The Military and State-Secrets Privilege: The Quietly Expanding Power

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Imagine living in a country where the government could pluck a person from an airport, send him to Syria to be tortured, and there existed no recourse to hold that government responsible. If you live in the United States of America, you may live in such a country. Under the current presidential administration's interpretation of the military and state-secrets privilege (state-secrets privilege), it is possible that your government lies beyond the reach of all discipline.

The state-secrets privilege, a creation of common law, is only available to the government and is intended to protect national security. The privilege permits the government to refuse discovery requests where "there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged."

Early cases addressing the state-secrets privilege often excluded evidence for which the privilege was asserted, but permitted the case to

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3. See Reynolds, 345 U.S. at 7 (noting that state-secrets privilege "belongs to the Government and must be asserted by it").

4. See, e.g., id. at 10 (discussing the need to hide military state-secrets in the name of national interests); Ellsberg v. Mitchell, 709 F.2d 51, 56 (D.C. Cir. 1983) (stating that discovery may be blocked if it adversely affects national security).

5. Reynolds, 345 U.S. at 10.
However, a trend has developed in which the state-secrets privilege is used as a basis to dismiss entire cases rather than block a discovery request. Because "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury," the increased use of this privilege to dismiss a case requires careful scrutiny. Theoretically, the judicial branch acts as a final check on the invocation of this privilege. However, judges have extended broad deference to the executive branch by granting nearly every invocation of the state-secrets privilege since its formal recognition in 1953.

This Comment first explores the historical roots of the state-secrets privilege and the potential for its abuse. Next, this Comment highlights the evolution of the privilege, especially in the aftermath of the Supreme Court's decision in United States v. Reynolds. An evaluation of the three current effects of invoking the state-secrets privilege follows, with particular attention paid to the impact of dismissing an entire case. This Comment then presents three analyses suggesting that the recent expansive use of the state-secrets privilege moves away from the original narrow purpose of the privilege. The Comment uses two recent cases,

6. See infra notes 71-74 and accompanying text.
7. See infra notes 23-27, 70 and accompanying text.
The first says that, insofar as war is concerned, the Constitution does not really matter. That is wrong. The Constitution always matters, perhaps particularly so in times of emergency. The second says that, insofar as the Constitution is concerned, war or security emergencies do not really matter. That is wrong too. Security needs may well matter, playing a major role in determining just where the proper constitutional balance lies.

Id. Thus, Justice Breyer stressed a balanced view of constitutional protections and the importance of protecting national security. See id.
10. See Reynolds, 345 U.S. at 9-10 (“Judicial control over the evidence in a case cannot be abdicated to the caprice of executive officers.”).
11. See William G. Weaver & Robert M. Pallitto, State-secrets and Executive Power, 120 POL. SCI. Q. 85, 102 (2005) (“In only four cases did courts ultimately reject the government’s assertion of the privilege.”). Further, Weaver and Pallitto point out that of the four cases, two, namely Republic Steel v. United States and U.S. Steel v. United States, were blatant misapplications of the privilege in cases involving unclassified information from the Department of Commerce. Id. In the third case, Yang v. Reno, Weaver and Pallitto note that although the privilege was initially rejected, the court indicated that if the government corrected procedural mistakes, the privilege would ultimately be upheld. Id. Finally, the authors mention that in the fourth case, Halpern v. United States, the court used a novel approach, ordering that the trial proceed in secret. Id.
Edmonds v. United States Department of Justice13 and Arar v. Ashcroft,14 to illustrate the difficulty that occurs when invocation of the state-secrets privilege causes dismissal of a case, particularly at the pleadings stage. The Comment reviews existing suggestions on how to prevent abuse of the state-secrets privilege. The Comment concludes with a proposal for a new Federal Rule of Evidence on the proper use of the state-secrets privilege.

I. THE ORIGINS AND MODERN DEVELOPMENT OF THE STATE-SECRETS PRIVILEGE

A. Origins of the State-Secrets Privilege

The state-secrets privilege developed at common law.15 The foundation of the state-secrets privilege in the United States can be traced as far back as 1807 in the treason trial of United States v. Burr.16 In Burr, the defendant demanded access to a letter written by General Wilkinson to President Thomas Jefferson, a key government witness.17 The letter allegedly contained information regarding Burr’s guilt,18 and, according to Burr, was critical to his defense.19 The government refused to produce the letter because “[i]t might contain state-secrets, which could not be divulged without endangering the national safety.”20 Ultimately, the court did not have to answer the state-secrets issue,21 but stated in dictum that if the letter contained information that “would be imprudent to disclose, which it is not the wish of the executive to

17. Id. at 31.
18. Id. at 32. The letter “purportedly contained information ‘in relation to the transactions of Mr. Burr, “of whose guilt” [General Wilkinson] says, “there can be no doubt.’” Edmonds, 323 F. Supp. 2d at 70 (alteration in original) (quoting Burr, No. 14,692D, 25 F. Cas. at 32).
20. Id.
21. Id. at 37. The court skirted the issue of suppression in this case because there was “nothing before the court which show[ed] that the letter in question contain[ed] any matter the disclosure of which would endanger the public safety.” Id.
disclose, such matter, if it be not immediately and essentially applicable to the point, [would], of course, be suppressed.”

In 1875, the Supreme Court confronted the state-secrets privilege issue in *Totten v. United States.* In *Totten,* the plaintiff sought compensation from the government for work he performed as a wartime spy. The Court formally recognized that public policy forbade a case to proceed where the trial “would inevitably lead to the disclosure of matters which the law itself regards as confidential.” Based on the plaintiff’s wartime duties, the Court reasoned 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. This condition of the engagement was implied from the nature of the employment, and is implied in all secret employments of the government in time of war, or upon matters affecting our foreign relations, where a disclosure of the service might compromise or embarrass our government in its public duties, or endanger the person or injure the character of the agent.

As a result of this reasoning, the Court upheld the dismissal of the case. Even though the term “state-secrets privilege” was never used in *Totten,* the case fortified the foundation for the privilege.

**B. United States v. Reynolds: Modern Development of the State-Secrets Privilege**

Although the state-secrets privilege took root as early as 1807, *United States v. Reynolds,* decided in 1953, is the privilege’s defining case. In

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22. *Id.*
23. 92 U.S. 105 (1875).
24. *Id.* at 105-06. The plaintiff “was to proceed South and ascertain the number of troops stationed at different points in the insurrectionary States, procure plans of forts and fortifications, and gain such other information as might be beneficial to the government of the United States, and report the facts to the President.” *Id.*
25. *Id.* at 107.
26. *Id.* at 106. The Court further reasoned that

[i]f upon contracts of such a nature an action against the government could be maintained in the Court of Claims, whenever an agent should deem himself entitled to greater or different compensation than that awarded to him, the whole service in any case, and the manner of its discharge, with the details of dealings with individuals and officers, might be exposed, to the serious detriment of the public.

*Id.* at 106-07; see also Kelly D. Wheaton, *Spycraft and Government Contracts: A Defense of Totten v. United States,* ARMY LAW., Aug. 1997, at 9, 16-17 (discussing the importance of the *Totten* doctrine in the government’s ability to carry out covert operations).
28. *Id.* at 106-07.
Reynolds, widows brought a suit against the United States under the Federal Tort Claims Act for the wrongful deaths of their husbands, who were on board a B-29 military aircraft that crashed while the crew was performing a highly secret mission involving electronic equipment. The widows sought production of the Air Force's official accident report and statements taken from surviving persons. The government refused to supply the report, stating that it could not do so "without seriously hampering national security, flying safety and the development of highly technical and secret military equipment."

In its analysis, the Supreme Court explicitly recognized that "the privilege against revealing military secrets . . . is well established in the law of evidence." In a few short sentences, the Court laid out the guidelines for invocation of the state-secrets privilege. The Court began by explaining that the privilege "belongs to the Government and must be asserted by it," but urged that "[i]t is not to be lightly invoked." The Court explained that "[t]here must be a formal claim of privilege, lodged by the head of the department which has control over the matter, after actual personal consideration by that officer.

Of critical importance, the Court established the judiciary as the final check on the use of the privilege when it stated that "[t]he court itself must determine whether the circumstances are appropriate for the claim of privilege." The Court recognized that making the judiciary a safeguard on the executive use of the privilege created a circular problem. The Court wanted the judiciary to be a final check on this
enormous power, but had to do so "without forcing a disclosure of the very thing the privilege is designed to protect." 41 Thus, the Court created a "formula of compromise," whereby the judiciary had control, but could not automatically require complete disclosure to evaluate the merits of a state-secrets privilege claim. 42 The Court created a hypothesis where even a "judge alone, in chambers" would not be permitted to see certain state-secrets if there was reasonable danger that doing so would jeopardize security. 43

Applying this "formula of compromise" to the facts of the case, the Court overruled both the trial and appellate courts, 44 holding that the Secretary of the Air Force did not need to submit the accident report or statements. 45 Through this holding, Reynolds more clearly defined the contours of the state-secrets privilege.

C. The Effect of the State-Secrets Privilege

Case law developed since Reynolds states that invocation of the state-secrets privilege can have three effects. 46 First, the state-secrets privilege can block production of potential evidence. 47 Blocking production of potential evidence can, in turn, have two effects. The plaintiff may be

41. Id. The Court then compared the state-secrets privilege to the privilege against self-incrimination: "The privilege against self-incrimination presented the courts with a similar sort of problem. Too much judicial inquiry into the claim of privilege would force disclosure of the thing the privilege was meant to protect, while a complete abandonment of judicial control would lead to intolerable abuses." Id.

42. Id. at 9-10. The Court declared that "[j]udicial control over the evidence in a case cannot be abdicated to the caprice of executive officers." Id. However, the Court was not willing to "go so far as to say that the court may automatically require a complete disclosure to the judge before the claim of privilege will be accepted in any case." Id. at 10.

43. Id. at 10.
44. Id. at 11-12.
45. Id. at 10-11. "Certainly there was a reasonable danger that the accident investigation report would contain references to the secret electronic equipment which was the primary concern of the mission." Id. at 10. In coming to this decision, the Court also used necessity as a factor to determine whether the privilege should be invoked. Id. at 11. However, "even the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that military secrets are at stake." Id.

