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KEEPING SECRETS FROM THE JURY: NEW OPTIONS FOR SAFEGUARDING STATE SECRETS

INTRODUCTION

Despite recent criticism, secrecy is still considered necessary to the proper functioning of all branches of the government. Courts have often recognized the compelling interests in protecting the confidentiality of government communications and matters relating to the national defense when these interests conflict with the judicial process. The secrecy of such sensitive information has been preserved through the use of well-established evidentiary privileges. For example, the state secret evidentiary privilege prevents the disclosures of

1. In the wake of Watergate, the public has become increasingly skeptical of claims of privilege for the alleged purpose of safeguarding national security. Recent criticism echoes such earlier statements as Mr. Justice Jackson's observation that "[s]ecurity is like liberty in that many are the crimes committed in its name." Knauff v. Shaughnessy, 338 U.S. 537, 551 (1950) (Jackson, J., dissenting). Commentators have observed that government privileges of nondisclosure are easily abused because the standards for determining the need to withhold certain information are less than exact and because "[t]he Government frequently withholds more and for longer than it has to." Henkin, The Right to Know and the Duty to Withhold: The Case of the Pentagon Papers, 120 U. Pa. L. Rev. 271, 275 (1971). See also Berger, The Incarnation of Executive Privilege, 22 U.C.L.A. L. Rev. 4, 27 (1974).


2. Each branch has utilized the right to conceal certain information. Congress has recognized the executive branch's system for classifying information and has provided for its enforcement through the enactment of criminal penalties. 18 U.S.C. § 798 (1976). Congress itself is authorized to conduct secret proceedings, U.S. Const. art. I, § 5, cl. 3, and the Supreme Court always maintains the confidentiality of its conferences. Henkin, supra note 1, at 273-74.

3. "[T]he words 'national defense' . . . have 'a well understood connotation'—a 'generic concept of broad connotations, referring to the military and naval establishments and the related activities of national preparedness' . . . ." New York Times Co. v. United States, 403 U.S. 713, 739 (1971) (quoting Gorin v. United States, 312 U.S. 19, 28 (1941)).


The danger of disclosing classified information during the criminal prosecution of Richard Helms, ex-director of the Central Intelligence Agency (CIA), led the Justice Department to accept a plea of nolo contendere to two misdemeanor counts for failing to testify fully before a Senate committee which had been investigating the CIA's covert activities in Chile in 1973. N.Y. Times, Nov. 1, 1977, § 1, at 1, col. 6.

5. For a discussion of the official information, identity-of-informers, executive, and state secrets privileges, see notes 65-70 infra and accompanying text.
matters relating to international relations, military affairs, and national security. Underlying this privilege is the paramount public interest in preventing the use of such information by enemies of the nation.

The usual result of a valid claim of the state secret privilege is to render the material in question unavailable to the litigants. Recently, however, the Second Circuit, in Loral Corp. v. McDonnell Douglas Corp., applied the state secret privilege to reach a very different procedural result. The court held that the parties could use the secret material during an in camera trial, but that the sensitive nature of the material rendered the case inappropriate for a jury trial despite the seventh amendment's guarantee of the right to a jury trial in civil actions at law.

The case involved a suit for breach of contract brought by Loral Corporation, a subcontractor which designed and produced classified equipment for the United States Air Force, against McDonnell Douglas Corporation, the prime contractor. The district court struck Loral's jury demand after concluding that a jury trial is inappropriate when the trier of fact must consider classified national defense information. The Second Circuit followed the district court's reasoning in upholding the denial of the jury trial. The court also observed that both parties had "bound themselves [contractually] to preserve the confidentiality of classified material" and thus


8. See notes 80-82 infra and accompanying text.

9. 558 F.2d 1130 (2d Cir. 1977). The three judge panel that heard the case consisted of Circuit Judges Lumbard, Smith, and Oakes.

10. Id. at 1132. The seventh amendment provides: "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law." U.S. Const. amend. VII.

11. The demand was properly and timely made pursuant to Fed. R. Civ. P. 38(b).

12. Loral Corp. v. McDonnell Douglas Corp., 558 F.2d at 1132. The district court also relied upon the necessity of protecting classified information to justify a reference of this case to a magistrate as special master. See notes 102-13 infra and accompanying text. It should be noted that the precise reasoning of the district court could not be ascertained because the district court order, along with all other documents in this case, has been sealed by order of the Second Circuit. 558 F.2d at 1133.

13. Although the district court orders were not final and therefore not appealable as of right, Loral had sought a writ of mandamus to compel the district court to vacate its orders. Id. at 1131-32.

14. The Second Circuit relied primarily upon United States v. Reynolds, 345 U.S. 1, 10 (1953), to deny the jury trial. 558 F.2d at 1132. Although the Reynolds Court discussed the state secrets privilege as an evidentiary rule of nondisclosure, it did not address any seventh amendment issues because the action was brought under the jurisdictional provision of the Federal Tort Claims Act, 28 U.S.C. § 1346(b) (1976), which does not guarantee a jury trial. See note 38 infra.

15. 558 F.2d at 1132 (footnote omitted).
had "effectively waived the right to jury trial of issues involving the contracts." 16

The Loral decision raises several issues relating to the seventh amendment right to jury trial and the use of evidentiary privileges. Part I of this Note will analyze the court's decision in light of the traditional historical test of the seventh amendment. Part II will examine the role of the judiciary in reviewing the validity of claims of the state secret privilege, and the possible limiting effects which current practices may have on the future conduct of in camera proceedings that involve state secrets. Part III will discuss possible procedural solutions which have been advanced to ensure the civil litigant a judicial forum and, in some cases, a jury trial in actions involving state secrets.

I. THE DETERMINATION OF THE RIGHT TO A JURY TRIAL

A. The Seventh Amendment Historical Test

Historically, the right to a jury trial in civil actions has been considered a primary protector of individual liberty and democracy. 17 Thus, the "maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care." 18

The seventh amendment, however, does not guarantee a jury trial in all civil actions. 19 The amendment incorporated into the legal system an historical test for the right to a jury by mandating the right only if it existed "at law" in 1791, the year the amendment was adopted. 20 This test adopted the

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16. Id.; see notes 28-36 infra and accompanying text.
17. It has been said that the sympathy and human understanding of the jury "infused the breath of life into cold and otherwise lifeless rule of law." 5 Moore's Federal Practice ¶ 38.02[1], at 17 (2d ed. 1977). During the American Colonial period, the jury system was considered to be each American's chief protection against coercive orders of the Crown. Pope, The Jury, 39 Texas L. Rev. 426, 445 (1961); Simon, Introduction to The Jury System in America, A Critical Overview, IV Sage Criminal Justice System Annuals 15 (R. J. Simon, ed. 1975).

