The State Secrets Privilege†

Military and diplomatic secrecy often conflicts with fairness to litigants who are disadvantaged by their inability to discover information withheld due to assertion of the state secrets privilege. The author of this article examines the issues involved in this conflict. He suggests a proper role for the courts in determining the validity of a claim of privilege and considers the weight to be accorded the governmental assertion of that privilege. The author follows with an examination of the privilege in specific litigation contexts: the criminal case, civil cases where the Government is the plaintiff, and civil cases where the Government is the defendant. He then concludes with a discussion of recent trends in the use of the privilege, urging that the reasons for the privilege be borne in mind in determining its utility in particular litigation contexts.

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INTRODUCTION

The privilege of the Government to refuse to reveal military or diplomatic information in court is universally recognized, when disclosure would undermine national security.¹ This privilege, the state secrets privilege, should be distinguished from two other privileges for governmental information: the privilege not to reveal the identity of an informer, and the privilege not to reveal "official information." Official information concerns the internal affairs of the state, acquired by public officials in the course of duty or transmitted from one public official to another in the course of duty.² A third privilege is the executive privilege

†The opinions expressed in this article are those of the author and are not intended to represent the views of the Office of the State's Attorney of Cook County, Illinois.

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². Uniform Rule of Evidence §4.
which is often asserted to justify the executives personal refusal to release information.\(^3\)

The state secrets privilege and the official information, informer, and executive privileges do rest, however, on substantially similar policies and give rise to similar doctrines. Consequently, much of the following discussion is based on material and precedents dealing with a privilege other than that of state secrets. Parenthetically, the use of the word "privilege" in connection with state secrets may be technically inappropriate, for at least once the Supreme Court has forced the Government to withhold information which it was quite willing to produce.\(^4\) For our purposes, however, we may assume:

The privilege belongs to the Government and must be asserted by it; it can neither be claimed or waived by a private party. It is not to be lightly invoked. There must be a formal claim of privilege, lodged by the head of the department which has control over the matter, after actual personal consideration by that officer.\(^5\)

This article examines the state secrets privilege as it exists today and the various problems created when the privilege is recognized.\(^6\) It also suggests a resolution of some of these problems. The kinds of documents or testimony that should be privileged as state secrets are considered in light of the relation of secrecy to the national interest, the definitions and concepts used in determining the need for secrecy, and the effect that courtroom revelation has upon secrecy. The article then examines the court's proper role in determining a claim of privilege by considering the power to make and the propriety of making an independent judicial decision on the claim of privilege. The article goes on to deal with the status of the privilege in civil and criminal cases where the Government is a party. For reasons of convenience, exercise of the privilege where the Government is not a party is
examined in the section on the power of the courts to decide issues of privilege.

I. THE ISSUES INVOLVED

Determining whether something should be privileged as a state secret requires a balancing of interests. The public interest in maintaining the secrecy of some military or diplomatic information must be balanced against the public and private interest in maintaining fairness and efficiency in litigation. Most legal discussions of the privilege assume that the nature of the interests at stake is clear to those who must determine whether or not to recognize the privilege. This assumption is partly justified since courts and lawyers are familiar with the values of an adequate litigation system. But the legal profession rarely has occasion to consider the interests served by governmental secrecy; this is the province of the intelligence officer. The values and limitations of military and diplomatic secrecy should therefore be examined.

The primary focus of this examination will be on military secrecy. The instances when purely diplomatic secrets are likely to be tenaciously safeguarded are few.

7. This problem has sometimes been referred to as a conflict between the public interest in secrecy and the private interest of the litigant. See, e.g., Note, 10 OKLA. L. REV. 336 (1957). However, to so state the problem is to eliminate it. See Pound, A Survey of Social Interests, 57 HARV. L. REV. 1 (1943).


9. The infrequency of litigation involving purely diplomatic secrets may be attributed to: (1) The military value of much of the highly sensitive diplomatic information; (2) the lack of a direct relationship between the diplomatic establishment and the daily functions of the commercial community; (3) diplomatic acts tend to reveal quickly the underlying diplomatic workmanship; those aspects of diplomacy that remain hidden usually involve arrangements contingent on events with military overtones; (4) the need for diplomatic secrecy is usually limited to the period of negotiation, normally of short duration. It is noteworthy that the State Department has had very few documented instances of refusal to disclose information. House Comm. on Gov't Operations, Availability of Information from Federal Departments and Agencies, H.R. REP. No. 2084, 86th Cong., 2d Sess. 31-32 (1960).

Most highly sensitive diplomatic information will also involve profound considerations of national defense; thus, there will be an immediate interest in preserving secrecy for military reasons.
A. SECRECY AND THE PUBLIC INTEREST

In considering secrecy and the public interest, one must distinguish between periods of peace and times of war. During a war the necessity and benefits of secrecy are clear. Until very recently wartime military secrets involved easily recognizable facts such as the number and disposition of troops, strategy and tactics, and designs for military machinery. During peacetime the military establishment was relatively inactive and insulated.

Today, however, the military establishment cannot be quiescent during peacetime. The technology of war is complex and extensive. Large segments of industry are constantly occupied with national defense. Thus, one must face the vital questions. How much secrecy is needed? What is the cost of too little or too much secrecy?

Some secrecy in military matters is obviously essential to the national defense, yet there are some very direct limits on its value. First, secrecy has harmful effects on the democratic form of government. Congress' ability to supervise the military establishment is a function of information. An uninformed Congress must either abdicate its power to the knowledgeable or exercise that power blindly. Even if Congress receives adequate information, secrecy reduces the number of non-Government experts from whom Congress may seek disinterested opinions. Military policy, like economic and foreign policy, is grounded on the values and beliefs of the nation's citizens. As secrecy increases, the


11. Reference to pertinent congressional hearings will disclose that a very small percentage of nongovernmental witnesses testify at congressional hearings on military and intelligence affairs.

availability of knowledge necessary for the public to make and express a meaningful opinion decreases.

Second, secrecy inhibits the interchange of ideas and information which is essential to scientific progress.\textsuperscript{13} The detrimental effects of secrecy are probably most notable in this area. "Secrets represented by weapons already developed or even by plans in laboratory files become insignificant in comparison with the importance of new ideas and new concepts. . . . Secret research in selected laboratories offers the poorest prospect for rapid progress. . . ."\textsuperscript{14}

Third, secrecy retards industrial development in new technological fields. So much advanced research is secret that many investors understandably fear that a new enterprise based on unclassified information is outdated or soon will become so.\textsuperscript{15} Additionally, defense contracting based on secret technologies bolsters monopoly.\textsuperscript{16}

Fourth, secrecy is expensive to achieve and expensive to end. The prohibitive cost of removing unneeded secrecy classifications deters their removal.\textsuperscript{17} Finally, secrecy results in less informed executive and military personnel. If a rapidly changing situation requires immediate action, it would be disastrous to rely on a classification officer to promptly provide operating personnel with all necessary information.

Clearly, governmental secrecy tends to hurt the nation, regardless of whether it harms the nation's enemies. Conversely, the harm done to the nation's enemies by secrecy is short-lived, since most modern technological secrets are based upon generally known scientific laws. The amount of time in which a nation with a pool of trained experts can duplicate foreign technical achievements is estimated to range from one to four years.\textsuperscript{18}

The significance of these considerations for the law of state

\textsuperscript{13} The advocates of military secrecy claim that no one should know who does not have a "need to know." Air Force Reg. 205-1, § 1–14 (Oct. 5, 1964), § 4–3 (Jan. 5, 1966); Dep't of Defense Directive No. 5200.1, pt. 4 (Dec. 31, 1964). But, it is almost impossible to determine in advance when there is a "need to know." \textit{Hearings} 1058–59.

\textsuperscript{14} \textit{Hearings} 728–29.


\textsuperscript{16} \textit{Hearings} 1025, 1057, 1064.

\textsuperscript{17} \textit{Hearings} 723–922, 3435–564.
secrets is not wholly clear, but the following implications seem justified. First, generalizations on the values of governmental secrecy will not necessarily simplify a specific decision whether a given piece of evidence is a state secret. But such general observations may make a decision for disclosure easier in a borderline case. Second, the failure of the Government to undertake the expensive program of systematic declassification allows one to reject the suggestion that classified material is entitled to a rebuttable presumption of secrecy.19

B. Definitions and Concepts in State Secrets Problems

The sine qua non of the state secrets privilege is that the public interest is served. In order to make an adequate judgment of the propriety of granting the privilege in a given situation, a specific knowledge of the concepts and definitions used by intelligence officers and government officials in classifying information is required.