46. See, e.g., Edmonds v. U.S. Dep't of Justice, 323 F. Supp. 2d 65, 78 (D.D.C. 2004), aff'd, U.S. App. LEXIS 8116 (D.C. Cir. May 6, 2005), cert. denied, 126 S. Ct. 734 (2005). The court stated that "[i]t is generally understood that 'the application of the state-secrets privilege can ... have three effects.'" Id. (alteration in original) (quoting Doe v. Tenet, 329 F.3d 1135, 1149 (9th Cir. 2003)); see also, Kasza v. Browner, 133 F.3d 1159, 1166-67 (9th Cir. 1998) (describing the three effects of invocation of the state-secrets privilege).

47. Kasza, 133 F.3d at 1166-67. The accident report in Reynolds is a prime example of the removal of a piece of evidence from a case due to the state-secrets privilege, but the case proceeding in the absence of such evidence. See Reynolds, 345 U.S. at 11.
able to proceed without the requested discovery. However, if the requested discovery is critical to the plaintiff's case, then the inability to introduce the privileged evidence will prevent the plaintiff from presenting a prima facie case. Similarly, a judge may dismiss a case if the government is unable to defend itself without using the classified privileged information.

The second application of the state-secrets privilege occurs when the government is prosecuting and a defendant is deprived of information necessary to a valid defense. In this case, summary judgment in favor of the defendant is appropriate.

Finally, invocation of the state-secrets privilege may lead to dismissal of the entire case even if the plaintiff is able to prosecute a claim using only non-privileged evidence. For example, a court reasoned that "if 'the very subject matter of the action' is a state secret, then the court should dismiss the plaintiff's action based solely on the invocation of the state-secrets privilege." Such dismissal may occur at the pleadings stage, prior to discovery. One court described this effect as "harsh," but determined that "the results are harsh in either direction and the state-secrets doctrine finds the greater public good." Thus, the court felt dismissal of a plaintiff's claim, even when the claim is valid, is "ultimately the less harsh remedy."

D. Use of the State-Secrets Privilege to Dismiss an Entire Case

Reynolds, the major state-secrets privilege case, never explicitly explored the three possible effects of the privilege. Therefore, a review

48. See Kasza, 133 F.3d at 1166 (explaining that "by invoking the privilege over particular evidence, the evidence is completely removed from the case. The plaintiff's case then goes forward based on evidence not covered by the privilege." (citing Reynolds, 345 U.S. at 11)).

49. See id. at 1166 ("[i]f, after further proceedings, the plaintiff cannot prove the prima facie elements of her claim with nonprivileged evidence, then the court may dismiss her claim as it would with any plaintiff who cannot prove her case.").

50. See Edmonds, 323 F. Supp. 2d at 78 (citing Zuckerbraun v. Gen. Dynamics Corp., 935 F.2d 544, 547 (2d Cir. 1991)).

51. See, e.g., Kasza, 133 F.3d at 1166 (citing Bareford v. Gen. Dynamics Corp., 973 F.2d 1138, 1141 (5th Cir. 1992)).

52. Id.

53. Id. (citing Reynolds, 345 U.S. at 11 n.26).

54. Id. (quoting Reynolds, 345 U.S. at 11 n.26).


56. Bareford, 973 F.2d at 1144.

57. Id.

58. See Reynolds, 345 U.S. 1.
of decisions justifying dismissal of an entire case at the pleadings stage affords useful insight. In the 2004 Edmonds decision, the court specifically considered the three possible applications of the state-secret privilege. In doing so, the court quoted Kasza v. Browner as precedent. In Kasza, the court relied on language in Reynolds to hold that the state-secrets privilege can justify dismissal of an entire case at the pleadings stage. However, the Reynolds Court never explicitly evaluated the three evolved and expanded applications of the privilege. The Kasza court drew upon various parts of the Reynolds decision to find support for the three applications of the privilege. Specifically, the Kasza court based its conclusion that the state-secrets privilege can be used to dismiss an entire case at the pleadings stage on the Reynolds discussion of the relative importance of the litigant's need for discovery. The Reynolds Court stated that even though the state-secrets privilege "should not be lightly accepted, . . . even the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that the military secrets are at stake." In support of its reasoning, the Reynolds Court cited the 1875 Totten decision. Like Reynolds, the Totten holding resulted in the dismissal of the plaintiff's case at the pleadings stage. According to Reynolds, the Totten Court reached this conclusion because "the very subject matter of the action, a contract to perform espionage, was a matter of state secret." Totten found, in effect, that a contract to perform espionage is a state secret per se.

Great care must be used before applying the privilege broadly because "[t]he very essence of civil liberty," to be protected by the laws in court, is effectively denied as a result of invocation of the state-secrets privilege. Recent use of the state-secrets privilege suggests movement away from

60. 133 F.3d 1159 (9th Cir. 1998).
61. See Edmonds, 323 F. Supp. 2d at 78.
62. See Kasza, 133 F.3d at 1166 (citing Reynolds, 345 U.S. at 11 n.26).
63. See Reynolds, 345 U.S. 1.
64. See Kasza, 133 F.3d at 1166 (citing Reynolds, 345 U.S. at 11 & n.26).
65. See id.
67. Id. at 11 n.26 (citing Totten v. United States, 92 U.S. 105 (1875)).
68. See supra text accompanying notes 23-27.
69. Reynolds, 345 U.S. at 11 n.26 (citing Totten, 92 U.S. 105).
70. See supra text accompanying notes 23-27.
narrow use of the state-secrets privilege into more expansive and potentially harmful applications.

1. The Trend Toward Expansive Use of the State-Secrets Privilege Moves Away From the Notion that the Privilege Is "Not To Be Lightly Invoked"

The more recent, broader application of the state-secrets privilege strongly suggests a movement away from one of the key principles enunciated in Reynolds—the state-secrets privilege is "not to be lightly invoked." 72

The use of the state-secrets privilege has expanded in two ways: (1) the absolute number of cases involving invocation of the state-secrets privilege by the government has increased; 73 and (2) within the increased number of state-secrets privilege cases, a larger percentage of those cases involve dismissal of the entire case due to the claimed sensitive nature of the case. 74 This recent expanded use of the privilege lies in contrast with


73. Weaver & Pallitto, supra note 11, at 101. Between 1953, the year of the Reynolds decision, and 1976, the election year of Jimmy Carter, "there were four reported cases in which the government invoked the privilege. Between 1977 and 2001, there were a total of fifty-one reported cases in which courts ruled on invocation of the privilege." Id. While the authors did not cite the fifty-one cases, individual research on the issue yields approximately the same number of cases. See OPENTHEGOVERNMENT.ORG, SECRECY REPORT CARD 2005: QUANTITATIVE INDICATORS OF SECRECY IN THE FEDERAL GOVERNMENT 2 (2005), http://www.openthegovernment.org/otg/SRC2005_embargoed.pdf ("The executive branch is using the 'state secrecy' privilege 33 times more often than during the height of the Cold War.").

74. See, e.g., Tenet v. Doe, 125 S. Ct. 1230, 1237-38 (2005) (dismissing case at pleadings stage in case involving the attempt to enforce a contract for alleged espionage); Sterling v. Tenet, 416 F.3d 338 (4th Cir. 2005), cert. denied sub nom. Sterling v. Goss, No. 05-571, 2006 U.S. LEXIS 87 (Jan. 9, 2006) (affirming dismissal of case at pleadings stage where a covert agent sued the Director of the CIA for alleged racial discrimination); Trulock v. Lee, 66 Fed. App'x 472, 473 (4th Cir. 2003) (upholding dismissal of complaint where former Department of Energy (DOE) employee brought action against the DOE for alleged defamation); Black v. United States, 62 F.3d 1115, 1116 (8th Cir. 1995) (affirming dismissal of case at pleadings stage in case where plaintiff alleged that the government subjected him to harassment and psychological attacks); Bowles v. United States, 950 F.2d 154, 155 (4th Cir. 1991) (upholding dismissal of United States as party in case where plaintiff was hurt in car accident where car was owned by the government and operated by a government employee); In re Under Seal, 945 F.2d 1285, 1286-88 (4th Cir. 1991) (upholding summary judgment for the defendant after minimal discovery in case where a former government contractor sued various government agencies for allegedly preventing the plaintiff's contract from being renewed); Zuckerbraun v. Gen. Dynamics Corp., 935 F.2d 544, 545 (2d Cir. 1991) (dismissing case at pleadings stage where estate of sailor sued designers and manufacturers of missile defense system which allegedly malfunctioned); Weston v. Lockheed Missiles & Space Co., 881 F.2d 814, 815-16 (9th Cir. 1989) (issuing a dismissal at the pleadings stage where homosexual man sued the Department and Secretary of Defense for allegedly denying him a security clearance.
the cases following Reynolds, which applied the state-secrets privilege narrowly to block only specified requested discovery, and, importantly, permitted the case to continue. The increased use of the state-secrets based on his sexual preference); Guong v. United States, 860 F.2d 1063, 1064, 1067 (Fed. Cir. 1988) (affirming dismissal of case at pleadings stage where plaintiff, an alleged Vietnam spy, tried to enforce an espionage contract with the United States in a case similar to Totten); Fitzgerald v. Penthouse Int'l, Ltd., 776 F.2d 1236, 1243 (4th Cir. 1985) (upholding dismissal of case because very nature of question in this libel suit was itself a state secret); Farnsworth Cannon, Inc. v. Grimes, 635 F.2d 268, 281 (4th Cir. 1980) (en banc) (holding, over a strong dissent, that the plaintiff could not make out a prima facie case due to the sensitive nature of the case); Edmonds v. U.S. Dep't of Justice, 323 F. Supp. 2d 65 (D.D.C. 2004), aff'd, 2005 U.S. App. LEXIS 8116 (D.C. Cir. May 6, 2005), cert. denied, 126 S. Ct. 734 (2005) (dismissing case at pleadings stage where former FBI employee alleged that FBI unchecked security breaches disclosed her personal employee folder to unauthorized persons in violation of the Privacy Act); Tilden v. Tenet, 140 F. Supp. 2d 623, 624, 626-27 (E.D. Va. 2000) (dismissing case at pleadings where CIA employee brought suit against the Director of the CIA for alleged gender discrimination); Mounsey v. Allied-Signal, Inc., No. CV95-4309SVW(MCX), 2000 WL 34017116, (C.D. Cal. Apr. 10, 2000) (granting summary judgment at pleadings stage in case involving “friendly-fire” of U.S. Black Hawk helicopters); Frost v. Perry, 919 F. Supp. 1459, 1462, 1468 (D. Nev. 1996) (dismissing case at pleadings where persons brought suit against the United States Air Force under the Resource Conservation and Recovery Act); Bentzlin v. Hughes Aircraft Co., 833 F. Supp. 1486, 1487 (C.D. Cal. 1993) (dismissing at the pleadings stage a case involving alleged malfunction of U.S. military missile aircraft which killed U.S. Marines during the Persian Gulf War); Clift v. United States, 808 F. Supp. 101, 102-03, 105 (D. Conn. 1991) (dismissing case after minimal discovery where court held that the subject matter of the case, the patent on an invention of a cryptographic encoding device, turned on a state secret); Nejad v. United States, 724 F. Supp. 753, 754, 756 (C.D. Cal. 1989) (dismissing the case at the pleadings where family members of passengers who died on an Iranian aircraft after it was shot down by U.S. missiles sued).

