ARTICLES

Secret Justice and the Adversary System

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Introduction

For years, *The Trial*, by Franz Kafka, has served as the literary model for totalitarian justice. Kafka's protagonist, Joseph K., stumbles through a nightmarish judicial proceeding in a shadowy forum without ever discovering the nature of the charges against him or the evidence upon which they are based. In a passage that probably best explains the derivation of the adjective "Kafkaesque" for all types of secret and unfair adjudications, the author explains that in this particular court

> the proceedings were not only kept secret from the general public, but from the accused as well. . . . For even the accused had no access to the Court records, and to guess from the course of an interrogation what documents the Court had up its sleeve was very difficult.[1]

Some recent judicial decisions in our own federal courts suggest that Kafka-like adjudication is not as foreign as one might expect or wish under a legal system dedicated to implementing due process of law.

This Article questions the compatibility of such adjudicatory procedures with American constitutional traditions. Part I discusses some recent decisions upholding the authority of federal courts to resolve contested issues of fact in favor of government agencies on the basis of secret evidence. Part II examines the modern derivation of the government privilege claim in civil litigation. Part III analyzes three different methods federal courts have devised to deal with legal disputes following a determination that relevant information is protected by government privilege. Part IV examines the doctrine of adversariness and its centrality to the notion of due process of law. Part V traces the increasing invo-

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1. F. KAFKA, THE TRIAL 146 (Knopf ed. 1986).

cation of national security claims during the Cold War era, and discusses the special threat posed to the adversary system when courts are too deferential to such claims. Part VI questions whether *in camera* examination of privileged material by a judge alone provides sufficient protection for the rights of litigants against the government. Part VII proposes a mechanism for protecting information whose release would indeed harm national security interests without sacrificing the rights of litigants to the adversarial hearing that due process would normally guarantee them. A concluding section raises fundamental questions about the politics of national security in the post-Cold War era and the continuing need to elevate national security concerns over the demands of adversary justice.

I. Creeping Kafkaism

The first case clearly to hold that a federal court could reach a decision as to disputed facts on the basis of evidence not shared with the opposing party is *Molerio v. Federal Bureau of Investigation*,[2] decided by the United States Court of Appeals for the District of Columbia.[3] *Molerio* was a discrimination suit by a rejected applicant for a job with the Federal Bureau of Investigation (FBI). The applicant claimed that he was rejected due to the political associations of his father.[4] The FBI refused to provide the plaintiff with his application file, but turned it over to the court *in camera*.[5] The court not only held the file privileged and not subject to discovery, but found as a fact that material in the file proved the defendant had a legitimate reason other than the alleged political discrimination for its action on the plaintiff's application.[6]

The appellate court conceded that the plaintiff "had made a circumstantial case permitting the inference that his father's political activities were a ' "substantial factor"—or, to put it in other words, . . . a "motivating factor" ' in the failure to hire."[7] The court went on to state, how-

2. 749 F.2d 815 (D.C. Cir. 1984).

3. The district court held "first, that without the privileged information the plaintiff had not made out a prima facie case; and second, that even if he had, the suit would have to be dismissed because the defendants were unable to present their defense on the record." *Id.* at 819-20.

4. *Id.* at 819.

5. When opinions refer to *in camera* proceedings, it is not always clear whether those proceedings are also *ex parte*, although the context generally indicates that they are. On occasion, courts have permitted adversarial participation in *in camera* proceedings. *See* United States v. Truong Dinh Hung, 667 F.2d 1105, 1107-08 (4th Cir. 1981), *cert. denied*, 454 U.S. 1144 (1982); *see infra* notes 173, 181-86 and accompanying text.

6. *Molerio*, 749 F.2d at 825.