There is a widespread belief that there are no true concepts or definitions of state secrets. It is argued that statutes and executive orders do not provide specific meaningful guidelines for case by case determination. "Basically, it is a problem generally requiring case by case handling because the ultimate decision depends upon many factors."20 This operational principle is widely recognized by intelligence officers and is the fundamental tenet of those who believe that only an experienced classification expert can make a valid decision as to secrecy. From this it logically follows that no judge can appreciate and duplicate the expert's decision-making process.

Notwithstanding these beliefs, relatively rigid classifications are suggested by Executive Order 10501:

(a) Top Secret. Except as may be expressly provided by statute, the use of the classification Top Secret shall be authorized, by appropriate authority, only for defense information or material which requires the highest degree of protection. The Top Secret classification shall be

19. See Haydock, supra note 6, at 468. An extremely limited and conservative system for automatic declassification and downgrading of classification is found in a joint directive. Air Force Reg. 205-2, Army Reg. 380-6, OPNAV 5500.40B (Oct. 1, 1962). The system divides information into four groups. The first two are exempt from automatic downgrading. The third is downgraded at twelve year intervals and at the end of twenty-four years is classified as confidential; there is no declassification. The fourth group is downgraded every three years and, at the end of twelve years, is declassified.

applied only to that information or material the defense aspect of which is paramount, and the unauthorized disclosure of which could result in exceptionally grave damage to the Nation such as leading to a definite break in diplomatic relations affecting the defense of the United States, an armed attack against the United States or its allies, a war, or the compromise of military or defense plans, or intelligence operations, or scientific or technological developments vital to the national defense.

(b) Secret. Except as may be expressly provided by statute, the use of the classification Secret shall be authorized, by appropriate authority, only for defense information or material the unauthorized disclosure of which could result in serious damage to the Nation, such as by jeopardizing the international relations of the United States, endangering the effectiveness of a program or policy of vital importance to the national defense, or compromising important military or defense plans, scientific or technological developments important to national defense, or information revealing important intelligence operations.

(c) Confidential. Except as may be expressly provided by statute, the use of the classification Confidential shall be authorized, by appropriate authority, only for defense information or material the unauthorized disclosure of which could be prejudicial to the defense interests of the Nation.21

This executive order, read as a whole, prescribes strict tests for classification. Yet the phrase "defense information or material the unauthorized disclosure of which could be prejudicial to the interests of the Nation" invites administrative expansion so as to include anything related to national defense. It would appear that this invitation has been accepted22 despite the warning implicit in the order itself — "anything related to the national defense" — is too broad a standard.23

Statutes dealing with state secrets also use very broad concepts. Typical language is: "detrimental to the national security,"24 "undue risk to the common defense and security,"25

23. See statement of Professor (now Dean) Frank C. Newman, Hearing 534–35.
"essential in the interest of national defense,"\textsuperscript{26} and "[publication of a patent which would] be detrimental to the public safety or defense or may assist the enemy or endanger the successful prosecution of the war."\textsuperscript{27} These standards tend to include all information dealing with national defense. But arguably, phrases such as "essential in the interest" and "undue risk" indicate there is some national defense information which can be revealed. Such statutes are not a great deal more illuminating than Executive Order 10501 except that Congress tends to make separate provisions for times of peace and times of war.\textsuperscript{28}

The courts have not developed meaningful standards for evaluating state secrets under either statutes or executive orders. Almost all cases follow the leading case, \textit{United States v. Reynolds},\textsuperscript{29} and use conclusory phrases such as "military secrets," "strategic information," or "intelligence value" to describe privileged matter. The opinions do, however, recognize that legal standards of state secrecy may vary, depending on whether the nation is at peace or war.\textsuperscript{30}

Two major concepts of state secrecy are condensed in the phrases "strategic information" and "intelligence value." The sentiments of many of those who use these phrases are summed up in the \textit{United States Navy Security Manual}:

> The work of foreign intelligence agents is greatly simplified by the easy collection of technical facts which appear in publications available to the general public. From an intelligence standpoint, the time and effort which foreign agents must spend to collect such information if it is not made available to the public are very costly and subject the personnel involved to being apprehended for violation of Federal laws. By compelling foreign agents to expend time and money in the collection of such information, their efforts on other projects are automatically curtailed.\textsuperscript{31}

Using these concepts to determine the appropriateness of secrecy is dangerous. The fact that free world intelligence agencies must work very hard to obtain sought-after information while our enemies can often achieve their objectives by subscribing to...

\textsuperscript{29} 345 U.S. 1 (1953).
Aviation Week\textsuperscript{32} does not justify excessive secrecy. Such unequal bargains are part of the price of living in a democracy. The decision to keep something secret cannot be made by answering the question, “would the Russians or Chinese classify it?”

The most recent attempt to categorize state secrets is found in the Atomic Energy Act of 1954.\textsuperscript{33} The act describes with some degree of specificity the content of the special category “Restricted Data”: “The term “Restricted Data” means all data concerning (1) design, manufacture, or utilization of atomic weapons; (2) the production of special nuclear material; or (3) the use of special nuclear material in the production of energy.”\textsuperscript{34} It also explains the conflicting purposes which underlie problems of classification:

It shall be the policy of the Commission to control the dissemination and declassification of Restricted Data in such a manner as to assure the common defense and security. Consistent with such policy, the Commission shall be guided by the following principles . . . .

(b) The dissemination of scientific and technical information relating to atomic energy should be permitted and encouraged so as to provide that free interchange of ideas and criticism which is essential to scientific and industrial progress and public understanding and to enlarge the fund of technical information.\textsuperscript{35}

The statute strikes a compromise between the traditionally broad standards articulated in most statutes and decisions and the concrete approach of the case by case method. Such a compromise should produce reasonably clear rules designed to deal with separate problem areas. Formerly, the A.E.C. Manual contained such rules,\textsuperscript{36} but the present A.E.C. Manual does not deal with

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\item[32.] Dulles, The Craft of Intelligence 239 (1963). President Eisenhower stated that foreign systems spend large amounts to get such information “. . . unless we give it to them for nothing. And since we don’t get it for nothing, I just don’t believe in that kind of trade.” N.Y. Times, April 28, 1955, p. 8, col. 3.
\item[36.] Insofar as control of information may affect progress:
\begin{itemize}
\item[a.] With respect to weapons — Retarding the progress of inimical nations in these activities is to be regarded as generally more important than advancing our own progress.
\item[b.] With respect to fissionable material — Retarding the progress of
policies of classification. While in effect, the classification practices of the Atomic Energy Commission received relatively little criticism.\textsuperscript{37}

One of the principal tenets of this article is that the broad concepts of the classic state secrets theory are of very limited value when standing alone in court. "Injury to the United States" and "advantage to a foreign nation" are the most workable concepts, yet they too are manifestly vague and conclusory. A mere statement to the effect that "disclosure would be detrimental to the public interest" is not an adequate justification for nondisclosure. While a classification of information system must ultimately be based on the considered judgment of security officers that divulgence will harm the national security, such judgments are still made only after the consideration of many factors more objective and concrete than the present statutory and judicial standards.