There are several theories regarding the exact origins of the jury system. According to the prevailing view, the jury as it developed in Anglo-American jurisprudence was a product of European origin—the custom of Germanic tribal democracy which settled disputes by popular decision. Pope, supra at 429. After such customs were introduced into England by Norman kings, the jury slowly developed into a smaller group of men who knew the facts of the case and who thus became the method of proof rather than determiners of fact. 1 W. Holdsworth, A History of English Law 317 (3d ed. 1922). As the jury system finally developed, however, the juror was transformed from a witness into the judge of the facts, 5 Moore's supra, ¶ 38.02[1], at 9, and his personal knowledge of the case was cause for disqualification from, rather than a prerequisite for, service as a juror when it would bias his opinion of the case. 47 Am. Jur. 2d Jury § 276 (1969) (citing cases).
19. Although the seventh amendment guarantees the right to a jury in civil cases in federal court, it does not compel the states to do the same. E.g., Walker v. Sauvinet, 92 U.S. 90, 92 (1876); Edwards v. Elliott, 88 U.S. (21 Wall.) 532, 557 (1874); Olesen v. Trust Co., 245 F.2d 522, 524 (7th Cir.), cert. denied, 355 U.S. 896 (1957). See also Colgrove v. Battin, 413 U.S. 149, 156 (1973).
distinctions of pre-1791 Anglo-American jurisprudence between law and equity—separate jurisdictions that relied upon different techniques of fact-finding and provided different remedies. As of 1791, actions at law were tried by a jury, and actions in equity were tried by the chancellor. Thus, the seventh amendment defined the right to a jury by demanding an inquiry into whether the issues were traditionally tried at law and thus entitled to be tried by a jury.

The historical test, as applied, does not require an examination of the nature of the facts that would be introduced in evidence at trial. In fact, the Supreme Court recently stated:

The question whether a particular case was to be tried in a court of equity—without a jury—or a court of law—with a jury—did not depend on whether the suit involved factfinding or on the nature of the facts to be found. Factfinding could be a critical matter either at law or in equity. Rather, as a general rule, the decision turned on whether courts of law supplied a cause of action and an adequate remedy to the litigant.

The implication of the Supreme Court's reasoning is that the assertion of evidentiary privileges based on the nature of the facts would have no effect on the right to a jury trial. Such privileges operate with equal force in courts of law and equity to prevent the disclosure of privileged material. Therefore, in determining the right to a jury, courts ignore the nature of the facts presented and examine instead the nature of the issues contained in the pleadings.

In Loral, there is no doubt that the breach of contract action for money damages is traditionally a legal action and, therefore, would normally be

21. 5 Moore's, supra note 17, ¶ 38.02[1], at 8.1-2.
22. Id.
23. See Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 504, 506 (1959); 5 Moore's, supra note 17, ¶ 38.11[2], at 113; James, Right to a Jury Trial in Civil Actions, 72 Yale L.J. 655, 657-63 (1963). In applying the historical test, courts consider the nature of both the issues contained in the pleadings and the remedies sought by the parties. 9 C. Wright & A. Miller, Federal Practice and Procedure § 2304, at 29 (1971). Although the application of the historical test may seem burdensome, the actual number of cases presenting difficult analysis is very small. C. Wright, Law of Federal Courts 450 (3d ed. 1976).

In Ross v. Bernhard, 396 U.S. 531 (1970), the Supreme Court suggested an alternative test: "The 'legal' nature of an issue is determined by considering, first, the pre-merger custom with reference to such questions; second, the remedy sought; and third, the practical abilities and limitations of juries." Id. at 538 n.10. This procedure, however, is not being followed. "Certainly there is no indication in the cases that the courts are adopting a balancing test, and weighing the practical abilities and limitations of jurors [the third element of the Bernhard test], to displace the traditional test for when an issue is triable to a jury." C. Wright, supra, at 454. In fact, this third element of the Bernhard test is considered only when determining the right to a jury trial in causes of action not recognized before the merger of law and equity. See, e.g., United States v. J.B. Williams Co., 498 F.2d 414, 428 (2d Cir. 1974).

25. See, e.g., Firth Sterling Steel Co. v. Bethlehem Steel Co., 199 F. 353, 355 (E.D. Pa. 1912). Although originally developed to guide a jury's consideration of evidence, such rules of evidence were also adopted by tribunals that did not utilize the jury procedure. 9 W. Holdsworth, supra note 17, at 127.
afforded a jury trial in accordance with the terms of the seventh amendment historical test. There are, however, recognized exceptions to the historical test. In these instances, even admittedly legal issues are not tried by a jury. Two exceptions which are suggested by the facts in Loral are the waiver of the right to jury trial and the application of the doctrine of sovereign immunity.

B. The Waiver Exception

A party's ability to waive his right to a jury trial is well recognized. In Loral, the Second Circuit found, based on a secrecy clause contained in the parties' contracts, that the parties had "bound themselves to preserve the confidentiality of classified material." Relying on this secrecy clause, the court concluded that the parties had "effectively waived the right to jury trial." The court's conclusion, however, is not consistent with the traditional view of jury waiver. Although the right to a jury trial may be waived both before and after a given cause of action arises, a waiver before a cause of action arises, such as the court found in Loral, is not lightly to be inferred. The general rule is that a waiver before the time for demanding a jury has expired should be based on a finding of "nothing less than an affirmative representation by the party himself, or by his duly authorized counsel." When a party's counsel waives the jury trial, the court should also find that he discussed the matter with the party who has determined not to exercise his constitutional right to a jury.

Ultimately, the validity of the Second Circuit's finding of waiver in Loral depends upon a question of fact—whether the parties knowingly dispensed with their constitutional right to a jury trial when they signed these contracts.

26. "As an action on a debt allegedly due under a contract, it would be difficult to conceive of an action of a more traditionally legal character." Dairy Queen, Inc. v. Wood, 369 U.S. 469, 477 (1962); see 5 Moore's, supra note 17, § 38.11[5], at 120 (action of special assumpsit was available at common law to recover damages on a simple contract).
28. 558 F.2d at 1132 (footnote omitted).
29. Id.

Besides a failure to make a timely demand for a jury, the right may be waived by the conduct or agreement of the parties. Scott v. Neely, 140 U.S. 105, 109-10 (1891) (jury trial may be waived by assent of parties); Tennessee Coal, Iron & R.R. v. Muscoda Local No. 123, 137 F.2d 176, 185 n.24 (5th Cir. 1943), aff'd on other grounds, 321 U.S. 590 (1944); see Civil v. Waterman S.S. Corp., 217 F.2d 94, 97 (2d Cir. 1954) (right to jury trial held to be "personal to the litigant, who may waive it by his action or nonaction"); 9 C. Wright & A. Miller, supra note 23, § 2321, at 102.
31. The seventh amendment right is fundamental, and courts must indulge every reasonable presumption against waiver. Heyman v. Kline, 456 F.2d 123, 129-30 (2d Cir.), cert. denied, 409 U.S. 847 (1972); see 9 C. Wright & A. Miller, supra note 23, § 2321, at 101.
33. Id.
The secrecy clause which the parties signed in *Loral* does not necessarily imply a knowing waiver of the right to a jury trial. Secrecy clauses are often inserted in contracts that entail exposure to classified information in order to prevent unauthorized disclosures to third parties during the performance of the contract. Given the routine nature and the purpose of such secrecy clauses, it is doubtful that the contract clause in *Loral* truly evidenced an intent to waive the right to a jury trial.

C. The Sovereign Immunity Exception

Another principle that affects the right to a jury trial is the common-law principle that the sovereign is immune from suit except when it consents to be sued. A corollary to this principle is that no constitutional right to a jury trial exists in actions against the United States.