7. *Id.* (citing Mt. Healthy Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977)).

ever, that as a result of its *in camera* inspection of the documents in connection with its verification of the privilege claim, it

> knows that the reason Daniel Molerio was not hired had nothing to do with [his father's] assertion of First Amendment rights. Although there may be enough circumstantial evidence to permit a jury to come to that erroneous conclusion, it would be a mockery of justice for the court—knowing the erroneousness—to participate in that exercise. . . . [W]e know that further activity in this case would involve an attempt, however well intentioned, to convince the jury of a falsehood.[8]

The opinion by Judge (now Justice) Antonin Scalia cited no authority for its far-reaching and extraordinary determination that a court of law, under our adversary system, could resolve a disputed issue of fact on the basis of secret evidence.

A subsequent District of Columbia Court of Appeals opinion approvingly cites *Molerio* in dicta. *In re United States*[9] concerned a mandamus petition by the government, which sought dismissal of a law suit against the FBI on the ground that privileged documents would prove the plaintiff's claim was groundless. The case of *Albertson v. Department of Justice*,[10] which gave rise to this mandamus proceeding, alleged particularly outrageous conduct by the FBI, which was then operating pursuant to its greatly discredited counterintelligence programs (COINTELPROs).[11] FBI documents discovered pursuant to the Freedom of Information Act (FOIA)[12] revealed that the FBI had planted fictitious papers to convince Communist Party officials that one of its leaders, William Albertson, was an FBI informant. As a result, Albertson was expelled from the Party, and according to the suit brought by his widow, Albertson also lost his health, his job at a Party bookshop, and most of his friends.[13]

The government argued that matters at the core of plaintiff's claims and the government's defenses constituted secrets of state that would be jeopardized if the case continued.[14] The appellate court was unconvinced, however, that "evidence of the Government's activities of twenty

8. *Id.*

9. 872 F.2d 472 (D.C. Cir.), *cert. dismissed*, 110 S. Ct. 398 (1989).

10. CA No. 84-02034 (D.D.C. filed July 1984).

11. *See generally* K. O'REILLY, HOOVER AND THE UN-AMERICANS 198-207 (1983) (describing FBI activities under various COINTELPROs).

12. 5 U.S.C. § 552 (1982 & Supp. 1985).

13. *In re United States*, 872 F.2d at 474; *see* Lewis, *Abroad at Home: Rule of Law?*, N.Y. Times, Oct. 26, 1989, at A27, col. 1 (reporting settlement of the case prior to the Supreme Court's ruling on the petition for certiorari).

14. *In re United States*, 872 F.2d at 474.

to thirty years ago will result in the disclosure of state secrets today."[15] The court also remained unconvinced that "the district court would be unable to 'disentangle' the sensitive from the nonsensitive information as the case unfolds."[16] Although the appellate court denied the government's petition and remanded for further proceedings, the court agreed that "summary judgment against the plaintiff is proper if the district court decides that the privileged information, if available to the defendant, would establish a valid defense to the claim."[17]

A recent Third Circuit case also follows *Molerio*. In *Patterson v. Federal Bureau of Investigation*,[18] a teenaged plaintiff sued the FBI under the Federal Privacy Act[19] for interference with his correspondence with foreign governments. A precocious youth, he had started at age eleven to compile his own personal world encyclopedia. His efforts included a steady stream of correspondence with embassies and information bureaus of Communist-ruled countries. Several years after an FBI agent visited the house to inquire about the suspicious correspondence, the family requested the child's file under FOIA.[20] They were told the file was exempt from disclosure because of national security considerations.[21] Litigation ensued. The complaint sought access under FOIA to all documents, and relief under the United States Constitution for illegal mail tampering[22] and under the Federal Privacy Act for illegal maintenance of a file on plaintiff's first amendment activities.[23] The government submitted an affidavit to justify actions that on their face appeared to violate provisions of the Privacy Act.[24] After reviewing the affidavit *in camera*, the district court granted the government's motion for summary judgment as to all counts of plaintiff's complaint. The court's opinion conceded that the public record contained genuine issues of material fact which normally would have precluded summary judgment, but held that the secret affidavit had satisfied the court that the government's action