Although it is beyond the scope of this article to develop complete and specific standards for the judicial classification of state secrets, it is still clear that in the midsixties only information related to a nation's capacity for attack and defense can justifiably be kept secret. The specific areas of sensitive information appear to be: (a) The plans and capabilities of specific combat operations; (b) the official estimates of the military plans and capabilities of potential enemy nations; (c) the existence, design, and production of new weapons or equipment or the existence and results of research programs specifically directed toward producing new weapons and equipment; (d) the existence and nature of special ways and means of organizing combat operations; (e)

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  \item inimical nations is not to be regarded as generally more important than advancing our own progress.
  \item c. With respect to the development of nuclear power—\ldots \text{Such information [of only peripheral interest to weapons or to production of fissionable materials] is likely to be of high value both to industry and to progress in the atomic-energy program. In the field of atomic power, therefore, to a greater extent than in that of the production of fissionable material, the value to ourselves of dissemination of information acquires an increased value as compared to the risk of disclosure to rivals.}
  \item d. With respect to nuclear and allied sciences—In order to promote scientific progress which requires a free interchange of ideas and of criticisms, basic scientific information should not generally be classified\ldots .
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\textsuperscript{37} The lack of criticism may be due to the fact that the AEC may declassify but the military can still withhold the information. Air Force Reg. 205-1E (Jan. 5, 1968).
the identity and location of vulnerable areas such as production facilities, critical supply depots, or weapons installations; (f) the existence and nature of clandestine intelligence operations, special plans, or data; (g) the keys to communication codes; (h) the existence and nature of international agreements relative to military plans and capabilities and the exchange of intelligence.

The criterion used in determining when evidence should be privileged is whether the interests of national security outweigh the interests of fair litigation. The balancing must be made in as specific a context as possible. That is, the decision should be made with the knowledge of exactly what information or material is in question and the purpose for which it is to be disclosed. The decision maker should seek professional advice and use all the articulated expertise of classification. Systematic categorization of properly classifiable material, such as mentioned above, is essential in analyzing the national security interests in a given case. Yet the mere fact that information is sensitive does not mean that it must necessarily be kept secret. The value of military and diplomatic secrecy must be weighed against the general values of free access to information and the general policy of refusing to withhold information from the courts without strong justification. Those secrecy values which survive this balancing must then be considered in light of (1) the comparative relevancy or materiality of the evidence; (2) the litigant’s need for the evidence; (3) the effect on justice if the evidence is privileged. But even when these delicate balancings are completed, the decision cannot be made without knowing how much and to whom the sensitive information will be disclosed. Only then can a proper decision be made.

C. SECRETS AND THE COURTROOM

The most common complaint of the security conscious is that thousands of details of defense programs are published in magazines and congressional reports. By comparison, a particular litigation would rarely disclose more than a small amount of information. Such small amounts of information may, however, be vital. A determination of the propriety of a privilege claimed in litigation will be made by either the executive or the court. If the executive makes the final decision, presumably he will do so after privately examining the materials. If the court makes the

38. Dulles, op. cit. supra note 32, at 239.
decision, its "examination must obviously be ex parte and in camera if the privilege is not to be lost in its assertion." The only argument against this procedure seems to be that there are some things which even a judge cannot be permitted to see. It is strongly urged that such material is relatively rare; no reported case has involved such material. Since the most intimate and shadowed operations of the nation are revealed in detail to Congressmen and their staffs in executive session, it should be no more dangerous, and probably less so, to make the same disclosure to a judge sitting in his chambers.

The claim that an ex parte, in camera hearing violates due process is palpably without merit. Such a hearing is conducted to aid judicial determination of a preliminary evidentiary question. Presumably, the courts could establish, as they have in England, an absolute privilege for government materials contingent only on a proper claim of privilege by the executive. If the courts can do this they can also condition a privilege on the approval of the court sitting ex parte, in camera. As a practical matter, where the claim of privilege is at least arguable the party opposing the Government is faced with a choice of an ex parte, in camera hearing as opposed to the possibility of no hearing at all. Thus, the probability of objection to such a hearing is slim.

If there is a valid claim of privilege, or if the material in question is very sensitive but not quite privileged, it may be possible for the court to utilize the privileged evidence by receiving it in a private hearing. This technique is approved for suits under the

40. Since it is a judicial function to construe the meaning of statutes prohibiting the disclosure of information, a judicial order to the executive to present information to the court constitutes, by implication, a holding that disclosure to the court is not prohibited by statute.
42. If the government has any doubt as to the trustworthiness of a judge, a change of docket could be requested. The lack of direct political pressure on a judge should also be compared to that on a Congressman.

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

Invention Secrecy Act and in British criminal cases under the Official Secrets Act. The in camera hearing is also used in cases involving trade secrets. In such cases it is common to seal records and exhibits and to impose heavy penalties if counsel or parties do not respect secrecy orders. While rules 43 and 77 of the Federal Rules of Civil Procedure provide for open hearings, statutory authority for closed hearings may be inferred from legislative policy forbidding unwise or unnecessary revelation of secret data. Furthermore, while the sixth amendment guarantee of a public trial seems to bar secret hearings in criminal cases, this guarantee is not thought to be transgressed by a court's limiting attendance at a trial concerning acts of moral turpitude. There is, however, no direct authority on the relation of the sixth amendment to the state secrets privilege. The problem of security presented by the necessity of a jury raises the question whether the members of the venire can be limited to good security risks. Some hints on this issue might be found in cases approving blue ribbon juries, but the answer is far from clear.

Except for the well-established trade secrets procedures, use of special courtroom techniques would be costly and clumsy. Further, use of any of the techniques would substantially increase the risk of disclosing secret or sensitive data to unauthorized persons. The best practice would be to allow the use of special techniques in cases involving sensitive information that is not quite privileged. This would allow a more reasonable adjustment to the need for secrecy and the needs of the litigation than is possible under an all-or-nothing approach. It may also induce the Government to permit the use of admittedly privileged evidence when it is required in litigation. Lastly, it should ease the psychological strain on the judiciary when the question of privilege is very close.

The suggestion that secondary evidence of the nonsecret elements of generally secret documents may be offered as an exception to the best evidence rule was contained in United States v. Halpern v. United States, 258 F.2d 36 (2d Cir. 1958). During World War II, federal courts sitting in admiralty could hold secret hearings. See Amendment to Rule 46, 316 U.S. 717 (1942), suspended, 328 U.S. 882 (1946).

44. 10 & 11 Geo. 5, c. 75, § 8(4) (1920).
Haugen, a case involving secret Government contracts for the establishment and maintenance of a plutonium plant. This course was apparently followed at Haugen's second trial. The best practice here would allow the Government to delete privileged matter from a document under court supervision and then present the opposing party with a copy of the document as deleted. However, the Supreme Court in Reynolds was reluctant to use this method when the private party requested copies of an Air Force accident investigation report. The report contained non-secret details of an airplane crash and details on tests of secret electronic equipment. There was "nothing to suggest that the electronic equipment had any causal connection with the accident." The Supreme Court did not disapprove the deletion method, but its conservative attitude toward this procedure indicates that the availability of other special techniques in dealing with privileged material is doubtful unless there is some express or implied statutory authority approving them.

II. ROLE OF THE COURT

The scope of the court's function in determining the validity of a claim of privilege is the great issue of state secrets law. Since the court must decide whether to sustain a claim of privilege in a case before it, the real question is how much deference the court will accord the executive.

A. ENGLISH AND AMERICAN RULES

The leading English case of Duncan v. Cammell, Laird & Co. held that the judge's function in state secrets cases is limited to ascertaining whether the claim is made by the proper officer in the proper form. In Duncan the widow of one of the ninety-five.

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51. Haugen v. United States, 153 F.2d 850 (9th Cir. 1946).
53. 345 U.S. at 11.
54. 3 Wigmore, Evidence § 2379 (McNaughton rev. 1951).
56. [1942] A.C. 624. There are no other reported English state secrets cases. All other English privilege cases deal with official information.
nine persons who died when the submarine Thetis failed to surface during tests brought suit against the private builder of the vessel. The Crown objected to the production of certain documents containing diagrams of the submarine on the grounds that their production would injure the public interest. The court held the claim of privilege by the First Lord of the Admiralty conclusive, though it expressly refrained from deciding whether this would be true if the government itself were a party to the suit.\textsuperscript{58} Confidence in the ability of the Crown Ministers to decide fairly whether the privilege was legally justified did not prevent their Lordships from exhorting the Ministers not to claim the privilege on improper grounds.\textsuperscript{59} It is clear that although the British courts will not challenge the executive's decision to withhold, the executive is not lawfully entitled to decide as he pleases but must apply a legal standard. In retrospect, the claimed privilege in \textit{Duncan} was probably justified since the documents revealed that the torpedo tubes aboard the Thetis were capable of firing sternwards, a novel development in 1942.\textsuperscript{60}