34. Generally courts have sustained the validity of contract clauses that expressly waive the right to a jury trial provided that the choice was made freely. 5 Moore's, *supra* note 17, § 38.46, at 350-53 (citing cases). However, even when courts recognize the contractual waiver of the right to a jury trial, they have tended to construe such clauses narrowly. See, e.g., *Rodenbur v. Kaufmann*, 320 F.2d 679, 683-84 (D.C. Cir. 1963); *National Acceptance Co. v. Myca Prods. Inc.*, 381 F. Supp. 269, 270 (W.D. Pa. 1974); 5 Moore's, *supra* note 17, § 38.46, at 346.

35. Courts are usually attentive to the need for secrecy in various contexts. Government contracts are a good example. Courts have often relied upon the concept of express or implied secrecy agreements to reach results other than the denial of a jury trial. In *Pollen v. Ford Instrument Co.*, 26 F. Supp. 583 (E.D.N.Y. 1939), aff'd on other grounds, 103 F.2d 762 (2d Cir. 1940), for example, the government asserted that the disclosure of military secrets involved in this patent infringement suit would be detrimental to the national security. The court relied upon an express secrecy pledge to deny discovery of certain documents pursuant to Fed. R. Civ. P. 26 F. Supp. at 584-86. The Supreme Court, in *E.W. Bliss Co. v. United States*, 248 U.S. 37 (1918), relied upon a secrecy clause contained in a weapons contract to grant an injunction prohibiting the defendant manufacturer from exhibiting or communicating to third parties the construction plans of a torpedo. "The nature of the services rendered was such that secrecy might almost be implied. It is difficult to imagine a nation giving to one of its citizens contracts to manufacture implements necessary to the national defense and permitting that citizen to disclose the construction of such implement or sell it to another nation." *Id.* at 46.

Secrecy clauses have also withstood first amendment attacks. In *United States v. Marchetti*, 466 F.2d 1309 (4th Cir.), *cert. denied*, 409 U.S. 1063 (1972), for example, the court upheld the validity of the secrecy clause contained in a CIA employment contract prohibiting the disclosure of classified information despite the ex-employee's claim of a first amendment right to publish this information. The court concluded that the government's need for secrecy in this area justified a system of prior restraints against employee disclosures of classified information. *Id.* at 1316-17. *But cf.* New York Times Co. v. United States, 403 U.S. 713. There the Court refused to enjoin publication of the "Pentagon Papers" despite the Government's assertion that such publication would be detrimental to national security because "[t]he word 'security' is a broad, vague generality whose contours should not be invoked to abrogate the fundamental law embodied in the First Amendment." *Id.* at 719 (Block, J., concurring).


The doctrine of sovereign immunity has no effect on the right to a jury trial in criminal actions.
The sovereign's immunity may also extend to agents of the United States in certain circumstances. When this is the case, the right to a jury trial will not exist. For example, the sovereign's immunity from jury trial will extend to the agent when the United States is in fact a real party in interest in actions brought nominally against the agent. On the other hand, if the United States will not be affected financially, the right to a jury trial will exist.

Using the above reasoning, a right to a jury trial would have been proper in Loral because the action was brought against the prime contractor personally and because the outcome of the action would not have affected the interests of the sovereign.

D. Inapplicability of the Historical Test and Its Exceptions

Based on the facts of Loral, neither the waiver theory nor the government agent immunity theory justifies the denial of a jury trial under the historical

instituted by the United States. The right to a jury in criminal proceedings is guaranteed by art. III, § 2, cl. 3 of the Constitution and by the sixth amendment. This doctrine also has no effect on the seventh amendment right to a jury trial in civil actions instituted by the United States as plaintiff when the issues are of a traditionally legal nature. See, e.g., United States v. Winchester, 99 U.S. 372, 374 (1878); The Sarah, 21 U.S. (8 Wheat.) 390, 394 (1823); Vandevander v. United States, 172 F.2d 100, 101 (5th Cir. 1949); 5 Moore’s, supra note 17, ¶ 38.31[1], at 233.

Thus, only when the United States is a defendant or is the target of a cross-claim, counterclaim or third-party claim does the doctrine of sovereign immunity come into play. In these situations, the consent of the United States to the terms of suit defines the jurisdiction of the court. For example, “Congress, despite the Seventh Amendment, may dispense with a jury trial in suits brought in the Court of Claims.” United States v. Sherwood, 312 U.S. 584, 587 (1941). When Congress consents to be sued, it may confer jurisdiction on the district court sitting as a court of law or equity, as a court of claims, or as a court of admiralty. The particular grant of jurisdiction will determine the method of trial; a grant of jurisdiction to the district court as a court of law carries with it the right to a jury trial. United States v. Pftsch, 256 U.S. 547, 552-54 (1921).

The general jurisdictional statute governing civil actions against the United States is 28 U.S.C. § 1346 (1976). Section 1346(a) gives the district courts original jurisdiction concurrent with the court of claims over “[a]ny civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority,” and over “[a]ny other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States.” 28 U.S.C. § 1346(a) (1976) (emphasis added). 28 U.S.C. § 1346(b), which is the jurisdictional provision of the Federal Tort Claims Act, gives the district court exclusive jurisdiction of civil actions sounding in tort against the United States without any limitation as to the amount of the suit. 28 U.S.C. § 2402 (1976) provides: “Any action against the United States under section 1346 shall be tried by the court without a jury, except that any action against the United States under section 1346 shall be tried by the court with a jury.” Thus, only in tax disputes is a jury available in actions brought under § 1346.


40. 28 U.S.C. §§ 1346(b), 2402 (1976); see 5 Moore’s, supra note 17, ¶ 38.31[2], at 238. An analogous inquiry is whether the United States is a necessary party to the civil action. See 3A id. ¶ 19.15.

41. 28 U.S.C. §§ 1346(b), 2402 (1976); 5 Moore’s, supra note 17, ¶ 38.31[2], at 238.
test. Nevertheless, application of the historical test to the unique situation presented in this case is not wholly satisfactory. It appears that no action involving state secrets has ever been tried before a jury. The simple explanation for the lack of judicial precedent on this issue is that the common-law state secrets privilege absolutely prevented disclosure of state secrets in any judicial proceeding. Thus, courts never reached the question of whether issues containing state secrets were entitled to a jury trial.

In Loral, the question of the right to a jury trial of these issues arose only because the executive branch did not fully assert its privilege. Although the nature of the evidence does not affect the right to a jury trial, the Second Circuit was, as a practical matter, faced with the decision of either denying the jury trial or, if a jury was ordered, forcing the executive branch to assert the full extent of its privilege. Under the circumstances, the latter alternative would have foreclosed any judicial consideration of the breach of contract action. By holding that a jury trial was not available in this action involving state secrets, the Second Circuit chose the procedure that would ensure the litigants a fair judicial resolution of their contract dispute. As the following discussion of the state secrets privilege will illustrate, the in camera nonjury trial in Loral represents a prudent compromise which the executive branch was not obliged to make.