75. See, e.g., United States v. Reynolds, 345 U.S. 1, 10-12 (1953); Northrop Corp. v. McDonnell Douglas Corp., 751 F.2d 395 (D.C. Cir. 1984) (upholding privilege related to state-secrets, but saying it was premature to grant privilege for documents that had not been used by the Departments of Defense and State to determine applicability of state-secrets); Ellsberg v. Mitchell, 709 F.2d 51, 59-60 (D.C. Cir. 1983) (upholding privilege for documents describing electronic surveillance of the plaintiffs, but refusing to uphold privilege used to hide the identities of the Attorneys General who authorized the wiretaps in case where plaintiffs alleged warrantless electronic surveillance); Halpern v. United States, 258 F.2d 36, 44 (2d Cir. 1958) (denying government's request for dismissal of case at the pleadings stage and ordering a trial in camera); Am. Tel. & Tel. Co. v. United States, 4 Cl. Ct. 157, 159, 162 (Cl. Ct. 1983) (upholding privilege in patent infringement case but encouraging counsel to proceed with discovery); In re “Agent Orange” Prod. Liab. Litig., 101 F.R.D. 97, 98 (E.D.N.Y. 1984) (ordering that the government provide more in camera information to determine if more information should be provided to determine whether certain people were alive); Ceramica Regiomontana, S.A. v. United States, 557 F. Supp. 593, 594, 596 (Cl. Int’l Trade 1982) (permitting limited discovery to determine whether motion for state-secrets privilege was proper in case where the government sought to block discovery of documents given to it by the Mexican government); Nat’l Lawyers Guild v. Attorney Gen., 96 F.R.D. 390, 393-94 (S.D.N.Y. 1982) (requiring strict adherence to procedure in order to uphold privilege); Sigler v. LeVan, 485 F. Supp. 185, 188-89, 198-99 (D. Md. 1980) (upholding the privilege when
privilege suggests a gradual judicial acceptance of a broadened state-secrets privilege, departing from the principles announced in Reynolds.76

2. The Analytical Distinction Between the Totten Per Se Rule and the State-Secrets Privilege

In its 2005 decision in Tenet v. Doe,77 the Supreme Court made an instructive distinction between the state-secrets privilege and what it called the “Totten rule,” referring to the 1875 Totten holding.78 The Supreme Court acknowledged that the state-secrets privilege has its roots in Totten.79 The Totten rule prohibits any trial “which would inevitably lead to the disclosure of matters which the law itself regards as confidential.”80 Thus, the effect of the Totten rule is to dismiss the entire case when it would involve such disclosures.81 The state-secrets privilege,
on the other hand, "simply cannot provide the absolute protection we found necessary in enunciating the *Totten* rule."82 In making this distinction, the Court insinuated that the state-secrets privilege is merely an evidentiary tool, without the absolute preclusive effect of the per se rule in the *Totten* decision.83 Thus, the *Tenet* holding suggests that where courts are using the state-secrets privilege to dismiss a case at the pleadings stage, as opposed to blocking discovery that in effect prevents a plaintiff from stating a claim, they should have done so under the *Totten* rule instead of the state-secrets privilege.84 The Court reaffirmed that both the *Totten* rule and the state-secrets privilege are narrow tools. Where the *Totten* rule should be used narrowly in intrinsic state secret cases such as where plaintiffs seek to enforce contracts involving espionage,85 the *Tenet* holding suggests that the state-secrets privilege should only be used as an evidentiary tool to fence privileged material rather than dismiss a case entirely.86 The *Totten* rule should only be applied, especially at the pleadings stage, where the subject matter of the claim is, per se, a state secret.87

*Tenet*’s careful distinction indicates the Court was sending a cautionary message against misapplication of the broad sanction provided by *Totten* for per se security cases to actions where only some of the evidence requires privileged protection.88

3. Excessive Use of the State-Secrets Privilege and the Government’s Use of its Classification Powers Create Significant Public Policy Concerns

Professor Thomas Emerson, a First Amendment scholar, noted that “[t]he secrecy attached to many national security issues allows the government to invoke national security claims in order to cover up embarrassment, incompetence, corruption or outright violation of law. And subsequent events almost always demonstrate that the asserted dangers to national security have been grossly exaggerated.”89 Despite

82. *Id.* at 1237.
83. *See id.* (“‘There is, in short, no basis for respondents’ and the Court of Appeals’ view that the *Totten* bar has been reduced to an example of the state-secrets privilege.’”).
84. *See id.* at 1235 n.4, 1236-38.
85. *See supra* note 80.
87. *See id.*
88. *See id.* at 1238.
89. *Askin*, *supra* note 30, at 760 (quoting Thomas Emerson, *National Security and Civil Liberties*, in THE FIRST AMENDMENT AND NATIONAL SECURITY 84-85 (1984)). Recognizing this issue, President Clinton issued Executive Order 12,958 in 1995, which declares that “[i]n no case shall information be classified in order to (1) conceal violations of law, inefficiency, or administrative error [or] (2) prevent embarrassment to a person,
concerns regarding too much secrecy, the Government has significantly increased the amount of documents that are considered classified in recent years, especially since September 11, 2001.\footnote{Emerging Threats: Overclassification and Psuedo-classification: Hearing Before the Subcomm. on National Security, Emergency Threats and International Relations of the H. Comn. on Government Reform, 109th Cong. 120 (2005) (prepared statement of Thomas Blanton, Executive Director, National Security Archive), available at http://www.access.gpo.gov/congress/house/pdf/109hrg/20922.pdf. Mr. Blanton of the National Security Archive addressed the chairman’s question “whether overclassification was a 10% problem or a 90% problem.” Id. Mr. Blanton argued that overclassification was a problem "towards the high end" of the range. Id. at 121. He noted:

The deputy undersecretary of defense for counterintelligence and security confessed that 50% of the Pentagon's information was overclassified. The head of the Information Security Oversight Office said it was even worse, "even beyond 50%.” The former official who participated in the Markle Foundation study cited by the 9/11 Commission on information sharing stated that 80-90% (at least in the area of intelligence and technology) was appropriately classified at first, but over time that dwindled down to the 10-20% range.

\textit{Id.} at 120 (emphasis omitted). Mr. Blanton further cited the former Solicitor General of the United States, Erwin Griswold, who prosecuted a case often referred to as the \textit{Pentagon Papers Case}. \textit{Id.} at 121. Griswold stated:

"It quickly becomes apparent to any person who has considerable experience with classified material that there is massive overclassification and that the principal concern of the classifiers is not with national security, but with governmental embarrassment of one sort or another. There may be some basis for short-term classification while plans are being made, or negotiations are going on, but apart from details of weapons systems, there is very rarely any real risk to current national security from the publication of facts relating to transactions in the past, even the fairly recent past."

\textit{Id.} (emphasis omitted) (quoting Erwin N. Griswold, Editorial, \textit{Secrets Not Worth Keeping: The Courts and Classified Information}, WASH. POST, Feb. 15, 1989, at A25); see also Weaver & Pallitto, \textit{supra} note 11, at 108. Weaver and Pallitto discussed that while former Attorney General Janet Reno authorized withholding of information under a request based on the Freedom of Information Act only if an agency "reasonably foresees that disclosure would be harmful [to national security]," \textit{id.} (alteration in original) (quoting Janet Reno, Memorandum for Heads of Departments and Agencies: Subject: The Freedom of Information Act (Oct. 4, 1993)), the subsequent Attorney General, John Ashcroft "directs agencies to withhold information where there is a 'sound legal basis' to do so," \textit{id.} (quoting John Ashcroft, Memorandum for Heads of All Federal Departments and Agencies: The Freedom of Information Act (Oct. 12, 2001). Thus, this is another example of how the government has broadened the criteria for holding documents secret or confidential.
problematic number of documents become classified, it is more likely that the Government can assert the state-secrets privilege based on a document which is unnecessarily or improperly classified.

Some argue that this concern was justified in a compelling manner in the state-secrets privilege arena. Fifty years after the Reynolds decision, the accident report that the Government demanded be kept secret in that case was declassified. Because the accident involved a military plane that tested secret equipment, the obvious assumption was that the Government was concerned that the report would reveal sensitive information regarding the secret military equipment. However, disclosure of the accident report many years later revealed that it did not discuss any secret electronic or military equipment. Instead, the report discussed the role of the military's negligence in the crash. Specifically, the "report state[d] that 'engine failure caused the crash' and that the

91. See supra note 90; see also OPENTHEGOVERNMENT.ORG, supra note 73, at 1. The OpenTheGovernment.org report stated that "[t]he government decided to stamp documents secret a record 15.6 million times in 2004. The U.S. government last year alone spent $7.2 billion securing its classified information. That's more than any annual cost in at least a decade." Id. The report also stated that "[f]or every $1 the federal government spent in 2004 releasing old secrets, it spent an extraordinary $148 creating new secrets. That's a $28 jump from 2003. In contrast, from 1997 to 2001, the government spent less than $20 per year keeping secrets for every dollar spent declassifying them." Id.

92. See supra note 91. One commentary argued that given the potential breadth of the state-secrets privilege, Attorney General John Ashcroft's directive regarding a request based on the Freedom of Information Act is "tantamount to making disclosure of any particular piece of information subject to the idiosyncratic discretion of administrators." Weaver & Pallitto, supra note 11, at 108. The authors further stated that "[a] 'sound legal basis' for withholding information under the state-secrets privilege may be manufactured for virtually any document an administrator does not want the public to see." Id.

93. See Robyn E. Blumner, The Dangers of Keeping Secrets, ST. PETERSBURG TIMES, Aug. 28, 2005, at 4P.

94. See Herring v. United States, No. 03-CV-5500-LDD, 2004 WL 2040272, at *7-8 (E.D. Pa. Sept. 10, 2004), aff'd, 424 F.3d 384 (3d Cir. 2005). In this case, the United States District Court for the Eastern District of Pennsylvania decided whether the Reynolds case should be reopened based on the declassification of the accident report. Id.