15. *Id.* at 479.
16. *Id.*
17. *Id.* at 476.
18. 893 F.2d 595 (3d Cir. 1990), *aff'g* 705 F. Supp. 1033 (D.N.J. 1989).
19. Privacy Act of 1974, 5 U.S.C. § 552a (1982 & Supp. 1985).
20. 5 U.S.C. § 552 (1982 & Supp. 1985).
21. *Patterson*, 705 F. Supp. at 1037.
22. *Id.* at 1038; *see* Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971).
23. 5 U.S.C. § 552a(e)(7) (1982 & Supp. 1985).
24. *Patterson*, 705 F. Supp. at 1044-45. The Federal Privacy Act states that agencies of the federal government may "maintain no record describing how any individual exercises rights guaranteed by the First Amendment unless expressly authorized by statute or by the individual about whom the record is maintained or unless pertinent to and within the scope of an authorized law enforcement activity." 5 U.S.C. § 552a(e)(7) (1982 & Supp. 1985).

was justified.[25]

The Third Circuit Court of Appeals expressed sympathy with plaintiff's "objections to the anomalous situation of having to defend against a motion for summary judgment without being privy to the very documents necessary for such a defense,"[26] and noted that the " 'lack of knowledge by the party seeing [sic] disclosure seriously distorts the traditional adversary nature of our legal system's form of dispute resolution.' "[27] "[N]otwithstanding this imbalance between the parties," however, the court proceeded to adopt what it termed the view of "the D.C. Circuit, as well as other circuits [that] have allowed the use of *in camera* affidavits in national security cases."[28] Examining the same *ex*

25. *Patterson*, 705 F. Supp. at 1044. The district court resolved two separate and distinct factual issues on the basis of the government's *in camera* submissions. The first concerned the plaintiff's Privacy Act claim that the FBI was maintaining records describing his exercise of first amendment rights, and that they were not "pertinent to and within the scope of an authorized law enforcement activity." The court acknowledged the existence of genuine issues of fact in the public record and then proceeded to resolve them on the basis of the *ex parte* evidence as follows:

> Because the FBI had not made an adequate showing of the relevance of records maintained on plaintiff's exercise of First Amendment rights to an authorized law enforcement activity, the Court ordered the FBI to submit an *in camera* affidavit which would further attempt to demonstrate the required relevance. The FBI subsequently submitted the Greer Affidavit to serve this purpose. Upon review of the Greer Affidavit, the Court now finds that records maintained by the FBI on plaintiff's exercise of First Amendment Rights are relevant to an authorized law enforcement activity of the FBI and that the continued maintenance of such records does not violate any provision of the Privacy Act.

Patterson, 705 F. Supp. at 1044.

Plaintiff also alleged unlawful interference with his mail. Again, the district court resolved the factual issues on the basis of the government's *ex parte* submissions:

> After reviewing the record as a whole, including *in camera* inspection of the withheld documents and the Greer Affidavit, the Court finds, as a matter of fact, that the FBI and any FBI or other government employees involved in activities concerning plaintiff acted in accord with all applicable statutory and regulatory guidelines.

Id. at 1045.

26. *Patterson*, 893 F.2d at 600.

27. *Id.* (quoting Vaughn v. Rosen, 484 F.2d 820, 824 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974)).

28. *Id.* at 600 n.9. The doctrine and authorities cited in footnote 9 and its accompanying text are in fact quite confused and garbled. The court is dealing, at that point in the opinion, with plaintiff's quite separate FOIA claims, which concededly are traditionally decided on the basis of *in camera* examination of the documents that are being requested. *See infra* notes 91-93 and accompanying text. Of the four cases cited in support, only Molerio v. Federal Bureau of Investigation, 749 F.2d 815 (D.C. Cir. 1984), concerns the use of *ex parte* evidence to resolve a disputed issue of fact. Hayden v. National Sec. Agency, 608 F.2d 1381 (D.C. Cir. 1979), *cert. denied*, 446 U.S. 937 (1980), is a traditional FOIA case. Fitzgerald v. Penthouse Int'l, Ltd., 776 F.2d 1236 (4th Cir. 1985), is a typical privilege case in which the suppression of privileged information leaves the plaintiff unable to establish a prima facie claim. *See infra* notes 46-60 and accompanying text. Jabara v. Webster, 691 F.2d 272 (6th Cir. 1982), *cert. denied*, 464 U.S. 863 (1983), is a decision on an issue of law concerning the interpretation of

parte material relied upon by the trial court, the appellate court was persuaded that the FBI had acceptably demonstrated that its behavior did not violate any provision of the Privacy Act and there were no remaining issues of material fact to resolve.[29]