The American rule is not clear. The majority of federal courts and most commentators feel the judge need not defer to a technically proper claim of executive privilege. The lack of clarity is caused by the Supreme Court's holding in \textit{Reynolds}.\textsuperscript{61} In \textit{Reynolds} three civilian engineers were killed when an Air Force bomber in which they were riding crashed during a mission testing secret electronic equipment. Their widows filed suit under the Federal Tort Claims Act. The plaintiffs moved under the Federal Rules of Civil Procedure\textsuperscript{62} for production of the Air

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\item[58.] [1942] A.C. 624, 632–33.
\item[59.] It would not be a good ground that, if they were produced, the consequences might involve the department or the government in parliamentary discussion or in public criticism, or might necessitate the attendance as witnesses or otherwise of officials who have pressing duties elsewhere. Neither would it be a good ground that production might tend to expose a want of efficiency in the administration or tend to lay the department open to claims for compensation. In a word, it is not enough that the minister of the department does not want to have the documents produced.
\item[60.] Simon, \textit{Evidence Excluded by Considerations of State Interest}, 1955 CANT. L.J. 62, 74.
\item[61.] Apparently, the Scottish procedure is similar to that recommended in \textit{Reynolds} but there is no reported experience with it.
\item[62.] Fed. R. Civ. P. 34. This rule provides for the discovery and production of documents and things in custody of a party to a suit, upon motion and showing of good cause.
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Force's official accident investigation report and the statements of the three surviving crew members taken during the investigation. The district court found good cause and ordered production over a general claim of executive privilege. The Secretary of the Air Force then formally claimed the state secrets privilege. Production of the documents was ordered to allow the court to determine properly the validity of the claims. When the Government refused to comply, the court entered an order that the facts on the issue of negligence would be considered as established in plaintiffs' favor. The Third Circuit affirmed, answering the contention of the Secretary of the Air Force that he should be the final determiner of whether the claimed privilege was justified by saying:

[A] claim of privilege against disclosing evidence relevant to the issues in a pending law suit involves a justiciable question, traditionally within the competence of the courts, which is to be determined in accordance with the appropriate rule of evidence, upon the submission of the documents in question to the judge for his examination in camera.

The Supreme Court reversed, agreeing that the courts should independently decide the validity of claims of privilege, but holding that in camera examination would not be necessary when the Government can "satisfy the court, from all the circumstances of the case, that there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged...." The Court said its rule in state secret cases was:

In each case, the showing of necessity which is made will determine how far the court should probe in satisfying itself that the occasion for invoking the privilege is appropriate. Where there is a strong showing of necessity, the claim of privilege should not be lightly accepted, but even the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that military secrets are at stake.

65. 192 F.2d at 997.
66. Justices Black, Frankfurter, and Jackson dissented, substantially for the reasons stated in the opinion of Judge Maris. 345 U.S. at 12.
67. Id. at 8.
67a. Id. at 10.
68. Id. at 11.
In deciding the merits of the case the Court took judicial notice of the effects of the Cold War on our defense posture, thus confirming the principle that the extent of the privilege should vary with wartime necessity. It then held that the record revealed a reasonable likelihood that the accident report would contain references to secret electronic equipment. Further, the Court thought the showing of need was doubtful in view of the Government's offer to produce the surviving crew members for deposition.

The principal difficulty with the Reynolds rule is that it forces the judge to rule in a vacuum. He must determine necessity without knowing the contents of the requested document and their value to the requesting party. In Reynolds the accident investigation report may have contained nothing of value to plaintiff. But it might have contained evidence of the Government's negligence not otherwise obtainable. Thus, if the report contained information not obtainable from the surviving crew members, the opportunity to depose them would not reduce the need for the report. Yet the Reynolds rule requires deciding these and similar questions without looking at the reports or documents. Since the judge is adrift in a sea of unknowns, it is hard to imagine a case in which the Government cannot plausibly argue that military secrets are at stake.\(^9\)

In Reynolds the Court sought a middle ground between Duncan and the opinion of the court of appeals. It would seem, however, that there is no middle ground and that the Reynolds compromise is illusory. In the final analysis, if the court does not examine the information, it must decide in the dark.\(^70\) Thus, the executive will almost always determine the legal question of privilege. For all practical purposes the rules of Reynolds and Duncan are identical. The significant fact, however, is not the equation of Reynolds with Duncan, but rather the inability of the Court to find a meaningful middle ground. The issue of whether the court should make an independent examination of the material in question or simply accept the executive's sworn assertion of the privilege, remains unresolved. The remainder of this section is devoted to resolving this issue.

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69. See the bow and arrow incident, text accompanying note 90 infra.

70. The court may also hear the testimony of the officer who determines whether material is privileged. It is doubted that such testimony could be specific enough to give the court adequate guidance for its decision without being so specific as to amount to a revelation of the supposedly privileged information.
B. **Must the Court Rely on the Government’s Claim of Privilege?**

It would seem that the executive could not properly claim the exclusive legal power to decide questions of the state secrets privilege. The privilege was judicially created, and it is foolish to assert that the judiciary is without power to supervise its exercise. Problems of executive versus judicial power do arise over executive privilege. Congress and the President have debated this matter for many years without judicial interference. The executive privilege is founded on the separation of powers. The executive asserts its freedom to decide which materials it shall disclose and to whom it shall disclose them. This privilege is not based on the nature of the material withheld, since it need only be connected with the executive’s constitutional duties, but upon the executive’s personal right to determine when withholding is in the public interest.\(^7\)

The state secrets privilege may be distinguished in that it is defined solely by reference to the privileged material. An expanded executive privilege could displace the state secrets privilege;\(^2\) but this possibility is not the immediate concern of this paper.

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71. There are statutes requiring the executive and the administrative agencies to disclose information. The overwhelming majority of such statutes pertain to operations which Congress has commanded the executive to perform. Insofar as Congress authors specific projects, it is not difficult to contend they may disclose the results as they see fit. See generally House Comm. on Gov’t Operations, *Availability of Information from Federal Departments and Agencies*, H.R. Reps: No. 2084, 86th Cong., 2d Sess. (1960); No. 1224, 86th Cong., 2d Sess. (1960); No. 1137, 86th Cong., 1st Sess. (1959); No. 234, 86th Cong., 1st Sess. (1959); No. 2578, 85th Cong., 2d Sess. (1958); No. 1884, 85th Cong., 2d Sess. (1958); No. 1619, 85th Cong., 2d Sess. (1958); No. 157, 85th Cong., 1st Sess. (1957); No. 2947, 84th Cong., 2d Sess. (1956); STAFF OF THE SPECIAL SUBCOM. ON GOV’T INFORMATION OF THE HOUSE COMM. ON GOV’T OPERATIONS, 86TH CONG., 2D SESS., FEDERAL STATUTES ON AVAILABILITY OF INFORMATION (Comm. Print 1960); HEARING BEFORE THE SUBCOMMITTEE OF CONSTITUTIONAL RIGHTS OF THE SENATE COMMITTEE ON THE JUDICIARY, 85TH CONG., 2D SESS., 2 PTS. (Comm. Print 1958).


No court has ever compelled the chief executive to furnish information in
When the Government is a party to litigation involving state secrets the separation of powers argument works against the executive, for it is normally a judicial function to determine the existence of a privilege. Giving the executive the final word in determining the existence of a privilege would infringe this traditionally judicial function. Writing for the court of appeals in *Reynolds*, Judge Maris said:

> to hold that the head of an executive department of the Government in a suit to which the United States is a party may conclusively determine the Government’s claim of privilege is to abdicate the judicial function and permit the executive branch of the Government to infringe the independent province of the judiciary as laid down by the Constitution.\(^73\)

Further, when the Government as a party resists a court order, the court can enter judgment against it or find against it on specific issues. Admittedly, assessing penalties is not the same as rationally deciding the question of privilege, yet the fact that a court may penalize the Government justifies the view that the court has the power to rule on the privilege question.

The greatest problems in this area arise when the Government is a disinterested third party. The executive may intervene to assert the privilege when a private party having possession of secret documents cannot claim the privilege.\(^74\) Or, as a third party, the Government may find itself called upon to surrender documents it considers secret.\(^75\) In such cases the executive is

a judicial proceeding. The only two decisions on the point have based their holdings on the doctrine of separation of powers. Thompson v. German Valley R.R., 22 N.J. Eq. 111 (Ch. 1871); Appeal of Hartranft, 85 Pa. 433 (1877). One federal court has held there is no absolute executive privilege. Timken Roller Bearing Co. v. United States, 38 F.R.D. 57 (N.D. Ohio 1964). See also United States v. Gates, 35 F.R.D. 524 (D. Colo. 1964).