II. THE STATE SECRET PRIVILEGE

A. The Reynolds Procedure

Of all the governmental privileges, courts have traditionally shown the most deference to executive claims of the state secret privilege. This judicial attitude is the product of two factors—the highly sensitive nature of the information protected by this privilege and the desire to avoid confrontations with the executive branch regarding the validity of privilege claims in this area. Judicial reluctance to question executive decisions concerning state secrets is understandable in light of the fact that the Constitution confers upon the President, as Chief Executive and Commander in Chief of the armed forces, broad powers in the conduct of foreign relations and national defense.

42. See note 80 infra and accompanying text.
43. See note 24 supra and accompanying text.
44. For a discussion of the other governmental privileges, see notes 65-67 infra and accompanying text.
45. Halkin v. Helms, No. 77-1922, slip op. at 14 (D.C. Cir. June 16, 1978). The highly protective attitude of courts toward state secrets is reflected in the procedure for claiming the state secrets privilege, which, unlike the procedure prescribed for other governmental privileges, restricts the ability of the court to examine the allegedly privileged documents. Compare the procedure described in notes 58-61 infra and accompanying text with the procedure described in notes 65-70 infra and accompanying text.
46. See authorities cited note 7 supra.
47. See United States v. Reynolds, 345 U.S. 1, 8-10 (1953); note 4 supra and accompanying text.
48. U.S. Const. art. II, § 2. The judiciary has recognized the executive interest in security which is necessary for the proper functioning of these article II powers. "The Government . . . has the right and the duty to strive for internal secrecy about the conduct of governmental affairs in areas in which disclosure may reasonably be thought to be inconsistent with the national
In order to minimize the possibility of confrontation between the executive and judicial branches, a formal procedure for claims of the state secrets privilege was developed in United States v. Reynolds. In that case, the widows of three civilian observers who were killed in the crash of a secret Air Force test flight sued the United States under the Federal Tort Claims Act and subsequently sought the production of the Air Force accident report pursuant to rule 34 of the Federal Rules of Civil Procedure. The Secretary of the Air Force resisted discovery by claiming the state secrets privilege.

interest. United States v. Marchetti, 466 F.2d 1309, 1315 (4th Cir.), cert. denied, 409 U.S. 1063 (1972); see Henkin, supra note 1, at 273-74. In Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948), the Court held that executive orders regarding air licenses were not reviewable. Although the state secrets privilege was not discussed, the case illustrates an analogous judicial attitude: "It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret. . . . [T]he very nature of executive decisions as to foreign policy is political, not Judicial. . . . They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry." Id.

Similarly, courts will not review the executive branch's classification of secret documents relating to foreign affairs and national defense. Courts are considered ill-equipped to become sufficiently familiar with foreign intelligence matters so as to review secrecy classifications effectively. United States v. Marchetti, 466 F.2d 1309, 1318 (4th Cir.), cert. denied, 409 U.S. 1063 (1972). However, the Freedom of Information Act, 5 U.S.C. § 552(a)(4)(B) (1976), has been interpreted to provide for judicial review to determine whether a document was in fact properly classified pursuant to executive order. Alfred A. Knopf, Inc. v. Colby, 509 F.2d 1362, 1367 (4th Cir.), cert. denied, 421 U.S. 992 (1975).

Furthermore, the war powers, U.S. Const. art. I, § 8, cl. 11, have also been found to justify the exclusion of military secrets from judicial review. "The right of the Army to refuse to disclose confidential information, the secrecy of which it deems necessary to national defense, is indisputable. . . . The war power embraces every phase of the national defense including the protection of war materials and the members of the armed forces from injury and from the dangers which attend the rise, progress and prosecution of war." United States v. Haugen, 58 F. Supp. 436, 438 (E.D. Wash. 1944).

49. 345 U.S. 1 (1953).
51. Fed. R. Civ. P. 34 provides that documents in the possession or control of a party may be discovered. Rule 34 and the general discovery provision in rule 26(b)(1) compel the production of any matters that are "not privileged." The term "not privileged" as it is used in the rules refers to common-law evidentiary privileges, including the state secret privilege. United States v. Reynolds, 345 U.S. at 6-7; Pollen v. Ford Instrument Co., 26 F. Supp. 583 (E.D.N.Y. 1939), aff'd on other grounds, 108 F.2d 762 (2d Cir. 1940).
52. The Secretary of the Air Force objected to production of the documents because the aircraft in question was engaged in a highly secret mission at the time of the crash. United States v. Reynolds, 345 U.S. at 4-5. The Air Force, however, offered to produce the surviving crew members for plaintiff's discovery of unclassified matters. Id. at 5. Based on this proposed compromise, the Supreme Court held that no compelling necessity for the government document was shown and therefore did not require an in camera examination of the material. Id. at 11.

The Secretary of the Air Force also filed a formal official information privilege claim for the interdepartmental report under an Air Force regulation, stating that the report was made in order to safeguard against future air disasters. He argued that this purpose might be defeated if the possibility of disclosure limited the confidentiality of communications among Air Force personnel. The Third Circuit, however, rejected this claim of absolute privilege. Reynolds v. United States, 192 F.2d 987, 992-95 (3d Cir. 1951). For a discussion of the official information privilege, see notes 65-70 infra and accompanying text.
The Supreme Court, holding that the circumstances indicated that a valid claim of privilege had been made, denied discovery. 53

The procedure announced by the Court required that a formal claim of privilege be filed by the appropriate department head after he has personally considered the matter. 54 This procedure is appropriate whether or not the United States is a party to the action because the privilege “belongs to the Government and must be asserted by it; it can neither be claimed nor waived by a private party.” 55

The Court perceived the difficulty of ascertaining the validity of a claim of privilege without disclosing the very information the privilege was designed to protect, 56 but it was unwilling to sacrifice complete judicial control over the evidence. 57 In an attempt to reconcile these opposing positions, the Court formulated the following compromise:

[We] will not go so far as to say that the court may automatically require a complete disclosure to the judge before the claim of privilege will be accepted in any case. It may be possible to satisfy the court, from all the circumstances of the case, that there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged. When this is the case, the occasion for the privilege is appropriate, and the court should not jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence, even by the judge alone, in chambers. 58

Furthermore, the Court noted that a judge may consider a showing of necessity for the privileged material when deciding whether an in camera examination of the material is required to determine the validity of the privilege claim. 59 Even the greatest necessity, however, will not defeat the government’s claim of the state secret privilege once the court is satisfied that the claim is valid. 60 Thus, the state secret privilege is absolute; it permits no

53. 345 U.S. at 11.
54. Id. at 7-8. The formal claim of privilege must set forth, with enough particularity to allow the court to make an informed decision, the nature of the material withheld and the threat to national security which would result from its disclosure. Kinoy v. Mitchell, 67 F.R.D. 1, 8 (S.D.N.Y. 1975). A factual basis for the privilege will not be required in the formal claim because of the danger that such facts may disclose sensitive matters which the privilege was designed to protect. Jabara v. Kelley, 75 F.R.D. 475, 488 (E.D. Mich. 1977).
56. 345 U.S. at 8.
57. The Government’s argument in Reynolds was that the executive department heads have the power to withhold their documents from judicial view if such is deemed to be in the public interest. Id. at 6. This position is similar to the view of the English courts which do not monitor or examine the validity of privilege claims. Once a claim of privilege is asserted by the appropriate department head, the courts are bound by his determination. Duncan v. Cammell, Laird & Co., [1942] A.C. 624, 639; Beatson v. Skene, 157 Eng. Rep. 1415, 1421-22 (Ex. 1860). But cf. Hennessy v. Wright, 21 Q.B.D. 509, 515 (1888) (dictum) (advocating in camera review of claim’s validity).
58. 345 U.S. at 10 (emphasis added).
59. Id. at 11 ("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 . . . .")
60. Id. In both Socialist Workers Party v. Attorney Gen. of the United States, No. 73 Civ.
balancing of the litigant's interests against those of the government, as is the
case with qualified privileges.61