95. See supra text accompanying note 31.

96. See Herring, 2004 WL 2040272, at *6. The court stated that "[p]laintiffs deduce that only the mission and electronic equipment were confidential." Id.; see also United States v. Reynolds, 345 U.S. 1, 5 (1953). Reynolds cited an affidavit of the Judge Advocate General, United States Air Force, "which asserted that the demanded material could not be furnished 'without seriously hampering national security, flying safety and the development of highly technical and secret military equipment.'" Id.

97. See Herring, 2004 WL 2040272, at *8 (discussing the declassification of the Reynolds accident report); Blumner, supra note 93.

98. See Herring, 2004 WL 2040272, at *8; Blumner, supra note 93.
accident might have been avoided 'had the plane complied with the technical orders.'

Based on the newly declassified documents, the Reynolds plaintiffs unsuccessfully tried to reopen the fifty-year-old case under the stringent Federal Rule of Civil Procedure 60(b). The United States District Court for the Eastern District of Pennsylvania held that under Rule 60(b)(3), the plaintiffs failed to make the necessary showing of a fraud on the court. The court supported its reasoning with three main arguments. First, the court relied on what has been referred to as the "mosaic theory." In essence, the court said that even if the accident report alone did not constitute a state secret, it could be pieced together with other seemingly innocent information and thereby create information which would pose a reasonable danger. Second, the court broadly read the affidavits provided in support of the Government's

99. Blumner, supra note 93; see also Morning Edition: Administration Employing State-secrets Privilege at Quick Clip (NPR radio broadcast Sept. 9, 2005) (transcript available at http://www.npr.org/templates/story/story.php?storyId=4838701). The reporter interviewed the daughter of one of the men killed in the crash. Id. She stated that the accident report described a series of crew and maintenance errors. Id. The problems began when an engine on the plane went on fire. Id. A pilot attempted to "feather" the engine, meaning turn the engine off. Id. However, the pilot accidentally turned off the wrong engine. Id. By the time the plane crashed, three out of four of the engines had failed. Id.
101. Federal Rule of Civil Procedure 60(b) states: "On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: . . . (3) fraud . . . misrepresentation, or other misconduct of an adverse party . . . " FED. R. CIV. P. 60(b).
102. See Herring, 2004 WL 2040272, at *4-11.
103. See id.
104. See id. at *5; Weaver & Pallitto, supra note 11, at 103-05. The court stated that "because 'each individual piece of intelligence information, like a piece of [a] jigsaw puzzle, may aid in piecing together bits of information even when the individual piece is not of obvious importance itself,'" Herring, 2004 WL 2040272, at *5 (alteration in original) (quoting Fitzgibbons v. CIA, 911 F.2d 755, 763 (D.C. Cir. 1990). Thus, the court should defer to the Government's claim of privilege even for "information that standing alone may seem harmless, but that together with other information poses a reasonable danger of divulging too much to a "sophisticated intelligence analyst."" Id. (quoting In re United States, 872 F.2d 472, 475 (D.C. Cir. 1989)).
105. Herring, 2004 WL 2040272, at *5; see also Weaver & Pallitto, supra note 11, at 103-05. Weaver and Pallitto described the mosaic theory as holding that "even unclassified, seemingly banal information may be protected by the privilege because the sum of a larger number of unclassified disclosures may add up to an overall picture of classified operations and capabilities." Id. at 104. The authors concluded that the mosaic theory "may now prevent disclosure of unclassified information that cannot in any sense be reasonably characterized as state-secrets. This is a rather stunning reach for a privilege that started out as a device to protect only the most sensitive information." Id.
The first affidavit was of Secretary of the Air Force, Thomas K. Finletter, which stated in relevant part:

"the aircraft in question, together with the personnel on board, were engaged in a confidential mission of the Air Force. The airplane likewise carried confidential equipment on board and any disclosure of its mission or information concerning its operation or performance would be prejudicial to this Department and would not be in the public interest."

Although the affidavit refers mostly to confidential equipment and mission, the court demanded that this be read broadly so it "suggests that beyond the mission itself, disclosure of technical details of the B-29 bomber, its operation, or performance would also compromise national security." Similarly, the court stated that a second affidavit by Judge Advocate General of the Air Force, Major General Reginald C. Harmon, should also be read as to suggest the existence of secrets beyond the particulars of the affidavit. General Harmon's affidavit stated that revealing the accident report would hurt "'national security, flying safety and the development of highly technical and secret military equipment.'"

Lastly, the court stated that even if the accident report did not discuss secret military missions or equipment, it could still constitute a military secret. The court acknowledged that the accident report concluded that engine failure caused the crash and if the plane had complied with orders, it likely would not have crashed. The court recognized that the report did not "refer to any newly developed electronic devices or secret electronic equipment." However, the court tried to stress that because the Reynolds decision was made "amid Communist paranoia, it is hardly shocking to contemplate an Air Force eager to protect from public view the accident investigation report that mentions modifications needed for the [military planes]."

In support of this point, the court described how three American bomber planes were forced to land in the then-Soviet Union in 1944. The Soviets used the planes to learn how to build their own planes, which were ultimately used by the Soviets to detonate an atomic bomb in 1949.

107. Id. (quoting Complaint ¶ 14, Exhibit C).
108. Id.
109. Id.
110. Id. (quoting Complaint ¶ 15, Exhibit D).
111. Id. at *6-7.
112. Id. at *8.
113. Id.
114. Id. at *9. In support of this point, the court described how three American bomber planes were forced to land in the then-Soviet Union in 1944. Id. at *8. The Soviets used the planes to learn how to build their own planes, which were ultimately used by the Soviets to detonate an atomic bomb in 1949. Id.
grave miscarriage of justice." 115 In its analysis, the court focused on the importance of finality in the judicial system. 116

Although the court held that the accident report in Reynolds was not classified in such a way to constitute a fraud under the stringent standard of Rule 60(b), 117 it does not necessarily follow that the report should have been classified. It is at least possible that the Government overclassified the report "amid Communist paranoia." 118 In any event, this case is not unique, and overclassification today seems to be growing, 119 thereby increasing the likelihood that invocation of the state-secrets privilege will be based on an improperly classified document. 120

E. Recent Cases Dismissed as a Result of Invocation of the State-Secrets Privilege: Edmonds v. United States Department of Justice and Arar v. Ashcroft

Two recent cases illustrate the frustration caused by the dismissal of presumptively valid claims because of the state-secrets privilege when the subject matter of the litigation is deemed sensitive: 121 1) Edmonds v. United States Department of Justice 122 and 2) Arar v. Ashcroft. 123

The FBI hired Sibel Edmonds as a translator soon after the attacks of September 11, 2001. 124 Ms. Edmonds contended that she witnessed serious security breaches during her time at the FBI. 125 Her primary

115. Id. at *9 (quoting United States v. Beggerly, 524 U.S. 38, 46-47 (1998)).
116. See id. at *9-10.
117. See id. at *8.
118. Id. at *9. Despite the court's reluctance to reopen a fifty-year-old case that had eventually settled, the court acknowledged that the report never referred "to any newly developed electronic devices or secret electronic equipment." Id. at *8.
119. See supra note 90; see also Weaver & Pallitto, supra note 11, at 87-88. Weaver and Pallitto stated that "[v]irtually all observers acknowledge that overclassification is a significant problem, and this has led to some embarrassing moments for the executive branch." Id. at 87. One of the several examples that the authors cite is related to the infamous Pentagon Papers. Id. There, the executive branch "reasserted classification of the Pentagon Papers after the papers had already been published in The New York Times." Id.
120. See supra text accompanying note 90.
121. See Scott M. Palatucci, Note, The Effectiveness of Citizen Suits in Preventing the Environment from Becoming a Casualty of War, 10 WIDENER L. REV. 585, 598-603 (2004). Palatucci expresses frustration with two cases, Frost v. Perry, 919 F. Supp. 1459 (D. Nev. 1996), and Kasza v. Browner, 133 F.3d 1159 (9th Cir. 1998), that involved serious environmental grievances which were dismissed as a result of the state-secrets privilege. Palatucci, supra, at 598-603.
125. Id. at 68 n.4.
complaint alleged potential espionage within the agency. Her complaints were substantiated by a report authored by the Department of Justice (DOJ) which "found that many of Edmonds' core allegations [regarding espionage within the FBI] were supported by either documentary evidence or witnesses other than Edmonds." Yet, instead of the FBI commending Ms. Edmonds for whistle-blowing, they fired her.

Armed with the DOJ report, Ms. Edmonds brought a suit against the United States Government. The lawsuit proffered three theories of liability. The first stated that under the Privacy Act, defendants unlawfully released information about the plaintiff. The second argued that the First Amendment should protect Ms. Edmonds against what she believed was a retaliatory termination. The third urged that Ms. Edmonds' termination violated her Fifth Amendment right to procedural and substantive due process.

Without addressing any of Ms. Edmonds' allegations, the government moved to dismiss the entire case, prior to discovery, based on the state-secrets privilege. The defendants stated that the issue was whether litigation of the subject matter would threaten national security. As a result, "the sufficiency of the plaintiff's allegations"—no matter how

126. Id.; see also OFFICE OF THE INSPECTOR GEN., U.S. DEPT. OF JUSTICE, A REVIEW OF THE FBI'S ACTIONS IN CONNECTION WITH ALLEGATIONS RAISED BY CONTRACT LINGUIST SIBEL EDMONDS § IV (2005), http://www.fas.org/irp/agency/doi/oig/sedmonds.html. ("In the classified version of the report, we fully described and evaluated the evidence underlying nearly a dozen separate allegations Edmonds made regarding the co-worker which, when viewed together, amounted to an accusation against the co-worker of possible espionage.").

127. OFFICE OF THE INSPECTOR GEN., supra note 126, § IV. The report stated that "had the FBI performed a more careful investigation of Edmonds' allegations, it would have discovered evidence of significant omissions and inaccuracies by the co-worker related to these allegations." Id.

128. Edmonds, 323 F. Supp. 2d at 69; see also OFFICE OF THE INSPECTOR GEN., supra note 126, § I.

129. Edmonds, 323 F. Supp. 2d at 67-68.

130. Id. at 70.

131. Id. The complaint stated that Ms. Edmonds' confidential information, including "information that Plaintiff was subject to a security review, [and information about the] Plaintiff's job performance and other information contained in the Defendants' personnel, security and investigative files" were unlawfully distributed. Id. (alteration in original) (quoting Complaint ¶ 37).