Molerio,[30] *In re United States*,[31] and *Patterson*[32] illustrate the willingness of federal courts to resolve contested issues of fact in favor of the government on the basis of evidence concealed from the opposing party.[33] These cases raise the question of the propriety of courts (which are bound by the Due Process Clause of the United States Constitution) resorting to Kafkaesque procedures to dismiss a plaintiff's claim when they believe disclosure of relevant evidence would harm national interests.

II. The Judicial Examination of Claims of Government Privilege: *United States v. Reynolds*

Federal courts recognize a common-law privilege for certain types of sensitive government information. In *United States v. Reynolds*,[34] the Supreme Court held that a government privilege against revealing military and state secrets was "well established in the law of evidence."[35]

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the Privacy Act. It leaves open the possibility of substantive consideration of an *in camera* affidavit on remand, but there is no clear holding on the point.

29. *Patterson*, 893 F.2d at 603. The court of appeals affirmed the district court's dismissal of the illegal mail tampering claim on an alternative ground that did not require application of the *Molerio* principle. The court held, more in line with traditional privilege law, that because the FBI could not be compelled to reveal the identity of the "John Doe" defendant who had intercepted plaintiff's mail and because a suit may not be maintained in federal court against a fictitious party, plaintiff could not establish that the district court had in personam jurisdiction; therefore the suit must be dismissed. *Id.* at 604.

30. Molerio v. Federal Bureau of Investigation, 749 F.2d 815 (D.C. Cir. 1984).

31. 872 F.2d 472 (D.C. Cir.), *cert. denied*, 110 S. Ct. 398 (1989).

32. 893 F.2d 595 (3d Cir. 1990), *aff'g* 705 F. Supp. 1033 (D.N.J. 1989).

33. Most recently, the Eighth Circuit has endorsed the doctrine. *See* Wabun-Inini v. Sessions, 900 F.2d 1234 (1990) (civil suit against the FBI for alleged violation of the plaintiff's fourth amendment right to be free from an unwarranted and unreasonable seizure of his property). In upholding the district court's grant of summary judgment to the defendants, the appeals court approved the trial court's *ex parte, in camera* examination of an FBI submission that explained the reasonable basis for the FBI's conduct. The FBI had contended that public disclosure of the reasons for its action would have impeded a law enforcement investigation, and the appellate court concluded that the trial court did not abuse its discretion by its disposition of the case. *Id.* at 1247.

34. 345 U.S. 1 (1953). The pre-*Reynolds* judicial history of the state secret privilege is traced in M. HALPERIN & D. HOFFMAN, FREEDOM VS. NATIONAL SECURITY (1977); *see also* Note, *The Military and State Secrets Privilege: Protection for the National Security or Immunity for the Executive?*, 91 YALE L.J. 570 (1982); Note, *Developments in the Law: The National Security Interest and Civil Liberties*, 85 HARV. L. REV. 1130, 1220-23 (1972).

35. 345 U.S. at 6-7 (footnotes omitted).