It is generally conceded that there is an executive privilege, but it is thought to belong only to the President himself. H.R. Rep. No. 2947, 81st Cong., 2d Sess. 86 (1956). Wigmore contends that the privilege applies only to the requirement of attendance at judicial proceedings and does not apply to the furnishing of information. 8 Wigmore, op. cit. supra note 54, §§ 2369, 2370.

The principal executive documents supporting the existence of the privilege are 40 Ors. Att’y Gen. 45 (1941) (Robert H. Jackson); 25 Ors. Att’y Gen. 328 (1905).

\(^73\). 102 F.2d at 997.


\(^75\). Cf. Machin v. Zuckert, 316 F.2d 336 (D.C. Cir.), cert. denied, 375 U.S. 896 (1963). Presently pending in the federal district court in Baltimore, Maryland, is a slander suit by one Estonian emigré against another. The defendant admitted spreading rumors that plaintiff was a Soviet agent, but claimed he did so as an agent of the C.I.A. The C.I.A. filed an affidavit affirming this
usually successful, partly because its noninvolvement lends force to its claim of having objectively determined whether the material should be privileged. The executive, however, actually may be withholding evidence for reasons of cost and convenience. Additionally, the executive has a bureaucratic tendency to overvalue its privacy. It is doubtful, therefore, that the court should give great weight to a claim of privilege merely because the Government is disinterested in the litigation. In fact, the primary reason for judicial deference to the executive’s assertions of privilege in this area well may be judicial uncertainty as to its ability to compel the executive to comply with its rulings. Although the court may order discovery and allow a subpoena to be issued against the Government to aid in litigation between private parties, there is serious doubt about its power to demand compliance with such orders. Executive disobedience of a subpoena simply cannot result, as a practical matter, in a contempt order.

The courts might try to coerce disclosure when the Government is a third party by threatening to prevent the Government from using the courts as a civil plaintiff in its proprietary role until it complies with the discovery subpoena. It should be noted that there is no precedent for this attempted judicial attainder. If legally possible it still probably would be as impractical as the contempt order and considerably more harmful to the public interest. A more realistic sanction would be to deny use of the discovery procedure to the Government when it vigorously resists discovery against itself. This action would not require particularly novel theories for support. Perhaps the familiar, and slightly

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76. See Bowles v. Ackerman, 4 F.R.D. 260 (S.D.N.Y. 1945). The military has directed that information is not to be withheld merely because it exposes administrative inefficiency. E.g., OPNAV 5510.1C, § 0406 Navy Security Manual for Classified Information (April 26, 1965).


78. See, e.g., the friction between Acting Attorney General Katzenbach and District Judge Cox reported in Time, Nov. 6, 1964, pp. 44, 49.

79. The obverse of this suggested policy was described in Judge Yankwich’s
fatuous, criminal law maxim of balancing the inherent inequities involved in a suit between the powerful Government and a simple private citizen would serve. The recent expansion of permissible discovery against the Government may indicate the availability of methods by which the courts may control an uncooperative Government.

If the court is convinced that the claim of privilege is without merit, at the least it ought to be able to invoke the English procedure under *Duncan*. That is, the judge would call upon the department head to appear in court and make a sworn claim of privilege, or would insist that the head personally examine the relevant documents in chambers. This procedure borders on the ridiculous, but it would be difficult for the executive to challenge its adoption since it has often urged the English rule upon the courts.\(^8\) The advantage of the practice is that it creates a procedural barrier to incessant assertion of the privilege yet does not challenge the executive's right to withhold. Such a procedure may result in the executive dropping all but the most well-taken claims of privilege.

There are other pressures on the executive to comply with a subpoena from an insistent court. The executive has had a running battle with the courts and Congress over its right to withhold information. An open conflict on the matter would, at the very least, impair the executive's claimed right to withhold, and the courts likely would be backed to the hilt by Congress. The courts have always held, in principle, that they alone are to determine privileges; they have never held that cabinet officers are immune from process and contempt. Second, a determined court, as inter-

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preter of the Constitution and final arbiter of virtually all con-

flicts between branches of the Government, has the political power
to insist that it make an independent ruling even when the Gov-

ernment is a disinterested third party. It is quite probable that

if the courts are firm the evidence will be forthcoming.81

Congress’ involvement with the state secrets privilege is fairly
clear. As final arbiter of military and diplomatic policy,82 Con-
gress has the power to create, obliterate, or waive the state secrets

privilege, subject only to constitutional limitations. The argument

that Congress cannot waive the executive’s privilege for him

seems persuasive because the executive privilege is tantamount to

a “personal” privilege pertaining to material in its possession. The

state secrets privilege, however, is nonpersonal, applicable to

specified information regardless of who has possession of it, and

justified by policies of national security which are ultimately
determined by Congress. If Congress has the last word on the

policies which justify the privilege, it should also have the final

say on its exercise.

It is probable that the individual states can never claim the

state secrets privilege. The conduct of war and foreign relations

belongs exclusively to the federal government.83 The state

secrets privilege is justified only in terms of national interests.

This does not mean that a state may not have state secrets in its

possession; it means only that those materials are privileged in

the nation’s interest and not in the state’s.

State courts rarely deal with assertions of the privilege; they

have no legal power to challenge claims of privilege made by the

federal government, or to address orders to federal officials.

Occasionally, however, in a suit between private parties in a state

court one party will refuse to reveal material because it may be a

state secret. The best procedure seems to be that followed in

dTicon Corp. v. Emerson Radio & Phonograph Corp.,84 where a


82. See U.S. Const. arts. I, § 8, II, § 2. The presidential powers over

treaties and the armed forces are subject either to outright congressional veto

or to implied veto by virtue of Congress’ control over appointments and

appropriations. Cf. Zemel v. Rusk, 381 U.S. 1, 28-30 (1965) (dissenting

opinion). But cf. Worthy v. Herter, 270 F.2d 905, 910 (D.C. Cir.), cert. denied,

361 U.S. 918 (1959); Frank v. Herter, 269 F.2d 245 (D.C. Cir.), cert. denied,


83. U.S. Const. art. I, § 10. It is inconceivable that the contingency in

§ 10, which would permit a State to engage in war, would come to pass today.

subcontractor sued the prime contractor for breach of contracts labeled “confidential” by the Army. The prime contractor moved to dismiss on the grounds that the conduct of its defense would violate the federal espionage laws. The court denied the motion to dismiss, holding that it was under a duty to protect both secrecy and justice. The court stated it would retain jurisdiction, using all proper judicial techniques to keep state secrets unrevealed, unless dismissal was essential to protect the national defense. The court decided to proceed according to its own best judgment until such time as the federal government chose to intervene.

C. SHOULD THE COURT DEFER TO THE GOVERNMENT’S CLAIM OF PRIVILEGE?

There are five basic reasons why the executive’s claim of the state secrets privilege should be conclusive: (1) Only an experienced intelligence officer can determine properly whether certain material should be kept secret; (2) even when the Government is a party to litigation, its officers do not have a personal interest in the litigation; on the contrary, they have a duty to be fair and can be trusted to weigh correctly litigation interests and apply the same standards as would the court; (3) the judiciary may well be biased in favor of the needs of the particular litigation; (4) some secrets cannot be entrusted even to judges; (5) if a department or agency head is required to personally claim the privilege, the possibility that the privilege will be invoked by a faceless subordinate hidden in the administrative establishment is eliminated.

There are, of course, reasons on the other side for insisting that the courts themselves make the determination: (1) The courts, which deal with equally complex problems of patent and antitrust law, can make reasonable decisions on questions of state secrets when aided by appropriate intelligence experts; (2) the executive may be biased in favor of the needs of secrecy; (3) allowing a litigant to determine his own legal rights during the course of litigation violates notions of fair play; (4) judicial decisions, unlike those of the executive, are subject to review; (5) agency and department heads will not have the time to personally claim the privilege. The additional fact that expert classifiers of data are usually subordinates makes delegation of the decision to claim the privilege inevitable.