B. Criticism of the Reynolds Procedure

The Reynolds procedure, which limits the number of occasions when in
camera examination by the court is appropriate to determine the validity of a
privilege claim,62 was not unanimously accepted by the Supreme Court. The
dissenting Justices agreed with the opposing viewpoint of Judge Maris,63 who
in the Third Circuit opinion in Reynolds, stated:

[We] are satisfied that a claim of privilege against disclosing evidence relevant to the
issues in a pending law suit . . . is to be determined in accordance with the appropriate
rules of evidence, upon the submission of the documents in question to the judge for
his examination in camera. Such examination must obviously be ex parte and in
camera if the privilege is not to be lost in its assertion.64

The strength of this position is enhanced by the fact that this procedure is
applied in other areas of governmental privilege which do not concern
national defense or foreign relations. These privileges include the official
information privilege,65 the executive privilege,66 and the privilege that
protects the identity of informers.67 Unlike the state secrets privilege, these
privileges are qualified and not absolute.68 Thus, the government's claim of a

3160, slip op. at 4, 8-10, 12 (S.D.N.Y. June 10, 1977) and Halkin v. Helms, No. 77-1922, slip op. at
10, 15 (D.C. Cir. June 16, 1978), where the success of plaintiffs' actions depended on the production
of secret government records, the respective courts examined the privileged materials in camera and
(limited disclosure of fact of interception but not of contents of intercepted communications or
methods used) with Socialist Workers Party v. Attorney Gen. of the United States, No. 73 Civ.
3160, slip op. at 2 (S.D.N.Y. Mar. 9, 1978) (no disclosure permitted once claim held valid).61

61. Halkin v. Helms, No. 77-1922, slip op. at 11 (D.C. Cir. June 16, 1978); see notes 65-70
infra and accompanying text.

62. See notes 58-59 supra and accompanying text.

63. Justices Black, Frankfurter and Jackson dissented in Reynolds. United States v.
Reynolds, 345 U.S. at 12.

64. Reynolds v. United States, 192 F.2d 987, 997 (3d Cir. 1951) (footnotes omitted).

65. The official information privilege protects information within the custody and control of a
government department or agency from disclosures shown to be contrary to the public interests.
See, e.g., Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena, 40 F.R.D. 318 (D.D.C. 1966), aff'd, 384
United States, 157 F. Supp. 939, 946 (Ct. Cl. 1958); 8 J. Wigmore, supra note 6, § 2378(3), at
798-99. See generally Note, Discovery of Government Documents and the Official
Information Privilege, 76 Colum. L. Rev. 142 (1976).

66. Executive privilege is a constitutional doctrine based upon the concept of separation of
powers and may encompass both official information and state secret claims. See United States v.

67. See, e.g., Roviaro v. United States, 353 U.S. 53 (1957); Westinghouse Elec. Corp. v. City
of Burlington, 351 F.2d 762 (D.C. Cir. 1965); Black v Sheraton Corp. of America, 47 F.R.D.
263 (D.D.C. 1969), aff'd, 564 F.2d 550 (D.C. Cir. 1977); 8 J. Wigmore, supra note 6, § 2374(3), at
761-72. One purpose of the identity-of-informers privilege is to foster effective law enforcement by
encouraging the cooperation of citizens with law enforcement authorities. Roviaro v. United
States, 353 U.S. at 59; Westinghouse Elec. Corp. v. City of Burlington, 351 F.2d at 768.

qualified privilege "may be overcome by a litigant's showing of need for the material great enough to outweigh the policies favoring nondisclosure."#69

This difference between qualified and absolute privileges accounts for the procedural treatment given to the state secrets privilege by the majority in Reynolds. When the privilege is qualified and a party has shown a genuine need for the privileged government documents, courts may order an in camera inspection of the material before ruling on the privilege claim.#70 The fact that courts are able to inspect qualified privilege claims in camera, however, indicates that courts are just as competent to protect the confidentiality of the material in their possession when determining the validity of claims of absolute privilege. Furthermore, judicial examinations of privilege claims only as a "last resort" may increase the likelihood of unfounded claims.#71 By excluding the state secrets privilege from in camera inspection of privilege claims, courts are inviting its abuse; in certain circumstances government officials may make unwarranted claims of the state secrets privilege to prevent disclosure of information that otherwise would have been discoverable after an in camera inspection. For these reasons, despite the different nature of the information protected by the state secrets privilege and that protected by the qualified privileges, the same in camera procedure should be used for examining both absolute and qualified privilege claims.

Nevertheless, such a modification of the Reynolds procedure has not occurred. It is interesting to note that the Reynolds procedure was developed during the height of the McCarthy era when concern for safeguarding state secrets was great. Ironically, twenty years later during the Watergate scandal, when mistrust of government secrecy was widespread, the Supreme Court in United States v. Nixon#72 reaffirmed in dictum the Reynolds position regard-


70. The in camera procedure was deemed especially necessary for reviewing the official information privilege claim because the wide range of information subject to this privilege increases the possibility of abuse. In light of this possibility, Wigmore questioned the validity of the privilege's rationale: "It is urged . . . that the 'public interest must be considered paramount to the individual interest of a suitor in a court of justice.' As if the public interest were not involved in the administration of justice! As if the denial of justice to a single suitor were not as much a public injury as is the disclosure of any official record! When justice is at stake, the appeal to the necessities of the public interest on the other side is of no superior weight." 8 J. Wigmore, Evidence § 2378a (3d ed. 1940).


ing the impropriety of in camera inspections of state secrets privilege claims.\textsuperscript{73} The \textit{Nixon} dictum, however, has been criticized as offering "an oblique invitation to the President to throttle judicial review by presenting a claim of executive privilege in the cellophane wrapper of 'national security.'"\textsuperscript{74} Moreover, as Professor Berger points out, it is ironic that after the events of Watergate, the Supreme Court was not persuaded that a district court judge could be as trustworthy in handling national security information in camera as the executive officers who engineered the break-in.\textsuperscript{75} Some of these same executive officers were imprisoned for the break-in which they attempted to justify on national security grounds. "[T]he incident may serve to illustrate the difficulties which will confront a district judge in applying the \textit{Reynolds} formula."\textsuperscript{76}

Given the confidential nature of many executive decisions, circumstances may often indicate a reasonable danger that compulsory production of evidence will expose state secrets. Nevertheless, establishing inflexible rules solely to protect against exposure of state secrets in cases when such protection is warranted allows for abuse of this privilege in cases when protection is not warranted,\textsuperscript{77} despite the fact that courts presume that executive discretion will only be exercised in good faith.\textsuperscript{78} The danger of such abuse could be curtailed by extending in camera inspection of privilege claims to more cases than the \textit{Reynolds} procedure currently permits.\textsuperscript{79}

\textsuperscript{73} Absent a claim of need to protect military, diplomatic, or sensitive national security secrets, we find it difficult to accept the argument that even the very important interests in confidentiality of Presidential communications is significantly diminished by production of such material for in camera inspection with all the protection that a district court will be obliged to provide." Id. at 706 (emphasis added).