132. Id.

133. Id.

134. See Defendants' Reply in Further Support of Motion to Dismiss at 1-2 & n.1, Edmonds, 323 F. Supp. 2d 65 (C.A. No. 1:02CV01448(JR)).

135. See id. at 2.
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136 The trial court granted the motion, “albeit with great consternation, in the interests of national security.”

The second case, Arar v. Ashcroft, offers a more extreme illustration of the application of the dismissal remedy at the pleadings stage upon assertion of the state-secrets privilege. In this case, the plaintiff, Maher Arar, a Syrian-born man and Canadian citizen, alleged that U.S. officials seized him while he was in international transit through John F. Kennedy airport (JFK) in New York, and sent to Syria, where he was tortured.

The complaint specifically refers to a controversial covert operation referred to as “extraordinary renditions,” which involves “removing non-U.S. citizens detained in this country and elsewhere and suspected—reasonably or unreasonably—of terrorist activity to countries, including Syria, where interrogations under torture are routine.”

Mr. Arar stated...
that he had been on vacation with his family in Tunisia in late September 2002. During his vacation, he received an e-mail from his former employer in Canada, MathWorks, where he had worked as an engineer, asking him to come back to meet with a potential client. Mr. Arar complied, leaving his wife and two children in Tunisia to continue their vacation, and left for Zurich. After stopping briefly in Zurich, he left for Canada with a layover at JFK. When he stopped at JFK, Mr. Arar presented his Canadian passport. At that point, an immigration inspector pulled Mr. Arar aside, fingerprinted and photographed him. When he asked to see an attorney, Mr. Arar was allegedly told that “only U.S. citizens were entitled to lawyers.” While detained, an FBI agent allegedly interrogated Mr. Arar for five hours, asking specific questions regarding any relations with Mr. Abdullah Almalki. Subsequently, an immigration officer questioned him about any links to any terrorist group. Mr. Arar “vehemently denied any such membership or affiliation.” Allegedly, he was “chained and shackled, put in a vehicle, and driven to another building at JFK, where he was placed in solitary confinement.”

The next evening, after further questioning, the complaint alleged that an immigration officer asked him to “‘volunteer’ to be sent to Syria.” Mr. Arar refused and was later sent to a detention center in Brooklyn where he was strip-searched. For the next three days, Mr. Arar stated that the Government did not permit him to use the phone to call his family or an attorney. At the end of the three days,

142. Complaint and Demand for Jury Trial, supra note 140, at 10-11.
143. Id. at 11.
144. Id.
145. Id.
146. Id.
147. Id.
148. Id. at 11-12. A New York Times article which also recounted Mr. Arar’s story stated that Mr. Arar was seen walking with Mr. Almalki in the rain in Canada by a Canadian surveillance team. Scott Shane, The Costs of Outsourcing Interrogation: A Canadian Muslim’s Long Ordeal in Syria, N.Y. TIMES, May 29, 2005, at 10. Although neither the complaint nor the New York Times article explained why Mr. Almalki would raise suspicion, the New York Times article alleged that Mr. Almalki was also later detained in Syria and tortured. Id. In the article, Mr. Arar claimed that the two men were not discussing terrorism, but rather if Mr. Almalki could get him a discount on ink cartridges. Id.
149. Complaint and Demand for Jury Trial, supra note 140, at 12.
150. Id.
151. Id.
152. Id.
154. Id.
Mr. Arar was given a document declaring that the Immigration and Naturalization Services (INS) found him “inadmissible in the United States because he belonged to a organization designated by the Secretary of State as a Foreign Terrorist Organization, namely, Al Qaeda.” At this point, the United States permitted Mr. Arar to call his family, who, in turn, called an attorney. Three days later, more interrogations took place, late on Sunday, October 6, 2002, without Mr. Arar’s attorney present. The complaint alleged that INS falsely told Mr. Arar’s attorney of his whereabouts, and told the attorney to call back the next day to find out Mr. Arar’s current location. On October 8, 2002, the Government informed Mr. Arar that he was being sent to Syria, based on his acquaintances with certain people, including Mr. Almalki. Despite Mr. Arar’s repeated concerns about torture, the officials allegedly stated “that the INS is not governed by the ‘Geneva Convention.’” Purportedly, the Government sent Mr. Arar to a New Jersey airfield, then flew him to Washington, D.C., then to Jordan, and then ultimately to Syria.

Although Mr. Arar’s complaint stated that some beatings occurred in Jordan, it primarily focused on the alleged gruesome torture during his ten-month stay in Syria. According to Mr. Arar, Syrian officials

155. Complaint and Demand for Jury Trial, supra note 140, at 13.
156. Id.
157. Id. at 14. The complaint alleged that Mr. Arar’s attorney was not told about the interrogations until receiving a voicemail that Sunday evening from Defendant McElroy, District Director for INS for New York City. Id. Unfortunately, Mr. Arar’s attorney “did not retrieve the message until she arrived at work the next day, Monday morning, October 7, 2002—long after Mr. Arar’s interrogation had ended.” Id.
158. Id. at 15. The complaint alleged that his attorney “received a call from an INS official falsely notifying her that Mr. Arar had been taken to the INS’s Varick Street offices ‘for processing’ en route to a detention facility in New Jersey.” Id. That same day, she received a second phone call from the INS, “falsely notifying her that Mr. Arar had arrived at the New Jersey detention facility” and to “call back the next day for the exact location.” Id. The complaint further alleged that Mr. Arar had remained at the same detention facility that entire time. Id.
159. Id.
160. Id.
161. Id. 15-16; see also Shane et al., supra note 140. The article reported that federal aviation records corroborated Mr. Arar’s account of where he flew during those days. Id. The report explained that “[t]he records show that a Gulfstream III jet, tail number N829MG, followed a flight path matching the route he described.” Id. This account described a more detailed route within the United States before leaving, describing the flight as “hopscotching from New Jersey to an airport near Washington to Maine to Rome and beyond.” Id.
162. Complaint and Demand for Jury Trial, supra note 140, at 16-19. Mr. Arar alleged that he was detained by the Palestine Branch of Syrian Military Intelligence. Id. at 16. There, Mr. Arar was purportedly subject to Syrian security who “regularly beat him on the palms, hips, and lower back, using a two-inch thick electric cable. They also regularly
released him after they were satisfied that he was not an Al Qaeda member, almost twelve months after he was first detained. On January 22, 2004, Mr. Arar brought a suit against John Ashcroft, then Attorney General of the United States, and other senior Government officials, asserting four claims for relief. The government promptly responded by asserting the state-secrets privilege.

In its recent February 16, 2006 decision, the United States District Court for the Eastern District of New York was able to dance around the state-secrets privilege issue. Judge Trager, who decided the case, stated "that before addressing the state-secrets privilege, it would be more appropriate to resolve the motions to dismiss the statutory and constitutional claims because it was not clear how the confidentiality of

struck Mr. Arar in the stomach, face, and back of the neck with their fists." Id. The torture allegedly included psychological torture as well. Id. Mr. Arar's complaint stated that the Syrian officers "placed him in a room where he could hear the screams of other detainees being tortured. They also repeatedly threatened to place him in the spine-breaking 'chair,' hang him upside down in a 'tyre' and beat him, and give him electric shocks." Id. Mr. Arar stated that he confessed to training with terrorists only because he wanted the torture to stop. Id.

163. Id. at 18-19; cf. Rajiv Chandrasekaran & Peter Finn, U.S. Behind Secret Transfer of Terror Suspects, WASH. POST, Mar. 11, 2002, at A1 (discussing the renditions program).

164. Complaint and Demand for Jury Trial, supra note 140. The complaint lists the following as defendants:

JOHN ASHCROFT, [then] Attorney General of the United States; LARRY D. THOMPSON, formerly Acting Deputy Attorney General; TOM RIDGE, Secretary of State for Homeland Security; JAMES W. ZIGLAR, formerly Commissioner for Immigration and Naturalization Services; J. SCOTT BLACKMAN, formerly Regional Director of the Eastern Regional Office of the Immigration and Naturalization Services; PAULA CORRIGAN, Regional Director of Immigration and Customs Enforcement; EDWARD J. MCELROY, formerly District Director of Immigration and Naturalization Services for New York District, and now District Director of Immigration and Customs Enforcement; ROBERT MUELLER, Director of the Federal Bureau of Investigation; and JOHN DOES 1-10, Federal Bureau of Investigation and/or Immigration and Naturalization Service Agents.

Id. at 1.

165. Id. at 20-24. The first claim for relief is under the Torture Victim Protection Act. Id. at 20. The second, third, and fourth claims for relief are individual Fifth Amendment due process claims. Id. at 20-24.

166. See Memorandum in Support of the United States' Assertion of State-secrets Privilege, Arar v. Ashcroft, No. CV-04-0249 DGT VVP, 2006 WL 346439 (E.D.N.Y. Feb. 16, 2006). The government stated that disclosure surrounding Mr. Arar's claims "would interfere with foreign relations, reveal intelligence-gathering sources or methods, and be detrimental to national security." Id. at 2-3. As such, the government concluded that "plaintiff cannot prove his claims and defendants are deprived of information critical to their defense." Id. at 15.

such information could be maintained without prejudicing [his] ability to hear and fairly respond to plaintiff's arguments.\textsuperscript{168}

In his analysis, Judge Trager held that three out of four claims in Mr. Arar's complaint should be dismissed, for reasons unrelated to the state-secrets privilege.\textsuperscript{169} As such, "the issue involving state secrets is moot" as related to the first three claims.\textsuperscript{170} Yet, the fourth claim, which alleged that Mr. Arar "suffered outrageous, excessive, cruel, inhumane and degrading conditions of confinement in the United States, was subjected to coercive and involuntary custodial interrogation and deprived of access to lawyers and courts, in violation of the Fifth Amendment,"\textsuperscript{171} was not dismissed with prejudice.\textsuperscript{172} The court noted that the government did not seek to use the state-secrets privilege specifically against the fourth claim.\textsuperscript{173} However, the individuals named in the lawsuit "have asserted that all counts—including 4—must be dismissed against them in light of the invocation of privilege by the United States."\textsuperscript{174} Yet, the court reasoned that "[b]ecause . . . the issue of state secrets is of little or no relevance, the individually named defendants' assertion that Count 4 must be dismissed with respect to them in light of the privilege is denied at this time."\textsuperscript{175} Thus, the district court's decision provides some hope that at least some judges are willing to tease out difficult issues in cases before them and not simply use the state-secrets privilege as a blanket of cover for the government.