It has been suggested that many problems might be solved by creating under article III of the Constitution a special tribunal
to pass upon questions of the state secrets privilege. This tribunal would consist of experts in the area of national security making decisions with due regard for litigants' needs. If such a tribunal dealt solely with state secrets, it would not have enough to do to justify its existence. However, Congress could create sufficient work for the tribunal by granting it authority to arbitrate newspaper, industrial, academic, and legislative demands for information from the executive. However, considering the inevitable executive opposition to a dual function agency and the small amount of work available for a tribunal dealing only with legal questions of state secrecy, it will be assumed that a special board is not likely to be established.

Neither the executive nor the courts have been outstanding in dealing with problems of state secrets. The executive has refused, under Executive Order 10501, to disclose (a) the number and use of administrative aircraft to a member of Congress;\(^8\) (b) the picture of the interior of a plush transport plane to a member of Congress;\(^8\) (c) information on monkey research to the press (on the grounds of possible sensitivity of Indian suppliers of monkeys to their use in space research);\(^8\) (d) photographs of the B-58 and the Titan missile to the press even though both were in public view;\(^8\) (e) a report on a bow and arrow weapon developed during World War II to the scientist who developed the weapon when he requested it some years after the war;\(^8\) (f) a report on pollution of ground supply water adjoining an arsenal (which also reported that water runs downhill) to a member of Congress;\(^8\) (g) reports dating back to 1907 of attacks by sharks on seamen to a group of scientists.\(^8\)

The situation would not be so absurd if such restrictions were promptly lifted when called to the attention of the department head or when a court order compelled a reexamination of the material. Unfortunately, however, prompt reclassification does

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85. Haydock, Some Evidentiary Problems Posed by Atomic Energy Security Requirements, 61 Harv. L. Rev. 468 (1948); Sanford, Evidentiary Privileges Against the Production of Data Within the Control of Executive Departments, 3 Vand. L. Rev. 73 (1949).
89. Id. at 209; H.R. Rep. No. 1884, supra note 87, at 57.
not generally occur. Even the parade of horrors listed above involved information that was not disclosed until the pressure of a full-scale congressional investigation was exerted, and even then there were often months of delay.

The courts, for their part, have been quite as marvelous as the executive. In *Totten v. United States*, the Supreme Court declared that a contract for Civil War espionage services made by President Lincoln in July of 1861, was still a state secret in 1875. In *Firth Sterling Steel Co. v. Bethlehem Steel Co.*, drawings of armor piercing projectiles were expunged from the record in a patent infringement suit. This shutting of the barn doors after the horse had fled served no useful purpose and deprived a litigant of needed evidence. In *Mercer v. Denne*, an English judge suggested that maps of the English coastline made in 1641, 1644, and 1647 for the Admiralty might be privileged in 1904. In *Reynolds* the Court disapproved a procedure that would have disclosed details of electronic equipment to only one man, the chief judge of a federal district court.

The executive has made the state secrets problem worse than it need be by retaining unnecessary classifications on billions of items. While it would seem to be fair to assume that a court order would at least induce the executive to reexamine the withholding of information in light of the limited courtroom disclosure contemplated, this has not been the case, in part because the judicial record has been one of great deference to the executive.

In *Republic of China v. National Union Fire Ins. Co.*, the coplaintiffs, Nationalist China and the United States, were suing an insurer to recover for the loss of seven ships. The crews of these ships had defected to Red China, leaving the ships in the British harbors of Singapore and Hong Kong. In spite of diplomatic negotiations, the British eventually allowed the Red

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94. Allen Dulles, a practicing lawyer as well as an intelligence officer, has said of this case: "This is a warning to the agent that he had better get his money on the barrelhead at the time of his operation." *Dulles, The Craft of Intelligence* 36 (1963).


96. [1905] 2 Ch. 538.

97. Dep’t of Defense Directive No. 5210.6 (Dec. 6, 1953); *Hearings 1764–79, 3448–49.


Chinese to take the ships. The United States was obliged under a clause of the insurance policy to attempt to recover the ships. Privilege was claimed for the records of the diplomatic conversations which were material to this issue. The court held, without examining the records, that the strained relations between Britain and the United States over the recognition of Red China justified the recognition of the privilege. The American diplomats might have made just a token effort to recover the ships, solely in order to make out a case for recovery under the insurance. By thereafter claiming privilege, such conduct is promoted to the status of a state secret.

On the whole it is probably better for the court to determine independently the validity of claims of the state secrets privilege. The courts have clearly shown they are not about to run wild in declaring information unprivileged. Seemingly there are few cases in which data are so secret with its value so subtle that a judge could not be trusted to make a reasoned decision. Indeed, lay classifiers tend to overclassify information, and an independent determination will force the executive to reason out his claim of privilege with the likely result that incidents of unreasonable claims will diminish. The aura of executive fiat in state secrets cases should also be expected to disappear.

Independent judicial determination should also eliminate instances where the executive, believing itself justified by executive privilege, will claim the state secrets privilege to avoid relying on the more tenuous legal doctrine of executive privilege. No one reading the briefs and record in Reynolds can doubt that the Government sought primarily to protect the confidential nature of accident investigation reports. The Government's briefs laid heavy emphasis on the proposition that if investigation reports were not kept secret, administrative investigations of air accidents would become less efficient because witnesses might be reluctant to make nonconfidential statements. The Government's argument is not unreasonable. But it is hardly an argument grounded on considerations of national security sufficient to justify the state secrets privilege. Further, the history of Revised Statute 161 illustrates the Government's propensity to use inapposite authority to support policies justified on other grounds. The

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statute provided: "The head of each department is authorized to prescribe regulations, not inconsistent with law, for ... the custody, use, and preservation of the records, papers, and property appertaining to it." This statute was claimed as authority for withholding information by the Department of Defense,\textsuperscript{102} and was so used by several other agencies\textsuperscript{103} despite persuasive evidence that it was meant only to operate as a "housekeeping" statute.\textsuperscript{104} When Congress sought to amend the statute, the executive opposed the action. In 1958 the statute was amended by adding the following sentence: "This section does not authorize withholding information from the public or limiting the availability of records to the public."\textsuperscript{105} The executive's reaction to this amendment is revealed by President Eisenhower's statement upon signing the amendment:

> It is also clear from the legislative history of the bill that it is not intended to, and indeed could not, alter the existing power of the head of an Executive department to keep appropriate information or papers confidential in the public interest. This power in the Executive Branch is inherent under the Constitution.\textsuperscript{106}

The inference seems inescapable that the executive has systematically sought to sustain honest decisions with a dubious legal justification and will undoubtedly attempt to continue to do so. If there is an executive privilege or broad ranging privileges for official information — or if there should be — then appropriate rulings by court or statute ought to be secured by the executive. The executive should not employ, and thus distort, the state secrets privilege in an effort to support other claims of privilege. An independent determination by the court of the state secrets privilege should terminate this practice.

In the last analysis, very little is lost if the court makes an independent determination. Limited disclosure to the judge will

\textsuperscript{102} The Special Subcommittee on Government Information, House Comm. on Gov't Operations, 84th Cong., 1st Sess., Replies From Federal Agencies to Questionnaire 119-20 (Comm. Print 1955).

\textsuperscript{103} United States \textit{ex rel.} Touhy v. Ragen, 340 U.S. 462 (1951); Jackson v. Allen Indus., Inc., 250 F.2d 629 (6th Cir. 1958); Appeal of the SEC, 226 F.2d 501, 517 (6th Cir. 1955).


\textsuperscript{106} Public Papers of the Presidents of the United States, Dwight D. Eisenhower 601 (1958). Professor Bernard Schwartz has said of the information withholding practices of federal departments and agencies, "You notice they try to hang their coat on every little statute they can find. They try to say, that gives us authority." \textit{Hearings} 509.
reduce the loss of secrecy. If the executive is as careful in claiming the privilege as it maintains, it will win in the overwhelming number of cases. In those in which the privilege is denied there should be an immediate appeal. In those cases where the Government is a party and cannot sustain its position, the executive can withdraw the secret material and accept an adverse decision.