\textsuperscript{76} Id. It has been argued that judges should not feel slighted by the suggestion that allowing them to review classified documents will increase the risk of disclosure. A judge's chambers are ill-equipped to provide the security necessary to protect highly sensitive information. Alfred A. Knopf, Inc. v. Colby, 509 F.2d 1362, 1369 (4th Cir.), cert. denied, 421 U.S. 992 (1975); see United States v. Reynolds, 345 U.S. at 10. Courts may also be hampered in their consideration of state secrets when they are unfamiliar with the factual context of the questioned information or lack the technical or scientific expertise to determine the need for secrecy. Note, \textit{Military Secrets as an Evidentiary Problem in Civil Litigation}, 4 J. Pub. L. 196, 199 (1955).

One objection to the \textit{Reynolds} procedure, however, is that district judges are capable of providing the security that such sensitive information requires. "The judges of the United States are public officers whose responsibility under the Constitution is just as great as that of the heads of the executive departments." \textit{Reynolds} v. United States, 192 F.2d 987, 997 (3d Cir. 1951), rev'd, 345 U.S. 1 (1953).

\textsuperscript{77} Courts which abdicate their inherent function of determining the facts upon which the admissibility of evidence depends will furnish bureaucrats with ample opportunity to abuse the privilege. "The lawful limits of the privilege are extensible beyond any control if its applicability is left to the determination of the very official whose interest it may be to shield a wrongdoing under the privilege." 8 J. Wigmore, \textit{supra} note 6, § 2379(g)(1), at 810.

\textsuperscript{78} Pollen \textit{v. Ford Instrument Co.}, 26 F. Supp. 583, 585 (E.D.N.Y. 1939), aff'd \textit{on other grounds}, 108 F.2d 762 (2d Cir. 1940).

\textsuperscript{79} It should be noted that in Socialist Workers Party \textit{v. Attorney Gen. of the United States}, No. 73 Civ. 3160, slip op. at 3, 4, 10 (S.D.N.Y. June 10, 1977), the court reviewed in camera a number of secret documents and affidavits to determine the validity of a state secrets privilege.
III. The Loral Compromise

A. The Hardships of the Absolute Privilege and the Need for New Procedures

Usually a valid claim of privilege will result in the complete unavailability of the privileged material. The ramifications of this nondisclosure will vary according to the type of action involved and the necessity of the privileged material to the litigants' case.

*Totten v. United States* illustrates the extreme hardship that may result from the state secrets privilege. There, the plaintiff sued to recover compensation for services rendered under a spy contract authorized by President Lincoln during the Civil War. Justice Field, though upholding the validity of the contract, held that an action for its enforcement was not maintainable: The secrecy which such contracts impose precludes any action for their enforcement.

It may be stated as a general principle, that public policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential, and respecting which it will not allow the confidence to be violated.

The Court found that absolute secrecy regarding the existence of spy contracts was necessary for the mutual protection of the parties and further justified

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claim. Although the privilege claim did not cover military secrets of the kind that would have precluded in camera review under the *Reynolds* procedure, the court noted that "the gathering of foreign intelligence is just as important to the national security as the development of military weapons." *Id.* at 8.


81. In criminal actions in which the Government withholds evidence under a claim of privilege, the charges against the defendant must be dismissed. Gravel v. United States, 408 U.S. 606, 645 (1972); Jencks v. United States, 353 U.S. 657, 671-72 (1957); United States v. Reynolds, 345 U.S. at 12; United States v. Andolschek, 142 F.2d 503, 506 (2d Cir. 1944). "[T]he prosecution must decide whether the public prejudice of allowing the crime to go unpunished was greater than the disclosure of such 'state secrets' as might be relevant to the defense." United States v. Coplon, 185 F.2d 629, 638 (2d Cir. 1950), *cert. denied*, 342 U.S. 920 (1952).

Under a similar rationale, civil actions instituted by the government must also be dismissed when evidence is withheld from the defendant under a claim of privilege. See United States v. Reynolds, 345 U.S. at 12 (by implication); 8 J. Wigmore, *supra* note 6, § 2379(2), at 812.

If the government is a defendant or is not a party to the action, the ordinary rule of nondisclosure applies to the government's assertion of its privilege. See note 80 *supra* and accompanying text.

82. When the privilege results in nondisclosure, the degree of hardship will depend upon whether the privileged information is necessary to establish an element of the litigant's cause of action. When an element of the cause of action may be proved by alternate means, the action will proceed; if not, the litigant must forego any legal remedy for his injury. See Socialist Workers Party v. Attorney Gen. of the United States, No. 73 Civ. 3160, slip op. at 8-9 (S.D.N.Y. June 10, 1977); United States v. Haugen, 58 F. Supp. 436 (E.D. Wash. 1944).

83. 92 U.S. 105 (1875).

84. *Id.* at 105.

dismissal by concluding that the contract contained an implied secrecy agreement.\textsuperscript{86}

The requirement of absolute secrecy concerning the existence of the contract, which led to dismissal in \textit{Totten}, usually would not apply to actions for breach of defense contracts like \textit{Loral}. Even though the weapons contract in the latter action contained state secrets, the existence of such a contract is not itself a secret. For this reason the New York Supreme Court, in \textit{Ticon Corp. v. Emerson Radio & Phonograph Corp.,}\textsuperscript{87} refused to dismiss or stay the proceedings in an action between a prime contractor and a subcontractor of an army defense contract.\textsuperscript{88} The court decided that every proper judicial technique short of dismissal should be invoked to protect the confidentiality of state secrets unless a dismissal is absolutely necessary.\textsuperscript{89}

In view of the nature of the state secrets privilege, it is evident that \textit{Loral} represents a wise compromise along the lines called for by \textit{Ticon} in that the executive branch partially waived its privilege by allowing an in camera trial without a jury.\textsuperscript{90} This concession to the in camera trial could not have been compelled under the \textit{Reynolds} procedure because circumstances in \textit{Loral} indicated that the contracts contained state secrets.\textsuperscript{91} If the United States chose to adhere strictly to the \textit{Reynolds} procedure, the Secretary of Defense could have filed a formal claim of privilege and thus could have prevented any in camera examination of the contract. The compromise procedure in \textit{Loral}, on the other hand, prevented a grave hardship by providing the