The Court further held that the privilege 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."[36]

Reynolds was a suit under the Federal Tort Claims Act[37] brought by the survivors of three civilians killed in the crash of a military airplane that was testing secret electronic equipment. Plaintiffs moved for production of the official accident report and other documents containing statements taken in connection with the official investigation of the crash.[38] The Secretary of the Air Force, objecting to production of the documents on the ground that the plane was engaged in a highly secret mission, filed a formal claim of privilege. The district court demanded that the government turn over the disputed documents for *in camera* inspection and, when the Secretary refused, entered an order in accordance with the Federal Rules of Civil Procedure[39] that the facts on the issue of negligence be taken as established in the plaintiffs' favor.[40] The ruling was affirmed by the court of appeals.[41]

In upholding the claim of privilege, the Supreme Court established a balancing test that required weighing the necessity of the information to the claimant against the government's need to keep the information secret.[42] The Court resolved the immediate dispute in favor of the government because it found that the plaintiffs' needs could probably have been satisfied by accepting the government's offer to make the surviving crew members available for examination.[43] Because an available alternative existed that might have provided them with the evidence they were seeking, plaintiffs' claim of need was considered "dubious" and they could not insist on "forcing a showdown on the claim of privilege."[44] The Court, however, in dicta that has been dear to the hearts of government attorneys ever since, declared that "even the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied

36. *Id.* at 7-8.
37. 28 U.S.C.A. §§ 1346, 2674 (West 1952).
38. *Reynolds*, 345 U.S. at 3.
39. FED. R. CIV. P. 37(b)(2)(i), now FED. R. CIV. P. 37(b)(2)(A).
40. *Reynolds*, 345 U.S. at 5.
41. Reynolds v. Bramer, 192 F.2d 987 (3d Cir. 1951).
42. *Id.* at 11.
43. *Id.*
44. *Id.* *Reynolds* actually involved two levels of privilege: (1) withholding the documents from the plaintiff; and (2) examination of the documents by the judge, over the government's objection, in the first instance. As to both issues, the Supreme Court held that it was up to the judiciary, not the executive branch, to decide. Under the circumstances in *Reynolds*, the Supreme Court held that the lower court could uphold the privilege without examining the documents themselves.

that military secrets are at stake."[45]

III. The Consequences of a Determination of Privilege

Once a court has determined that a privilege exists,[46] there are three possible methods of proceeding. The traditional method is merely to remove the information or documents from the case. When a court upholds a claim of privilege invoked by a party resisting the discovery requests of an adversary, the respondent is protected from having to reveal the disputed information and the discovering party loses its potential benefit.[47]

The second method applies when a criminal defendant claims that the privileged data is necessary for his or her defense. Congress, by adopting the Classified Information Procedures Act (CIPA),[48] created a special procedure that may force the government to choose between permitting disclosure of the information or dropping prosecution of a case. CIPA was adopted by Congress in 1980 to combat the problem of "graymail"—the threat by a government agent to reveal classified information unless the government refrained from prosecution. The purpose of the Act is to establish a procedure to determine whether a defendant's claim of exculpatory material is indeed genuine.[49] If the court so determines after an *in camera* examination, the government must choose between disclosing the information or dropping the case. This principle had been expounded thirty-six years earlier by Judge Learned Hand in *United States v. Andolschek*,[50] which concerned not national security information, but information the disclosure of which might jeopardize an ongoing criminal investigation:

> So far as [privileged documents] directly touch the criminal dealings, the prosecution necessarily ends any confidential character the documents may possess; it must be conducted in the open, and

45. *Id.*

46. *See infra* note 60 and accompanying text.

47. *See* Fitzgerald v. Penthouse Int'l, Ltd., 776 F.2d 1236 (4th Cir. 1985); Farnsworth Cannon, Inc. v. Grimes, 635 F.2d 268 (4th Cir. 1980); D. LOUISELL & C. MUELLER, FEDERAL EVIDENCE 1059-65 (1985).

48. Pub. L. No. 96-456, *reprinted in* 18 U.S.C. app. § 348 (1989); *see* United States v. Pringle, 751 F.2d 419, 425-28 (1st Cir. 1984).

49. The Attorney General's certification that a public proceeding may result in the disclosure of classified information requires an *in camera* hearing to determine if the information will in fact jeopardize national security interests. At the government's request, the court may, in its discretion, substitute a generic description of the information if it has not previously been revealed, or a statement admitting relevant facts, or a summary of the classification. *See* Salgado, *Government Secrets, Fair Trials, and the Classified Information Procedures Act*, 98 YALE L.J. 427 (1988).