II. PROPOSALS TO PREVENT ABUSE OF THE STATE-SECRETS PRIVILEGE

Others have already addressed the potential problem of abuse of the state-secrets privilege. A summary of some curative suggestions follows.

\begin{itemize}
  \item \textsuperscript{168} Id.
  \item \textsuperscript{169} Id.
  \item \textsuperscript{170} Id.
  \item \textsuperscript{171} Id. at *6.
  \item \textsuperscript{172} Id. at *35. The court stated that "[i]n sum, Count 4, construed most favorably to plaintiff, alleges a possible 'gross physical abuse' due process violation and perhaps a limited denial of access to counsel right (apart from the rendition aspect of the claim)." Id. at *34. It is important to note that, according to the court, the existing statutory and case law was unable to extend protection to Mr. Arar's claims regarding torture in Syria. Id. at *35. However, the court was willing to hold that if Mr. Arar could "identify the specific injury he was prevented from grieving," id., without referring to the torture in Syria or the rendition program, he would be able to state a claim specific to his treatment in the United States, id. at *34. Thus, the fourth claim that still exists as of publication of this article is relatively narrow in that it focuses only on Mr. Arar's treatment in the United States, but not to his treatment in Syria. Id.
  \item \textsuperscript{173} Id. at *35.
  \item \textsuperscript{174} Id.
  \item \textsuperscript{175} Id.
\end{itemize}
A. Proposed Federal Rule of Evidence 509 as Guidance

The Federal Advisory Committee on the Rules of Evidence proposed Rule 509, which related specifically to the state-secrets privilege.\textsuperscript{176} Section (e) of the proposed rule 509 provided:


SECRET OF STATE AND OTHER OFFICIAL INFORMATION

(a) Definitions

(1) Secret of state. A "secret of state" is a governmental secret relating to the national defense or the international relations of the United States.

(2) Official information. "Official information" is information within the custody or control of a department or agency of the government the disclosure of which is shown to be contrary to the public interest and which consists of: (A) intragovernmental opinions or recommendations submitted for consideration in the performance of decisional or policymaking functions, or (B) subject to the provisions of 18 U.S.C. § 3500, investigatory files compiled for law enforcement purposes and not otherwise available, or (C) information within the custody or control of a governmental department or agency whether initiated within the department or agency or acquired by it in its exercise of its official responsibilities and not otherwise available to the public pursuant to 5 U.S.C. § 552.

(b) General rule of privilege. The government has a privilege to refuse to give evidence and to prevent any person from giving evidence upon a showing of reasonable likelihood of danger that the evidence will disclose a secret of state or official information, as defined in this rule.

(c) Procedures. The privilege for secrets of state may be claimed only by the chief officer of the government agency or department administering the subject matter which the secret information sought concerns, but the privilege for official information may be asserted by any attorney representing the government. The required showing may be made in whole or in part in the form of a written statement. The judge may hear the matter in chambers, but all counsel are entitled to inspect the claim and showing and to be heard thereon, except that, in the case of secrets of state, the judge upon motion of the government, may permit the government to make the required showing in the above form in camera. If the judge sustains the privilege upon a showing in camera, the entire text of the government's statements shall be sealed and preserved in the court's records in the event of appeal. In the case of privilege claimed for official information the court may require examination in camera of the information itself. The judge may take any protective measure which the interests of the government and the furtherance of justice may require.

(d) Notice to government. If the circumstances of the case indicate a substantial possibility that a claim of privilege would be appropriate but has not been made because of oversight or lack of knowledge, the judge shall give or cause notice to be given to the officer entitled to claim the privilege and shall stay further proceedings a reasonable time to afford opportunity to assert a claim of privilege.

(e) Effect of sustaining claim. If a claim of privilege is sustained in a proceeding to which the government is a party and it appears that another party is thereby deprived of material evidence, the judge shall make any further orders which the interests of justice require, including striking the testimony of a
If a claim of privilege is sustained in a proceeding to which the government is a party and it appears that another party is thereby deprived of material evidence, the judge shall make any further orders which the interests of justice require, including striking the testimony of a witness, declaring a mistrial, finding against the government upon an issue as to which the evidence is relevant, or dismissing the action.\textsuperscript{177}

Thus, the proposed rule provided for judicial procedures when the “interests of justice require” because a party was “deprived of material evidence” due to invocation of the state-secrets privilege.\textsuperscript{178} Although acknowledging that the state-secrets privilege could be used to dismiss a case,\textsuperscript{179} the Advisory Committee Notes stated that, in cases where the state-secrets privilege is invoked by the government to block privileged material relating to the plaintiff’s claim against the government, prior case law indicated “an unwillingness to allow the government’s claim of privilege for secrets of state to be used as an offensive weapon.”\textsuperscript{180}

Congress, however, never adopted proposed Rule 509.\textsuperscript{181} Legislative history suggests that there was considerable controversy surrounding rules related to specific privileges.\textsuperscript{182} Instead, Federal Rule of Evidence 501 was adopted, which is a more simplified version and does not specifically recognize the state-secrets privilege.\textsuperscript{183}

Despite the fact that Rule 509 was never adopted, one author believes that the proposed Rule 509 may still provide guidance on how to

\textsuperscript{177}Id., reprinted in 2 DAVID W. LOUISELL & CHRISTOPHER B. MUELLER, FEDERAL EVIDENCE app. A at 1162-63 (rev. ed. 1985).
\textsuperscript{178}Id. \textsection (e), reprinted in 2 DAVID W. LOUISELL & CHRISTOPHER B. MUELLER, FEDERAL EVIDENCE app. A at 1163 (rev. ed. 1985).
\textsuperscript{180}Id. advisory committee's note, reprinted in 2 DAVID W. LOUISELL & CHRISTOPHER B. MUELLER, FEDERAL EVIDENCE app. A at 1165 (rev. ed. 1985).
\textsuperscript{181}See id. supra note 30, at 770.
\textsuperscript{182}See id. According to the author, the legislative history illustrated that the proposed privilege rule was “‘extremely controversial.’” Id. (quoting S. REP. NO. 93-1277, at 6 (1974)). In addition, the author summarized that since no one could agree on a specific privilege rule, thereby threatening to prevent other rules from passing, a more watered-down or generalized version of the rule was passed in Rule 501. See id.
\textsuperscript{183}See id. (“Congress instead adopted a bare-bones Rule 501, which provides that privileges in the federal courts shall be determined according to ‘the principles of the common law as they may be interpreted . . . in the light of reason and experience.’” (alteration in original) (quoting FED. R. EVID. 501)).
interpret Rule 501. To support this assertion, the author points to *Liuzzo v. United States*, where a district judge relied on proposed Rule 509, specifically section (e), as guidance on whether to admit a government record when the government sought to block it from discovery. In *Liuzzo*, the government asserted an executive privilege, specifically the “deliberative process” privilege, which “protects from discovery ‘intragovernmental documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.’”

The court stated that it “must accommodate the government’s professed need for secrecy with the plaintiffs’ need to prove their case.” First, the court stated that the government did not need to show the contested report in camera. The court reasoned that “[t]his approach reduces judicial interference in the internal workings and autonomy of the executive branch, and gives due regard to the formal claim of privilege asserted by the Attorney General.” However, the court recognized that the plaintiffs’ needs must also be addressed. If the plaintiffs could establish on remand that removal of the contested report from discovery deprives them of material evidence as set forth in proposed Rule 509, then “the court [would] follow the suggested procedure in Rule 509(e) and enter a finding of liability on the part of the defendant.” The rationale behind this procedure would be followed “to reconcile the competing interests” involved in the case. The court stated that “[w]hen government claims the right to refuse information as to its conduct on the theory that harm

184. See id. at 771 (“Even though parts of the proposed rule engendered serious controversy, there is authority that they provide guidance as to how privileges are to be determined and implemented under Rule 501.”).

185. 508 F. Supp. 923 (E.D. Mich. 1981). In *Liuzzo*, plaintiffs brought an action against the FBI, alleging that the agency was responsible for the murder of the plaintiffs’ mother, Ms. Viola Liuzzo. Id. at 926. In 1965, Ms. Liuzzo went to Alabama to participate in a voting rights march. Id. While traveling to the march, members of the Ku Klux Klan shot and killed Ms. Liuzzo. Id. One of the persons present with the Ku Klux Klan when they shot her was Gary Thomas Rowe, an FBI informant. Id.

186. Id. at 939. The report was the result of an investigation of the FBI by the Office of Professional Responsibility, which delved into the FBI’s handling of Mr. Rowe as an informant. Id. at 936.

187. Id. at 937 (quoting Carl Zeiss Stiftung v. V.E.B. Carl Zeiss Jena, 40 F.R.D. 318, 324 (D.D.C. 1966)). The Attorney General asserted a formal claim of privilege because, he argued, “the disclosure of the report would jeopardize not only the deliberative processes involved in this investigation but in other investigations as well.” Id. at 939.

188. Id. at 939.

189. Id. at 940.

190. Id.

191. See id. (“Plaintiff’s needs, however, can and will be met.”).

192. Id.

193. Id.
would come to its efforts to protect society, that same society can recompense plaintiffs for their injuries."\(^{194}\)

The court further explained that "this approach is appropriate in this type of case because it allows plaintiffs to realize their goals—the award of money damages for their losses—while not intruding on the internal processes of the executive branch."\(^{195}\) However, the court warned in dicta that the approach used in this case may not be appropriate for state-secrets cases.\(^{196}\) The court distinguished between the privileged materials involved in *Liuzzo*, which related to internal policies, from privileged materials relating to state-secrets.\(^{197}\) The court recognized that disclosure in state-secrets cases could potentially "jeopardize the security or welfare of this nation."\(^{198}\)

One author suggested that the approach used in *Liuzzo* may be appropriate for cases involving state-secrets, despite the court's hesitation.\(^{199}\) Professor Askin argued that the approach used by the court permits the government to maintain its secrets and allows plaintiffs compensation.\(^{200}\) Thus, "in the interest of justice," if the remedy does not force disclosure, it should not matter "whether the claim of privilege is based on a military secret or some other reason."\(^{201}\)

### B. Judicial Procedural Tools

Another author made a similar proposal to the suggestion that judges should follow proposed Rule 509.\(^{202}\) Proposed Rule 509, in essence, provides judicial procedural tools to help compensate a litigant when an asserted privilege by the government blocks "essential material."\(^{203}\) This author suggested that judicial procedural tools such as protective

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194. *Id.* at 941.
195. *Id.* at 940. The court added that the government was not "unduly penalized" by the decision. *Id.*
196. *Id.* at 940-41.
197. *Id.*
198. *Id.* at 940.
199. See Askin, *supra* note 30, at 772.
200. *Id.*
201. *Id.*
orders,\textsuperscript{204} in camera proceedings,\textsuperscript{205} construing facts in favor of the deprived litigant, and shifting burdens against the government were all legitimate ways to help support the deprived litigant after the state-secrets privilege had been upheld in favor of the government.\textsuperscript{206} The author suggested that if protective orders or in camera proceedings are not sufficient to protect national security, courts could create a summary of documents upon which litigation could occur.\textsuperscript{207} The author drew this

\textsuperscript{204} A protective order is defined as "[a] court order prohibiting or restricting a party from engaging in conduct (esp. a legal procedure such as discovery) that unduly annoys or burdens the opposing party or a third-party witness." BLACK'S LAW DICTIONARY 1260 (8th ed. 2004).