\begin{itemize}
\item \textsuperscript{86} The Court was influenced by the special nature of spy contracts whose very existence is a state secret. The Court thought its highly protective position was justified under the circumstances because publicity, even without more detailed disclosures, can lead to diplomatic embarrassment and can endanger the national security and the well being of the individual agent. 92 U.S. at 106.
\item \textsuperscript{87} 206 Misc. 727, 134 N.Y.S.2d 716 (Sup. Ct. 1954).
\item \textsuperscript{88} The court distinguished this case from \textit{Totten} in which the publicity of suit would have been a breach of contract, and in which there was no hope that the material would be declassified. In \textit{Ticon}, on the other hand, if plaintiff's suit were dismissed and the subject matter later declassified, plaintiff would have been forever barred from bringing a meritorious suit. \textit{Id.} at 732, 134 N.Y.S.2d at 721. The court also recognized that though courts are bound to protect national security, denial of judicial forums in defense contract disputes may actually work to the detriment of national security interests because, with the knowledge that their contracts are immune from judicial enforcement, parties might feel free to breach them. \textit{Id.} at 730, 134 N.Y.S.2d at 719.
\item \textsuperscript{89} \textit{Id.} at 732, 134 N.Y.S.2d at 721. The court's position in \textit{Ticon}, however, appears to do no more than postpone the inevitable when the privileged information is indispensable to establishing a claim or defense because the state secret privilege remains an absolute privilege. Sensitive information deemed to be absolutely privileged will not be disclosed regardless of the hardship to the private litigant. \textit{See note 61 supra} and accompanying text. Even in the most severe cases, courts have determined that the interests of the private litigant must yield to the "overriding interest of national security". Halpern v. United States, 258 F.2d 36, 43 (2d Cir. 1958).
\item \textsuperscript{90} The Government, as amicus curiae, asserted its privilege only to the extent that it refused to provide security clearance for the jury similar to that provided to court personnel, attorneys, and their supporting personnel. 558 F.2d at 1132. Thus, insofar as it allowed state secrets to be exposed in a proceeding before the court in camera, the Government only partially waived its privilege.\textsuperscript{91} \textit{See note 58 supra} and accompanying text.
\end{itemize}
litigants with a judicial forum in which their dispute could be resolved. The Loral compromise thus illustrates both the ability of courts to utilize procedural safeguards which protect the confidentiality of state secrets and the necessity of doing so in order to avoid the extreme hardship that granting the privilege might cause to the private litigant who needs the secret information to establish his claim.

The feasibility of procedural safeguards, however, should not be left entirely to the discretion of the executive branch, as it was in Loral. Permitting the government to decide on a case-by-case basis whether to assert or waive its privilege could easily lead to abuse through overbroad claims of privilege resulting from bureaucratic laziness or through the manipulation of court procedures by the United States when it wishes to benefit a party it favors. The danger of such favoritism is apparent in subcontract situations like that in Loral in which the government would be expected to favor the position of the prime contractor upon whom it customarily relies. Giving the courts complete control over the application of procedural safeguards, however, would eliminate the possibility of such abuses. When procedural safeguards effectively protect the confidentiality of state secrets, courts can then prevent assertions of the privilege from frustrating the litigant's right to a judicial resolution of his dispute.92

B. Optional Procedures

1. In Camera Nonjury Trial

In Loral, the Department of Defense consented to an in camera nonjury trial of the contract action. Under this procedure, court personnel, attorneys, and their supporting personnel were given security clearance by the Department of Defense, and thereafter the classified documents were available for their use in the private trial.93 Of course, such an in camera trial would be appropriate only when both parties to the litigation already have knowledge of the state secrets, as was the case in Loral. Disclosure to private litigants having no prior knowledge of the classified information would otherwise defeat the protective purpose of the state secrets privilege.

2. Jury Security Clearance

In addition to in camera nonjury trials, the Loral court discussed the feasibility of other judicial safeguards. Among these was the possibility of preserving the jury procedure in actions involving state secrets by giving the jury security clearance.94 The court, however, rejected this procedure because "jurors may not feasibly be handled by such a process."95 The detailed investigation of jurors would lengthen the delay in trial of such actions and thus would increase the danger of exposing classified material.96 This procedure also

93. 558 F.2d at 1132.
94. Again, this procedure will be appropriate only if both parties know the contents of the state secrets, because disclosure in open court to a party having no prior knowledge of the secrets obviously would undermine the privilege's purpose.
95. 558 F.2d at 1132.
96. Id. at 1133.
might not adequately protect the confidentiality of state secrets because jurors "lack . . . the usual job-related inducements and training for long-term commitments to secrecy . . . ."97 This threat to security is further complicated by the difficulty of monitoring the jury's long-term compliance with secrecy orders.98

Moreover, providing security clearance for a jury would create burdensome investigations into the private lives of jurors that would have a chilling effect upon the proper functioning of the jury.99 Meeting the standards necessary for security clearance would also impose qualifications on jurors higher than those required by the Jury Selection Act of 1968100 and would thus infringe upon the right to have a jury selected at random from a fair and representative cross section of the community.101

3. Reference to a Special Master

Even though both parties in Loral had knowledge of the state secrets involved, the court recognized that the complexity of the case and the congestion of the court's calendar increased the difficulty of protecting the confidentiality of the classified documents.102 The Second Circuit specifically pointed to the fact that delay while the classified papers were in the possession of the clerk of the district court would increase the danger of exposure.103 To remedy this situation, the action was referred to a magistrate as a special master.104 Although neither party consented to the reference, the Second Circuit held that the reference was an appropriate exercise of the court's equitable power to adopt measures to meet the needs of private litigants while preserving national security.105

The standards provided by the Federal Magistrate's Act106 and rule 53(b) of the Federal Rules of Civil Procedure for an appropriate reference to a magistrate are not exact. Rule 53(b) provides that "reference to a [special] master shall be the exception and not the rule," and that in nonjury cases "reference shall be made only upon a showing that some exceptional condition requires it."107 The Federal Magistrate's Act provides that the court may appoint a magistrate as a special master without the consent of the parties when authorized by the standards of rule 53(b).108

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97. Id. at 1132.
98. Id.
99. Id.
102. 558 F.2d at 1132.
103. Id. at 1133.
104. Id. at 1131.
105. Id. at 1133.
107. If the case is to be tried by a jury, rule 53(b) provides that a reference is appropriate "only when the issues are complicated." In such circumstances the master's preliminary findings "are admissible as evidence of the matters found and may be read to the jury," Fed. R. Civ. P. 53(e)(3). This procedure does not infringe upon the party's right to a jury trial because after the report is given prima facie effect, each petitioner is afforded the opportunity to present evidence in rebuttal to the report. See, e.g., Burgess v. Williams, 320 F.2d 91, 94 (4th Cir. 1962).
Although the Second Circuit realized that the mere length and complexity of the issues involved in *Loral* would not sufficiently justify a reference under Fed. R. Civ. P. 53(b), it found the need to protect classified information to be an exceptional condition within the meaning of the rule. The reference was appropriate, therefore, in view of the congressional intent underlying the Magistrate's Act to encourage district courts "to continue innovative experimentations in the use of [magistrates]."

The careful consideration afforded the reference issue by the Second Circuit is typical of judicial disfavor of references except under exceptional circumstances. This judicial attitude stems from the increased expenses and delays of reference when private attorneys serve as special masters. These disadvantages, however, are not present when the special master is a magistrate because, as a full time judicial officer of the United States, the magistrate is paid a fixed federal salary and can devote all of his energies to his duties as a special master.

4. Protective Orders

In cases in which both parties do not have knowledge of the state secrets, it is possible that classified documents could be exposed to them in camera under a protective order. Courts, however, have not been receptive to this procedure. The highly sensitive nature of the information protected by this privilege, and the possible disastrous results of disclosure, have led the courts in [1976] U.S. Code Cong. & Ad. News 6162, 6172. The act does permit references in unexceptional cases, but only if both parties consent thereto. 28 U.S.C. § 636(b)(2) (1976).