50. 142 F.2d 503 (2d Cir. 1944).

> will lay bare the 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.[51]

The Supreme Court adopted this reasoning in *Jencks v. United States*,[52] holding that the "burden is the Government's . . . to decide whether the public prejudice of allowing the crime to go unpunished is greater than that attendant upon the possible disclosure of state secrets and other confidential information in the Government's possession."[53] That holding was subsequently codified by Congress in the Jencks Act.[54]

The procedure followed in *Molerio v. Federal Bureau of Investigation*[55] and *Patterson v. Federal Bureau of Investigation*,[56] and approved in dicta in *In re United States*,[57] provides a third alternative: allow the government to use information that it keeps from its adversary as a sword to establish a fact upon which it has the burden of producing evidence.[58]

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51. *Id.* at 506.

52. 353 U.S. 657 (1957).

53. *Id.* at 672. Upon discovering, during cross-examination of two undercover informants, that information relevant to defendant's case was regularly recorded by the FBI, defense counsel moved for production of the records and was denied. The Supreme Court reversed, holding that the defendant was entitled to inspect all written reports touching upon events and activities testified to at trial. The trial court could not rule on the materiality of the documents without first allowing the defense to examine them.

One commentator has suggested that the result should be the same whenever the government initiates the action, whether in its law enforcement or in its proprietary capacity. Zagel, *The State Secrets Privilege*, 50 MINN. L. REV. 875, 906 (1966). See the opinion of Judge Simon Rifkind in Bank Line, Ltd. v. United States, 76 F. Supp. 801 (S.D.N.Y. 1948), suggesting that the government as civil plaintiff stood in the same shoes as the criminal prosecutor in being required to disclose privileged evidence or refrain from suit. *Id.* at 803. Judge Rifkind then added: "It is a somewhat longer step to the conclusion that the privilege is surrendered when the government is a party defendant." *Id.* at 804.

54. 18 U.S.C. § 3500 (1988). The Jencks Act addresses information that is obtained through trial testimony. CIPA requires notification prior to trial that a party may disclose classified information.

A similar adverse consequence may be imposed on an unresponsive litigant when a fifth amendment self-incrimination claim is cited as the reason for withholding relevant information from the litigation. In such cases, the court may impose a reasonable sanction on the withholding party, such as drawing an adverse inference. *See* Baxter v. Palmigiano, 425 U.S. 308, 318 (1976) ("[T]he prevailing rule [is] that the Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them: the Amendment 'does not preclude the inference where the privilege is claimed by a party to a civil cause.' ") (quoting 8 J. WIGMORE, EVIDENCE 439 (McNaughton rev. 1961)).

55. 749 F.2d 815 (D.C. Cir. 1984).

56. 893 F.2d 595 (3d Cir. 1990), *aff'g* 705 F. Supp. 1033 (D.N.J. 1989).

57. 872 F.2d 472 (D.C. Cir.), *cert. denied*, 110 S. Ct. 398 (1989).

58. Prior to *Molerio*, there were several First Circuit decisions setting aside summary judgments granted by lower courts that had relied upon privileged material. The First Circuit restricted the material on which a court may rely for such a judgment to material that "would be admissible in evidence," citing, *inter alia*, Federal Rule of Civil Procedure 56. Association

One must consider not only the consequences of a determination of privilege, but also the procedure that must be followed in deciding whether or not a privilege exists. Two options are permitted by *Reynolds*: a judge may decide the issue based on extrinsic evidence alone, or after an *in camera, ex parte* inspection of the confidential documents. A third option is an *in camera*, adversary examination under protective order.[59] Although few reported cases actually permit opposing counsel to review documents at a hearing to determine privilege *vel non*, such a procedure is arguably within the acknowledged discretion of the court.[60]

IV. Adversary Justice and Its Exceptions

The adversarial system is central to the American notion of due process. Justice Alan Handler of the New Jersey Supreme Court cogently stated this principle:

> An unmentioned premise of our adversary system is that the truth takes sides. Because we do not know which side truth has taken, we let the sides fight it out. . . . The premise of the modern adversary system is that an impartial fact finder, be it jury or judge, will reach the correct determination in weighing the evidence that has been presented to it by the advocates of each adversary party, who are dedicated solely to presenting their client's position in the best possible light. In this contest, the truth will out.[61]

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for Reduction of Violence v. Hall, 734 F.2d 63, 67 (5th Cir. 1984) (reversing summary judgment because "the district court apparently relied on documents which it had previously determined to be privileged"). In Bane v. Spencer, 393 F.2d 108, 109 (1st Cir. 1968), *cert. denied*, 400 U.S. 866 (1970), the court stated:

> The district court, after personally examining the medical records, did not pass on plaintiff's motion to release them, but in granting summary judgment stated that there was nothing in them of aid to the plaintiff. Assuming the district court to be correct, the defendant should not be able to use the records as a sword to seek summary judgment and at the same time blind plaintiff so he cannot counter. Defendant's affidavit must contain on its face, for plaintiff to see, whatever defendant wishes to rely upon to seek summary judgment.

Concededly, these cases did not involve information alleged to affect national security. A subsequent decision by the district court in Massachusetts applied the principle enunciated in *Hall* and *Bane* to a case involving material privileged for reasons of national security. Allende v. Shultz, 605 F. Supp. 1220, 1226 (D. Mass. 1985) ("[T]he very nature of the adversary system demands that both parties be given full access to any information which may form the basis for a judgment.").

59. *See infra* notes 173-93 and accompanying text.

60. *See* United States v. Truong Dinh Hung, 667 F.2d 1105 (4th Cir. 1981), *cert. denied*, 454 U.S. 1144 (1982); United States v. Lyon, 567 F.2d 777 (8th Cir. 1977), *cert. denied*, 435 U.S. 918 (1978); *cf.* United States v. American Tel. & Tel. Co., 567 F.2d 121, 133-34 (D.C. Cir. 1977). *But see* United States v. Pringle, 751 F.2d 419 (1st Cir. 1984) (holding that defendant and his counsel could be excluded from an *in camera* CIPA hearing).

61. Handler, *The Judicial Pursuit of Knowledge: Truth and/or Justice*, 41 RUTGERS L. REV. 1, 4 (1988); *see* Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 171 (1951)

An early epistemological rationale was supplied by John Stuart Mill:

> Since there are few mental attributes more rare than that judicial facility which can sit in intelligent judgment between two sides of a question, of which only one is represented by an advocate before it, truth has no chance but in proportion as every side of it, every opinion which embodies any fraction of the truth, not only finds advocates, but is so advocated as to be listened to.[62]

The United States Supreme Court has frequently emphasized the need for adversarial confrontation as part of the truth-finding process in order to minimize the risk of error. In setting aside the centuries-old common-law practice of permitting prehearing attachments of property in certain kinds of cases, the Supreme Court declared in *Fuentes v. Shevin*, "[N]o better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it."[63]

Carroll v. Princess Anne[64] contains an even more pointed explication of the need for adversarial confrontation: "The value of a judicial proceeding . . . is substantially diluted where the process is *ex parte*, because the Court does not have available the fundamental instrument for judicial judgment: an adversary proceeding in which both parties may participate."[65]

Relying on such principles, the First Circuit Court of Appeals has considered on several occasions grants of summary judgment by trial courts that had taken into consideration privileged material not available to the opposing party. *Association for Reduction of Violence v. Hall*[66] was a civil rights action by prison inmates who claimed they had been the victims of retaliatory transfers for the exercise of rights protected by the First Amendment.[67] The trial judge acknowledged, in granting sum-

(Frankfurter, J., concurring); S. LANDSMAN, READINGS ON ADVERSARIAL JUSTICE: THE AMERICAN APPROACH TO ADJUDICATION (1988).

62. J.S. MILL, *On Liberty*, in ESSENTIAL WORKS OF JOHN STUART MILL 301 (M. Lerener ed. 1961).

63. Fuentes v. Shevin, 407 U.S. 67, 81 (1972) (Frankfurter, J., concurring) (citing *Joint Anti-Fascist Refugee Comm.*, 341 U.S. at 170-72).

