of at least some of the information necessary to plaintiffs' claims.<sup>196</sup>

Dismissal in these cases simply cannot be reconciled with *Reynolds's* understanding of the Privilege as evidentiary in nature. Nor can it be reconciled with the understandings of the drafters of proposed Rule 509: "If privilege is successfully claimed by the government in litigation to which it is not a party, the effect is simply to make the evidence unavailable, as though a witness had died or claimed the privilege against self-incrimination, and no specification of the consequences is necessary."<sup>197</sup> By ignoring this fundamental understanding of

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192. *Id.* at 302.

193. See *supra* notes 118-20 and accompanying text for a discussion of the NSA surveillance program.

194. See, e.g., *Al-Haramain Islamic Found., Inc. v. Bush*, 451 F. Supp. 2d 1215, 1225 (D. Or. 2006) (noting that government had already "lifted the veil of secrecy on the existence of the Surveillance Program" and that plaintiffs sought only to establish lawfulness of government's interception of their communications); *ACLU v. NSA*, 438 F. Supp. 2d 754, 765 (E.D. Mich. 2006) (acknowledging that plaintiffs had established their prima facie case based solely on public statements regarding challenged "Terrorist Surveillance Program"), *vacated*, 493 F.3d 644 (6th Cir. 2007).

195. See, e.g., *Hepting v. AT&T Corp.*, 439 F. Supp. 2d 974, 1011 (N.D. Cal. 2006) (denying government motion to dismiss or, in the alternative, for summary judgment, on state secrets grounds); *ACLU*, 438 F. Supp. 2d at 782 (granting plaintiffs' motion for partial summary judgment and holding that NSA's terrorist surveillance program violates Administrative Procedure Act, ch. 324, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.)).

196. See, e.g., *Terkel v. AT&T Corp.*, 441 F. Supp. 2d 899, 920 (N.D. Ill. 2006) (granting government's motion to dismiss action on state secrets grounds).

197. See Advisory Committee's Note to Preliminary Draft of Proposed FED. R. EVID. 509(e), 56 F.R.D. 183, 254 (1973); *accord* *Ellsberg v. Mitchell*, 709 F.2d 51, 64 (D.C. Cir. 1983) (noting effect of government's invocation of state secrets privilege is well settled and results only in unavailability of evidence without affecting case's proceeding). It should be noted that the final version of the proposed

the Privilege, shared by the *Reynolds* Court and the drafters of proposed Rule 509, courts have transformed the Privilege into a new form of executive immunity.

#### CONCLUSION

It is time for courts to return to *United States v. Reynolds*<sup>198</sup> and to reconsider what it means for the Privilege to be conceived by analogy to the privilege against self-incrimination. The judiciary, rather than Congress, is the branch of government best positioned to do so, because courts are best situated to realize, on a case-by-case basis, the delicate balance that protects state secrets while preserving individual rights. Congress lacks both the institutional competence to properly handle an evidentiary privilege and the will to confront possible executive abuses of the Privilege.

In short, *Reynolds* must be disentangled from *Totten v. United States*,<sup>199</sup> especially in cases involving alleged violations of statutory and constitutional rights. Much of the work of disentanglement can be comfortably achieved at the lower court level within the boundaries of *Reynolds*. To some extent, however, it may be necessary for the Supreme Court to revisit its decision in *Reynolds* and to provide direction to lower courts in cases that raise questions that were not before the *Reynolds* court. Specifically, *Reynolds* does not clearly govern cases in which the government or its agents stand accused of constitutional or statutory violations. It makes no sense to permit the government to invoke a privilege in connection with conduct in which neither it nor its agents may lawfully engage. If the government or its agents are charged with illegal conduct, it cannot claim—as it now routinely does—that the public has no right to demand a straight answer to the question: did you do it?

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rule was not entirely in accord with the ideas of its original drafters. See *supra* notes 106-13 and accompanying text for a discussion of intent of original drafters compared to the final version of the proposed rule.

198. 345 U.S. 1 (1953).

199. 92 U.S. 105 (1875).