While very little is lost by an independent judicial determination of the privilege, a great deal is gained in terms of a fair and efficient legal system. If the privilege is sustained, the deprived party is at least assured that his plight was caused by an overriding public interest in national security and not solely by executive fiat. If the privilege is denied, full disclosure of information obviously aids the achievement of maximum fairness in litigation.

Whenever the Government asserts a privilege, it has the burden of persuasion. Arguably, this should not be the case when national security is involved since the special interests are important enough to require exceptional procedural protection. This argument, however, makes little sense in the context of the ex parte hearing and thus the burden should remain with the Government. The most reasonable concession that interests of national security justify was the one made in Reynolds—the party requesting the information had a heavy burden of showing need for the evidence.107 This burden is reasonable only if the party may be compelled to show that it cannot establish its contentions with other evidence. Surely a party cannot be required to show that he needs a specific piece of evidence if he does not know its contents. Only when the Government is willing to allow opposing counsel to examine the evidence is it tenable that the requesting party should have the burden of persuading the court that the particular evidence is not privileged.

A claim of privilege should be more substantial and definite than the typical statement that the executive finds that the disclosure of such and such a document would be detrimental to the national security.108 Each claim of privilege should be accompanied by a statement of reasons supporting nondisclosure which need not be made public. To accept anything less is to accept the executive's determination of the existence of privilege as conclusive. The principles of decision making described in Part I of this article, plus the present conclusion that the court should make decisions on the merits of the privilege, require the

107. 345 U.S. at 11.
108. See the comments of Judge Clark concurring in Bank Line, Ltd. v. United States, 163 F.2d 133, 139 (2d Cir. 1947).
judge to examine the documents and the executive's statements of reasons before ruling on the privilege. But, in the face of *Reynolds*, the most that can be urged under present law is that the court demand a specific explanation of why the evidence must be privileged. Under *Reynolds*, however, even this procedure may not allow an explanation sufficiently specific to aid the judge in making his ruling. How much information the court can demand without subverting *Reynolds* is problematical.

III. THE PRIVILEGE IN SPECIFIC TYPES OF LITIGATION

As a general rule, the nature of governmental privileges varies with the type of the litigation and the Government's role in it. This section will discuss the degree to which this is true of the state secrets privilege.

A. THE PRIVILEGE IN CRIMINAL CASES

In criminal cases the Government as prosecutor is often thought to be under a duty to produce all relevant evidence or suffer dismissal. The language of Judge Learned Hand in *United States v. Andolschek* supports this thesis:

> While we must accept it as lawful for a department of the government to suppress documents, even when they will help determine controversies between third persons, we cannot agree that this should include their suppression in a criminal prosecution, founded upon those very dealings to which the documents relate, and whose criminality they will, or may, tend to exculpate. So far as they directly touch the criminal dealings, the prosecution necessarily ends any confidential character the documents may possess; it must be conducted in the open, and will lay bare their subject matter. The government must choose; either it must leave the transactions in the obscurity from which a trial will draw them, or it must expose them fully.

Nevertheless, the courts have never held that the state secrets


110. 142 F.2d 503.

111. *Id.* at 506.
privilege cannot be properly invoked in a criminal prosecution. All of the cases which hold that the Government cannot avail itself of a privilege in criminal prosecutions have dealt with official information or informer privileges. Should a privileged state secret be learned by the defendant, the judge might not allow the evidence to be introduced in open court;\textsuperscript{112} if the information was gained through the Government’s carelessness or deliberate action, the privilege would probably be deemed waived.

The Government’s position was sustained in the only reported criminal case in which the state secrets privilege was claimed, \textit{United States v. Haugen}.\textsuperscript{113} There a World War II contract provided that a subcontracting commissary company furnish meals to the workers of the prime contractors at a large Government plutonium plant. In a prosecution for forging meal tickets, the contract was held to be a state secret. The judicial temper is sympathetic to claims of privilege based on national security during wartime, and \textit{Haugen} was explicitly grounded on the existing state of war. A more recent case, \textit{United States v. Schneiderman},\textsuperscript{114} involved reports by a prosecution witness to the FBI. The court held the defendant was not entitled to this official information as a matter of right, although it was presumably relevant. Considering these cases, it is impossible to state with precision the current status of the state secrets privilege in criminal prosecutions.\textsuperscript{115}

It seems sensible that in criminal cases, the privilege should only be claimed when the evidence does not directly touch the criminal dealings. The rule follows \textit{Andolschek}, and is probably consistent with \textit{Haugen}. Admittedly it is a vague rule, but it probably cannot be improved. Where the evidence bears on facts

\textsuperscript{112} If the defendant acquired the secret information through his own wrongdoing, the court might not allow the evidence to be introduced in open court and rely on the threat of prosecution for unauthorized disclosure to keep the defendant silent. If the defendant is faced with serious criminal charges and the secret evidence is exculpatory, it will certainly be revealed at least to the press.

\textsuperscript{113} 58 F. Supp. 436 (E.D. Wash. 1944).
\textsuperscript{114} 106 F. Supp. 731 (S.D. Cal. 1952).
\textsuperscript{115} The sensational Sokolev espionage case might have posed an interesting problem. The \textit{N.Y. Times}, Oct. 3, 1964, p. 1, col. 3, reported that the government had dropped the case to avoid revealing its informer apparatus under 18 U.S.C. § 3452 (1964), which requires a list of proposed government witnesses and their places of abode to be given to the defendant in capital cases. Though the problems here seem to involve official information and informer privileges, it is strongly urged that revelation of an informer apparatus
which are relevant to guilt or innocence, however, the Government
should not be able both to claim its privilege and proceed with
the prosecution. Reynolds indicates this is the direction in which
the courts are moving.\textsuperscript{116}

Most criminal cases involving state secret claims arise under
the espionage laws\textsuperscript{117} which make the taking or disclosing of in-
formation relating to the national security a criminal offense.\textsuperscript{118}
The Supreme Court held in Gorin v. United States,\textsuperscript{119} that a jury
must determine whether the material in question relates to the
national defense. This holding may force the Government to drop
a prosecution to avoid aggravating the original breach of se-
curity.\textsuperscript{120} However, the problem does not arise in prosecutions
under the Atomic Energy Act\textsuperscript{121} which punishes the communica-
tion or disclosure of restricted data whatever its content, nor does
it arise in prosecutions for communicating or disclosing diplo-
matic codes\textsuperscript{122} or classified information concerning communications in-
telligence such as codes, ciphers, or cryptographic systems.\textsuperscript{123}
However, problems in administration of the espionage laws,
though related to problems of privilege, do not actually involve
the state secrets privilege. The necessity to disclose information
at trial which is thought to be vital to the interests of national
security arises because the legislative definitions of the elements
of the crime require exposure of state secrets to the jury. Presum-
ably the legislature could rewrite the espionage laws to avoid the
disclosure problems; such redrafting would not involve the ques-
tion of privilege except insofar as the legislative policy, like that
underlying the Atomic Energy Act or the British Official Secrets

\textsuperscript{116} In dictum, Chief Justice Vinson stated:
The rationale of the criminal cases is that, since the Government which
prosecutes an accused also has the duty to see that justice is done, it is
unconscionable to allow it to undertake prosecution and then invoke
its governmental privileges to deprive the accused of anything which
might be material to his defense.

\textsuperscript{117} Note, 47 Colum. L. Rev. 1356 (1947).
\textsuperscript{119} 312 U.S. 19 (1941).
\textsuperscript{120} United States v. Coplon, 185 F.2d 629 (2d Cir.), cert. denied, 342
U.S. 920 (1950).
Act,\textsuperscript{124} regards all classified Government information as privileged.

B. THE PRIVILEGE IN CIVIL CASES WHEN THE GOVERNMENT IS THE PLAINTIFF

There is authority for the proposition that the Government waives its privileges by bringing a civil suit.\textsuperscript{125} However, the state secrets privilege was recognized in Republic of China v. National Union Fire Ins. Co.,\textsuperscript{126} the only case in which the United States as a plaintiff claimed the privilege. If the Government brings a suit in its proprietary role, it clearly may claim the privilege.\textsuperscript{127} But when suits are brought in the Government’s law enforcement capacity, such as antitrust actions, the courts have often employed a waiver theory to defeat the claim of privilege.\textsuperscript{128} The rule should be the same regardless of the theory under which the Government brings the suit. The waiver theory might presage a doctrine that the Government waives any claim to determine questions of privilege. Under this theory the court could examine the evidence before ruling, thus leaving no need for a blanket denial of the existence of the privilege whether the Government acts in its proprietary or its law enforcing role.