In *Jabara v. Kelley*, 75 F.R.D. 475, 486-87 (E.D. Mich. 1977), the court refused to issue a protective order to allow the parties to be present to aid the court during the in camera inspection of a claim of the state secret privilege. The court concluded that such disclosure was exactly what the privilege was designed to prevent—that is, the court itself must first determine the validity of the claim without revealing the contents of the privileged materials. *Accord*, Halkin v. Helms, No. 77-1922, slip op. at 15 (D.C. Cir. June 16, 1978).

Similarly, in *Henne v. Raus*, 399 F.2d 785, 791 (4th Cir. 1968), *cert. denied*, 402 U.S. 914 (1974), the Fourth Circuit, though not directly addressing the practicality of a protective order, stated that the parties would be excluded from the court's in camera determination of whether the defendant acted within the scope of his authority as a CIA agent by uttering statements which were the subject of this libel action. The evidence considered by the court ex parte allegedly contained state secrets. The court recognized that "[d]isclosures in camera are inconsistent with the normal rights of a plaintiff of inquiry and cross-examination, of course, but if the two interests cannot be reconciled, the interest of the individual litigant must give way to the government's privilege against disclosure of its secrets of state." *Id.* at 791.
to conclude that a protective order would not adequately protect classified information because of the difficulty of monitoring long-term compliance with the court’s order.\textsuperscript{116} Furthermore, “[p]rotective orders cannot prevent inadvertent disclosure nor reduce the damage to the security of the nation which may result.”\textsuperscript{117} Protective orders are, however, available to safeguard less sensitive government documents.\textsuperscript{118}

5. Summaries of Classified Documents

Another procedure for avoiding the disclosure of state secrets unknown to all parties or when a jury procedure is desired is to redact irrelevant classified information from the evidence and to prepare unclassified summaries of the relevant classified documents. The use of such secondary evidence is preferable to the hardship that nondisclosure may produce, especially when the unavailability of the original document is not caused by any fault of either party. Justice will be better served in cases which require review of classified documents if the pertinent part of their contents can be provided by secondary means.\textsuperscript{119}

The use of secondary evidence, however, is often difficult because parties in such situations usually cannot agree that the summaries fairly and accurately interpret the material in question.\textsuperscript{120} Another disadvantage of using summaries is that in actions like \textit{Loral} where the issues depend upon the construction of classified documents, the unclassified summaries perform the interpretive function that is traditionally the domain of the trier of fact. Perhaps a more satisfactory way of obtaining secondary evidence is to make the original classified document the subject of a limited reference under Fed. R. Civ. P. 53, thus enabling a special master or magistrate having security clearance to produce a version accurately reflecting the original.

6. Declassification

When procedural safeguards are unavailable, the litigants could simply wait until the classified information necessary for the resolution of their dispute is declassified. At that time the issues that formerly involved state secrets could be disposed of by trial on the merits with full disclosure of all relevant information.\textsuperscript{121} This option assumes, however, that the material will in fact be declassified and that the parties can cope with the financial burdens which may accompany what might be a long-term delay in the resolution of

\textsuperscript{117} Halkin v. Helms, No. 77-1922, slip op. at 11 (D.C. Cir. June 16, 1978).
\textsuperscript{118} See, e.g., Rosse v. Board of Trade, 35 F.R.D. 512, 516 (N.D. Ill. 1964) (Department of Agriculture commodity transaction reports).
\textsuperscript{119} United States v. Haugen, 58 F. Supp. 436, 439 (E.D. Wash. 1944). In this criminal action, the court allowed the government to utilize oral, secondary evidence to prove the contents of a contract relating to the construction of a secret government installation during World War II.
\textsuperscript{120} To avoid disputes regarding the use of self-serving summaries, a fact finding board or commission, qualified to receive classified information and report its findings to the court, could be established. See Note, \textit{Military Secrets as an Evidentiary Problem in Civil Litigation}, 4 J. Pub. L. 196, 201 (1955).
their dispute. This alternative also ignores the likelihood that the testimony of
witnesses will be lost because of their unavailability or faded memories. A
further problem is that the applicable statute of limitations, if any, may pass.

7. Avoiding the Problem by Planning Ahead

The procedural difficulties that confronted the court in Loral could have
been avoided by including an express jury waiver clause\(^{122}\) in all defense
contracts. Another solution which would facilitate a speedy disposition of
defense contract disputes is the insertion of mandatory arbitration clauses in
these contracts.\(^{123}\) The Department of Defense could further ensure security
when such arbitration clauses are used by providing a list of arbitrators who
have been given security clearance from which the parties could choose.\(^{124}\)

In addition, Congress could enact legislation authorizing the district courts
to conduct in camera nonjury trials in all actions involving state secrets
already known to both parties.\(^{125}\) Such a modification of the current restric-
tive attitude toward the exposure of state secrets to the judicial branch would
alleviate many unnecessary hardships by ensuring the litigants a forum for the
resolution of disputes involving privileged matters.

CONCLUSION

The right to jury trial in actions involving state secrets is not simply
resolved by the application of the historical test of the seventh amendment,
for under that test, the nature of the facts in question has no effect upon the
right to a jury trial. Furthermore, actions involving state secrets may not fall
within any of the recognized exceptions to the historical test and thus should
normally be afforded a jury trial.\(^{126}\)

On the other hand, a jury trial would be inappropriate because the
confidentiality of the secrets would be destroyed. Upholding the state secrets
privilege would solve the problem of confidentiality in a jury trial, but in so
doing would deprive the litigants of any judicial forum for the resolution of
their disputes when classified information is necessary to prove their claims.
Therefore, new procedures are necessary to solve the problems of maintaining
confidentiality in a jury trial while ensuring a forum for the resolution of
controversies involving state secrets.\(^{127}\)

The in camera trial procedure adopted in Loral appears to be a prudent
solution to this problem. This procedure should be available in all defense
contract actions in which both parties are already in possession of the
classified information because court procedures are available to prevent the
leakage of information to the general public. In such cases, this procedure
would prevent the denial of a judicial forum that would otherwise result from
the assertion of the privilege. The avoidance of this type of hardship is

\(^{122}\) See notes 34-36 supra and accompanying text.
\(^{123}\) 55 Colum. L. Rev. 570, 573 (1955).
\(^{124}\) Id.
\(^{125}\) See Halpern v. United States, 258 F.2d 36, 43 (2d Cir. 1958).
\(^{126}\) See pt. I supra.
\(^{127}\) See pt. III supra.
especially desirable in view of the potential for abusing the privilege. *Loral* illustrates that this hardship can be eliminated in many cases through the application of procedural innovations.\(^{128}\)

Finally, *Loral* indicates that the *Reynolds* procedure which limits in camera examination of privilege claims is too restrictive. If a district court is capable of providing security for classified information during an in camera trial, surely it could do the same during its own in camera and ex parte examination of privilege claims.\(^{129}\)

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\(^{128}\) *See* pt. III(A) *supra.*

\(^{129}\) *See* notes 70-71 *supra* and accompanying text.