\textsuperscript{205} In camera is defined as "1. In the judge's private chambers. 2. In the courtroom with all spectators excluded. 3. (Of a judicial action) taken when court is not in session." \textit{Id.} at 775.

\textsuperscript{206} See Note, \textit{supra} note 15, at 587-88.

\textsuperscript{207} \textit{Id.} at 588 n.91. The author cited \textit{In re Attorney General of the United States}, 596 F.2d 58 (2d Cir. 1979) in support of this suggestion. \textit{Id.} In \textit{In re Attorney General}, the plaintiffs were the Socialist Workers Party (SWP), its affiliate, the Young Socialist Alliance (YSA), and some individual members. \textit{In re Attorney Gen.}, 596 F.2d at 60. The plaintiffs alleged that, under the Federal Tort Claims Act, the FBI unlawfully investigated their organizations "with the purpose of disrupting or destroying them." \textit{Id.} The investigation of these organizations involved approximately 1300 informants, 300 of which were members of the SWP or YSA. \textit{Id.} During the pre-trial stages, one of the informant's files became public for reasons unrelated to the case. \textit{Id.} at 60 n.1. The plaintiffs compared the now public file to answers to interrogatories they had received from the government. \textit{Id.} The comparison proved that the government had failed to make important disclosures, namely that the informant "had removed documents from SWP and YSA offices." \textit{Id.} The plaintiffs then demanded production of additional informants' files to ensure the accuracy of the government's discovery responses. \textit{Id.} at 60. The trial judge ordered that the government show opposing counsel summaries of the informants' files. \textit{Id.} After a failed compromise between the government and the trial court, the Attorney General refused to comply with the disclosure order. \textit{Id.} at 60-61. Similar to a state-secrets privilege case where secrecy is critical, the government was concerned with releasing the informants' names in breach of a confidentiality pledge the FBI makes with its informants. \textit{Id.} at 64 n.11. The government feared that breach of this confidentiality "would signal to other informants and potential informants that the United States would not or could not continue to honor the pledge of confidentiality which has been the cornerstone of its relationship, . . . thereby adversely affecting the ability of other law enforcement agencies." \textit{Id.}

Somewhat boldly, the trial court placed the Attorney General under civil contempt for failure to comply with the discovery order, despite the government's concerns. \textit{Id.} at 61. The United States Court of Appeals for the Second Circuit reviewed, among other issues, whether the contempt order was proper and whether other, better, options were available. \textit{Id.} at 65. The court summarized available sanctions under Federal Rule of Civil Procedure 37(b)(2):

(1) an order that "designated facts shall be taken to be established"; (2) an order "refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence"; and (3) an order "striking out pleadings or parts thereof . . . or rendering a judgment by default."
suggestion from a case where the government was sanctioned for non-compliance with a discovery order,\textsuperscript{208} which is different than a case involving a state-secrets privilege.\textsuperscript{209} In a state-secrets privilege case, the government invokes a “special legal right”—which is very different from failing to comply with a judicial order to produce discovery.\textsuperscript{210} However, even though the state-secrets privilege involves no wrongdoing on the government’s part, the effect of refusing to comply with a discovery request and invocation of the state-secrets privilege is often the same—a claimant may be left without the ability to proceed on an otherwise meritorious claim.\textsuperscript{211} The proposal to use sanitized summaries of privileged information or proposed findings of fact designed to negate the withholding of privileged information by the government should offset the harshness that often results from invocation of the state-secrets privilege.\textsuperscript{212}

C. Specialized Courts

One author has suggested that a specialized court would aid judges in balancing between the need to protect national security and the need to protect a person’s basic right to due process.\textsuperscript{213} The court could be modeled after the current Foreign Intelligence Surveillance Court (FISC).\textsuperscript{214} The FISC specializes in approving government collection of\textsuperscript{215}

\textit{Id.} (alteration in original) (quoting FED. R. CIV. P. 37(b)(2)). Because options other than contempt were available, the court overruled the contempt order. \textit{Id.} at 67. Then, the appellate court ordered that the lower court use alternate sanctions “which, so far as possible, put plaintiffs in the position that they would have been in if the Government had disclosed the information.” \textit{Id.} The appellate court suggested that the “district court produce[] a set of representative findings from the informant files for the benefit of the plaintiffs.” \textit{Id.} The appellate court even drew up sample fill-in-the-blank templates which the government could use to show the number of informants present at a meeting, for example, without disclosing their identities. \textit{Id.} app. at 68.

\textsuperscript{208} See supra note 207.

\textsuperscript{209} See \textit{In re Attorney Gen.}, 596 F.2d at 60-62 (detailing several government defenses but none involving the state-secrets privilege).

\textsuperscript{210} BLACK’S LAW DICTIONARY 1234 (8th ed. 2004) (defining privilege).

\textsuperscript{211} See, e.g., supra note 207 (discussing a case involving non-compliance with discovery order).

\textsuperscript{212} Compare supra note 207 (discussing a case involving non-compliance with discovery order), \textit{with} United States v. Reynolds, 345 U.S. 1, 3-4, 7-8 (1953) (involving the state-secrets privilege blocking an accident report from discovery).

\textsuperscript{213} See \textit{In re Attorney Gen.}, 596 F.2d at 68-69.

\textsuperscript{214} See Silverman, supra note 15, at 1124-27.

\textsuperscript{215} \textit{Id.} at 1124-25. The author explained that “[t]he FISC was created under the Foreign Intelligence Survey Act (‘FISA’) in response to the domestic spying scandals of the Nixon era.” \textit{Id.} at 1124. The Rules of the Foreign Intelligence Surveillance Court are available at http://www.aclu.org/patriot_foia/2003/court_rules.pdf.
foreign intelligence, and "deliberates behind... spy-proof doors in a windowless, vault-like room in the headquarters of the Department of Justice." Although the standard for invoking the privilege would remain the same, judges on a special court would be able to ask more questions and "feel more comfortable in criticizing classification decisions that seem dubious or overbroad." In addition, the court would use judges who were experts in the field. Also, a specialized court would promote expedited dockets. Thus, even critical issues arising during a military conflict could be dealt with quickly and would not become moot before appearing before the court. While this is a solid proposal for a long term solution, a more immediate solution is necessary for current cases such as Arar and Edmonds.

D. The Comparative Standard

One author proposed that judges should look at the litigant's need for the information, in addition to the sensitivity of the information sought, in order to determine whether to accept invocation of the state-secrets privilege. Under the current analysis, a litigant's need for the information is used only to determine the scrutiny a judge will apply to determine if the privilege should be granted. For example, if a litigant's need for the controversial discovery is high, then the judge may require an in camera review of the item before determining whether to grant the privilege. If the need is low, then the judge may grant the

216. Silverman, supra note 15 at 1125-26. The hearings are non-adversarial. Id. at 1125. Rather, the government "presents applications to conduct surveillance." Id.
217. Id. at 1125 (alteration in original) (quoting Paul DeRienzo & Joan Moossy, America's Secret Court, http://www.penthouse.com/features/9906fLsecret_court/index2.html (last visited Feb. 17, 2003)).
218. Id. at 1126.
219. Id. The author suggests that "[f]ederal legislation creating a lottery system to designate already appointed civilian federal judges" to this new court "could be a starting point." Id. The author explained that FISA "mandates that the 'Chief Justice of the United States... publicly designate 11 district court judges from 7 of the United States judicial circuits of whom no fewer than 3 reside within 20 miles of the District of Columbia.'" Id. (alteration in original) (quoting 50 U.S.C. § 1803(a) (2000)). The author suggests that the lottery system would be better for the hypothetical court because it would avoid a pro-Republican or a pro-Democrat Chief Justice from filling the court with only judges of the same party. See id. The author also suggests that the judges for the hypothetical court would be trained on classification procedures, have secure chambers, trained staff, and they "should be able to hire former intelligence or military experts to serve as special masters." Id.
220. Id. at 1127.
221. Id.
222. Note, supra note 15, at 584-86.
223. Id.
224. Id.
privilege without even seeing the item. However, the standard for upholding the privilege is the same in both scenarios—whether there is any threat against national security. If a threat is found, “even the most compelling necessity cannot overcome the privilege.” Thus, under the current analysis, a small threat to national security can trump a litigant’s large need for the evidence to proceed with the case. The author suggested that the litigant’s need for the evidence should be weighed at an early stage of the analysis to avoid unnecessarily removing evidence, or worse, stopping litigation from proceeding.

While the comparative standard analysis is interesting, it does not offer assistance where the government demands dismissal of a claim before there is evidence to weigh. *Edmonds* illustrates this point. Ms. Edmonds argues that she can litigate even without the allegedly privileged report. Where the government successfully relies on the *Totten* standard, the case is dismissed and the claimant is thereby deprived access to the comparative standard for assistance. As a result, the suggested comparative standard analysis is relevant only where the government’s assertion of the privilege is confined to a piece of evidence as opposed to cases where the government seeks to bar the litigation.

**E. The Reynolds Standard for Judicial Review**

The trend of increased dismissals based on the state-secrets privilege may reflect an erosion of a judicial check on the state-secrets privilege.

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225. *Id.*

226. *Id.*

227. *Id.*

228. *See id.* at 574-75.

229. *See id.* at 584-86.


231. *See id.* at 17-19.