C. THE PRIVILEGE IN CIVIL CASES WHEN THE GOVERNMENT IS THE DEFENDANT

When the Government is a defendant in a civil action, it is generally held subject to discovery and subpoena in the same manner and to the same extent as a private individual.\textsuperscript{129} There is, of course, no waiver of the state secrets privilege.\textsuperscript{130} Yet when

\textsuperscript{124} 10 & 11 Geo. 5 c. 75 (1920).
\textsuperscript{126} 126. 142 F. Supp. 551 (D. Md. 1956).
\textsuperscript{129} United States v. Reynolds, 345 U.S. 1, 4 (1953); Federal Tort Claims Act, 28 U.S.C. § 2674 (1964). It is sometimes argued that the Government is immune from discovery under the Federal Rules of Civil Procedure. This position is completely demolished in Berger & Krash, supra note 77; Note, 41 Va. L. Rev. 507 (1955).
\textsuperscript{130} United States v. Reynolds, supra note 129; Note, 41 Va. L. Rev. 507 (1955).
the Government is a party the court has considerable latitude in dealing with claims of privilege since it may assess procedural penalties. These sanctions are available if the court finds that the claim is unjustified or that it requires further investigation of evidence which the Government fails to produce. It is clear, however, that the Government as defendant ordinarily should be allowed to claim the state secrets privilege without suffering procedural penalties.

The Invention Secrecy Act of 1951 provides that the Patent Office may refuse to disclose information contained in patent applications when specified officials believe that disclosure would be detrimental to the national security. If an invention warrants a patent but must remain secret, the Patent Office will notify the inventor that the claims in his patent application are allowable, but a patent will not issue until the necessity for secrecy ceases. Thus, the inventor cannot exploit his invention. In order to protect the inventor and to encourage the discovery of inventions having military applications, the inventor whose patent has been withheld under a secrecy order may obtain compensation from the United States — both for withholding the patent and for any use by the Government. The act outlines administrative procedures for securing such compensation and also allows suits to be brought in the district courts. In Halpern v. United States, the court stated that an inventor would be allowed to maintain an action for compensation in district court during the pendency of the secrecy order as soon as an administrative award was denied.

131. Fed. R. Civ. P. 37(b)(1) authorizes a finding of contempt. Rule 37(b)(2) provides that:

the court may make such orders in regard to the refusal as are just, and among others the following: (i) An order that the matters regarding which the questions were asked, or the character or description of the thing or land, or the contents of the paper, ... or any other designated facts shall be taken to be established for purposes of the action in accordance with the claim of the party obtaining the order; (ii) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing in evidence designated documents or things or items of testimony ... (iii) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party ....


133. If the inventor starts making and selling his invention, he will almost certainly run afoul of 18 U.S.C. 798 (1964), which bars disclosure of classified information, i.e., the patented device, to unauthorized persons.

134. 258 F.2d 86 (2d Cir. 1958).
or if the award was unsatisfactory to the inventor. The court further held that such a trial should be conducted in camera. The Government would not be able to avail itself of the state secrets privilege if the court decided the trial could be held without substantial risk that secret information would be publicly divulged. The court reasoned that the Invention Secrecy Act was designed to encourage inventions of military application. Delaying court proceedings until the secrecy order was rescinded would be contrary to this legislative purpose. It was also felt the litigation would not make the information public since the plaintiff was the inventor. Substantial risk of disclosure might result, however, if the plaintiff's lawyer was a poor security risk. More importantly, the court might refuse to try the case if the Government could convince it that plaintiff's invention was outmoded by a new invention, the details or even the very existence of which should not be revealed. The result in Halpern has been praised, but its method of statutory construction in reaching that result, and its alleged disregard for the spirit of Reynolds have been criticized.

Though the Invention Secrecy Act and Halpern cover only patent infringement suits concerned with matters of military technology, this type of case most commonly raises state secrets privilege problems. If litigation permitted under the act were brought under other law, it would encompass both suits against the Government and suits between private parties. Insofar as the act brings the Government into suits which would normally involve only private parties, it eases the difficulty of enforcing discovery orders.

It may be wise to allow the opposing party an option to continue the lawsuit or to postpone the litigation until the need for secrecy has lapsed. When the Government as a civil party successfully invokes the privilege, the statute of limitations should then be tolled. Admittedly the private party has the unpleasant choice of going forth without the evidence or waiting for the privileged

185. The inventor would probably not have to reveal secret details of his invention to his lawyer for purposes of drawing a complaint or drafting a request for administrative award. If the inventor did reveal such details he might be violating 35 U.S.C. § 182, or § 186 (1964), which provide penalties for unauthorized disclosure of secret inventions. This situation will not arise if plaintiff's lawyer originally drafted the patent application.


material to become available — during which time other evidence may dissipate. Such a choice should not often be necessary because under proper standards most sensitive information requires secrecy for short periods of time, at most three or four years. The rationale of such a statute is that it may aid a private party by counterbalancing the Government's special privilege to withhold information. Consequently, the statute should not apply in suits between private parties when evidence is withheld by a disinterested Government. It would be manifestly unfair to allow the option to one party even though the other party never had the right to claim the privilege.

IV. RECENT TRENDS

The Government's evidentiary privileges are matters of great uncertainty and ardent debate. Each privilege has its distinct scope, justification, and shade of legal imprimatur. An inherent danger is the potential use of the state secrets privilege to sustain the withholding of evidence which may justifiably be withheld only under an official information or executive privilege.\footnote{E.g., Dayton v. Dulles, 254 F.2d 71 (D.C. Cir.), rev'd on other grounds, 357 U.S. 144 (1958).} Such actions result in the unreasoned and undesirable expansion of governmental privileges. Privileges are detrimental to a litigation system in the first place since they exclude useful evidence. In a democracy governmental privileges are especially undesirable unless supported by appropriate policies. The policies of protecting national welfare in the military and diplomatic fields are clearly irrelevant to the policies supporting the secrecy of official information. The problems and disadvantages of governmental privileges demand that each species of privilege be incorporated into law only after painstaking examination of the policies which justify it.

It is difficult to predict the effect on the state secrets privilege of the recent trends towards expanding discovery against the Government. Originally, the judiciary was concerned about the loss of governmental efficiency resulting from excessive demands for information, or from the disclosure of intragovernmental communications and confidential sources of information. Recently, judicial concern has shifted to preserving fairness in litigation; as a consequence the Government has been less successful in resisting discovery. The magnitude of the interests protected by the state secrets privilege, however, makes any analogy to other governmental privileges hazardous. It is one thing to sacrifice governmental efficiency to assure fair litigation; it is another to endanger
the nation to preserve the integrity of a litigation system. This does not mean that the Government may not have to pay a price for the right to invoke the privilege; but before the exercise of the state secrets privilege would be affected, a court would have to come very close to ruling that no interest, however great, justifies allowing the Government to invoke successfully a privilege without suffering procedural penalties. To the extent that recent developments in expanding discovery against the Government rest upon limited judgments that specific interests such as efficiency do not justify privilege without penalty, the state secrets privilege remains unaffected.

CONCLUSION

There is no greater reason for secrecy than protecting the military and diplomatic welfare of the nation. Thus, if any privilege based on the Government's need for secrecy can be justified, it is clearly the state secrets privilege. The problems that have arisen in connection with the privilege are, for the most part, avoidable. The reason they have not been avoided is that no one in the executive branch or the judicial branch wants to take upon himself the responsibility for authorizing or forcing disclosure of any matter that might affect the national security. Yet the refusal to undertake this responsibility, although understandable, has not avoided a hard decision; it merely means that the decision to withhold has been made without thought. It is the conclusion of this writer that a careful and wise decision on the exercise of the privilege can be made; it should ultimately be made by a judge; it should be based upon the specific nature of the evidence to be disclosed, the role it will play in the litigation, and the degree to which it will be disclosed in the litigation process.