232. *See id.*

233. *See Weaver & Pallitto, supra* note 11, at 87. Weaver and Pallitto noted that “[t]he privilege seems to be ultra-constitutional, for the courts have not forced the government to disclose agency-held classified information in any case in which the privilege has been asserted, even when the basis for compulsion has been the assertions of a constitutional right.” *Id.*; see also Cass R. Sunstein, *Minimalism at War*, 2004 SUP. CT. REV. 47, 47-56. Professor Sunstein argued that, especially during national emergencies, two polar positions can be taken. *Id.* at 47-50. The first is described as “National Security Maximalism.” *Id.* at 49-50. The author explained that “National Security Maximalists understand the Constitution to call for a highly deferential role for the judiciary, above all on the ground that when national security is threatened, the President must be permitted to do what needs to be done to protect the country.” *Id.* Liberty Maximalists, on the other hand, “insist that in times of war, at least as much as in times of peace, federal judges must protect constitutional liberty.” *Id.* at 50. While the author ultimately embraces what he argued as an intermediate position, a so-called “minimalist position,” *id.* at 51, he
This result follows from the judiciary’s inclination to give “utmost deference” to the executive branch. While a court’s desire to maintain secrecy is understandable, the deference emanating from Reynolds towards claims of national security leads to failures of judicial oversight that threaten our constitutional arrangement of powers. By not acting as a final check, “courts double the damage.” Based on the gradual upswing of cases dismissed on the basis of the state-secrets privilege, and especially in light of the dramatic fact patterns seen in more recent cases like Edmonds and Arar, a reexamination of judicial deference is warranted.

recognized that “unmistakable forms of National Security Maximalism, rather than an intermediate approach, can be found in several places in recent years.” Indeed, the author cited to Edmonds as one example of National Security Maximalism. See United States v. Nixon, 418 U.S. 683, 710 (1974) (“As to these areas of Art. II duties the courts have traditionally shown the utmost deference to Presidential responsibilities.”).

See Weaver & Pallitto, supra note 11, at 89 (“Agency officials argue, and courts often agree, that judges and lay people are incompetent to assess the danger that the release of information may pose to national security . . . .”).

Id. at 102-03; see also Hamdi v. Rumsfeld, 542 U.S. 507, 545 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment). Justice Souter stated:

In a government of separated powers, deciding finally on what is a reasonable degree of guaranteed liberty whether in peace or war (or some condition in between) is not well entrusted to the Executive Branch of Government, whose particular responsibility is to maintain security. For reasons of inescapable human nature, the branch of the Government asked to counter a serious threat is not the branch on which to rest the Nation’s entire reliance in striking the balance between the will to win and the cost in liberty on the way to victory . . . . A reasonable balance is more likely to be reached on the judgment of a different branch . . . .

Id. Professor Sunstein also argued that too much judicial deference (or what he referred to as National Security Maximalism) “understates the risks of unlimited presidential authority.” Sunstein, supra note 233, at 69. One risk includes the notion that because the executive branch is run by one person, who is “constitutionally entitled to fill his branch with like-minded people,” this branch is subject to the problem of “groupthink.” Id. at 69-72. In other words, “like-minded people tend to end up thinking a more extreme version of what they thought before deliberation began.” Id. at 69. For example, commenting on a 2004 Senate Select Committee on Intelligence Report, Sunstein stated that the CIA’s “predisposition to find a serious threat from Iraq led it to fail to explore alternative possibilities or to obtain and use the information that it actually held.” Id. at 71. The Committee specifically accused the CIA of “groupthink.” Id. at 70-71. A second risk resulting from too much judicial deference occurs where liberties are taken from only certain groups as opposed to “all or most.” Id. at 72. Where liberties are taken from “all or most,” it is likely that enough force will be present in the general public to make necessary changes in the government through the election process. Id. However, if only portions of the population are affected, “the political check is weakened.” Id.

Weaver & Pallitto, supra note 11, at 103.

See supra note 74.
III. PROPOSAL TO PREVENT ABUSE OF THE STATE-SECRETS PRIVILEGE: AMEND THE FEDERAL RULES OF EVIDENCE TO INCLUDE CHECKS ON THE STATE-SECRETS PRIVILEGE WHILE ADDRESSING LEGITIMATE LEGISLATIVE CONCERNS ABOUT PRESERVING THE PRIVILEGE

Although the first attempt failed in the 1970s to create a federal rule of evidence specifically addressing the state-secrets privilege, Congress should again attempt to provide guidance and balance in light of the increased use of the state-secrets privilege, the Tenet distinction between the Totten rule and the state-secrets privilege, recent signs of potential over-classification, and extreme cases like Arar v. Ashcroft. A new rule, created by Congress, would also act as an additional check on the apparently growing executive power. The new rule can be largely based on the proposed Rule 509 as a starting point, but it should also address each of these newer issues.

For example, the new rule could take the following form:

Rule X. The Military and State-Secrets Privilege.

(a) General rule of privilege. The government has a privilege to

239. See supra notes 181-83 and accompanying text.
240. See supra note 73 and accompanying text.
241. See supra text accompanying notes 77-85.
242. See supra note 90.
243. No. CV-04-0249 DGT VVP, 2006 WL 346439 (E.D.N.Y. Feb. 16, 2006); see also supra notes 138-66 and accompanying text. Mr. Arar's attorneys argued that "[i]t is one thing to invoke the state-secrets privilege to bar litigation of an employment dispute; it is another matter entirely to permit its invocation to immunize government officials from allegations that they were complicit in torture and prolonged arbitrary detention." Plaintiff Maher Arar's Memorandum of Law in Opposition to Defendant's Invocation of the State-secrets Privilege at 31, Arar, 2006 WL 346439 (No. CV-04-0249 DGT VVP). The attorneys further stated that "[a] government should not be able to shield itself from accusations of genocide, slavery, torture, or prolonged arbitrary detention by claiming that its decisions to engage in the conduct are secret." Id. at 32. Finally, the attorneys argued that "while the state-secrets privilege has been described as 'absolute,' there must be a point at which even its limits have been surpassed." Id.

244. See Sunstein, supra note 233, at 76-77 (arguing the importance of a minimalist judicial approach during wartime in which the judiciary should look to see if the executive and the congressional branches are in sync). The importance of involving the legislative branch is compounded by Alexander Hamilton's view that "[t]he judiciary is beyond comparison the weakest of the three departments of power; that it can never attack with success either of the other two; and that all possible care is requisite to enable it to defend itself against their attacks." The Federalist No. 78, at 402 (Alexander Hamilton) (George W. Carey & James McClellan ed., 2001) (footnote omitted). However, the role of the judiciary is not to be overly minimized. See id. at 405-06. Hamilton also stated that "judges may be an essential safe-guard against the effects of occasional ill humours in the society." Id. at 406. In addition, Hamilton stated that the judiciary "not only serves to moderate the immediate mischiefs of those which may have been passed, but it operates as a check upon the legislative body in passing them." Id.

245. See supra note 176.
refuse to give evidence and to prevent any person from giving evidence upon a showing of reasonable likelihood of danger that the evidence will result in a threat to the national security of the United States government. However, the privilege is "not to be lightly invoked."247

(b) Procedures. The privilege must be in writing and lodged by the head of the department which has control over the matter, after actual personal consideration by that officer.248 If possible, counsel for all relevant parties involved in the lawsuit should be permitted to view the privileged information.249 If this is not possible due to national security concerns, then the judge should opt to use protective orders or in camera proceedings as a means to maintain the case and protect national security.250 The government should make a minimal showing that the document is not over-classified.251 If the judge sustains the privilege upon a showing in camera, the entire text of the government's statements shall be sealed and preserved in the court's records in the event of appeal.252

c) Distinction from the Totten rule. If the government argues that a

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246. This line of Proposed Rule X was largely taken from Proposed Federal Rule of Evidence 509(b). FED. R. EVID. 509(b) (proposed draft), reprinted in 2 DAVID W. LOUISELL & CHRISTOPHER B. MUELLER, FEDERAL EVIDENCE app. A at 1162 (rev. ed. 1985).


248. Except for the writing requirement, this language was taken directly from United States v. Reynolds. Id. at 8.

249. Proposed Federal Rule of Evidence 509(c) discussed this notion. FED. R. EVID. 509(c) (proposed draft), reprinted in 2 DAVID W. LOUISELL & CHRISTOPHER B. MUELLER, FEDERAL EVIDENCE app. A at 1163 (rev. ed. 1985). The relevant portion stated that

[the judge may hear the matter in chambers, but all counsel are entitled to inspect the claim and showing and to be heard thereon, except that, in the case of secrets of state, the judge upon motion of the government, may permit the government to make the required showing in the above form in camera.]


251. See supra notes 90-92 and accompanying text.

252. This line was taken directly from Proposed Federal Rule of Evidence 509(c). FED. R. EVID. 509(c) (proposed draft), reprinted in 2 DAVID W. LOUISELL & CHRISTOPHER B. MUELLER, FEDERAL EVIDENCE app. A at 1163 (rev. ed. 1985).
case should be dismissed at the pleadings stage, prior to discovery, the government ought to proceed under the Totten rule, which is distinct from the state-secrets privilege as clarified in Tenet v. Doe.\textsuperscript{253} However, if the government argues that a portion of discovery should be blocked, due to national security concerns, then the government should proceed using the state-secrets privilege as prescribed in section (b) of this Rule.

(d) Effect of invoked claim upheld. If the government properly invokes the state-secrets privilege and it is upheld, thereby depriving a party of critical evidence, the judge shall make any further orders which the interests of justice require.\textsuperscript{254} The orders may include striking the testimony of a witness, declaring a mistrial, or finding against the government upon an issue as to which the evidence is relevant.\textsuperscript{255} The judge should dismiss the trial only under extreme circumstances where none of the above-stated or other suggestions will protect national security.

IV. CONCLUSION

The increasing number of cases involving the state-secrets privilege, especially those resulting in dismissal at the pleadings stage, the Tenet holding, possible over-classification resulting in an overly-broad use of the privilege, and cases like Arar are all reasons why Congress should revisit the state-secrets privilege issue. A new rule of evidence addressing the state-secrets privilege, incorporating legitimate state concerns and addressing new problems, would help contain the expansion of the state-secrets privilege.

\textsuperscript{253} 125 S. Ct. 1230 (2005); see also supra text accompanying notes 77-85.

\textsuperscript{254} This line was largely taken from Proposed Federal Rule of Evidence 509(e). \textsc{Fed. R. Evid.} 509(e) (proposed draft), \textit{reprinted in} 2 \textsc{David W. Luiell & Christopher B. Mueller, Federal Evidence} app. A at 1163 (rev. ed. 1985).

\textsuperscript{255} This line was directly taken from Proposed Federal Rule of Evidence 509(e). \textsc{Fed. R. Evid.} 509(e) (proposed draft), \textit{reprinted in} 2 \textsc{David W. Luiell & Christopher B. Mueller, Federal Evidence} app. A at 1163 (rev. ed. 1985).