64. 393 U.S. 175 (1968) (precluding the issuance of temporary restraining orders on the basis of *ex parte* proceedings).

65. *Id.* at 183-84; *cf.* Dennis v. United States, 384 U.S. 855, 873 (1966) ("In our adversary system for determining guilt or innocence, it is rarely justifiable for the prosecution to have exclusive access to a storehouse of relevant fact."); Endicott Johnson Corp. v. Encyclopedia Press, 266 U.S. 285, 288 (1924) ("The words 'due process of law', when applied to judicial proceedings, . . . require a proceeding which, . . . whenever it is necessary for the protection of the parties, gives them an opportunity to be heard respecting the justice of the judgment sought.").

66. 734 F.2d 63 (1st Cir. 1984).

67. *Id.* at 64.

mary judgment to the defendants, that he had reviewed documents which he had earlier ruled privileged and exempt from discovery by plaintiffs following an *in camera* examination.[68] The appeals court reversed, holding, *inter alia*, that Rule 56 of the Federal Rules of Civil Procedure, governing summary judgments, precluded consideration of material other than material " '*that would be admissible in evidence or otherwise usable at trial.*' . . . Material that does not come within the above broad category should not be considered."[69] The court emphasized that *in camera* inspections should be "conducted solely to determine discoverability and not 'for the purpose of making any *ex parte* determination on the merits.' "[70] The court also relied on an earlier Circuit opinion by a panel that included two members of the *Association for Reduction of Violence v. Hall*[71] panel, Judges Coffin and Aldrich.[72]

In addition, the court cited *Kinoy v. Mitchell*,[73] in which the government made a claim of national security privilege. The government had submitted *in camera* exhibits in connection with a motion for summary judgment, and had requested the court to determine whether certain electronic surveillance concerned foreign rather than domestic security and might thereby obviate the warrant requirement held applicable to domestic security investigations by the Supreme Court.[74] Judge Constance Baker Motley of the Southern District of New York stated: "Our system of justice does not encompass *ex parte* determinations on the merits of cases in civil litigation. [If] the documents are privileged [then] the litigation must continue as best it can without them . . . ."[75] Judge Motley also stated:

> Simultaneously, . . . the Government presents the Court, *in camera*, with material which it asserts must be withheld from plaintiffs as privileged, yet which it requests the Court to consider in ascertaining material facts and drawing legal conclusions concerning dispositive issues in the case. In this Court's view such a course is wholly unacceptable.[76]

In *Allende v. Schultz*,[77] the Massachusetts District Court followed *Hall* and held that the government could not justify its denial of a visa to

68. *Id.* at 65.

69. *Id.* at 67 (emphasis in original) (quoting FED. R. CIV. P. 56).

70. *Id.* (quoting Jabara v. Kelley, 75 F.R.D. 475, 489 (E.D. Mich. 1977), *rev'd on other grounds*, 691 F.2d 272 (6th Cir. 1982)).

71. 734 F.2d 63 (1st Cir. 1968).

72. *See* Bane v. Spencer, 393 F.2d 108 (1st Cir. 1968), *cert. denied*, 400 U.S. 866 (1970).

73. 67 F.R.D. 1 (S.D.N.Y. 1975).

74. *See* United States v. United States Dist. Court, 407 U.S. 297 (1972).

75. 67 F.R.D. at 15.

76. *Id.*

77. 605 F. Supp. 1220 (D. Mass. 1985).

an allegedly undesirable alien on the basis of privileged information. The court denied the government's motion for summary judgment, which was supported by *in camera* submissions, declaring that the decision was made "without prejudice to its renewal if defendants can produce unclassified material establishing, as a matter of public record, a 'facially legitimate and bona fide' reason for their refusal to grant Mrs. Allende a visa."[78]

Justice Frankfurter has noted that the right to an adversary contest over the facts serves the additional goal of legitimizing the legal process by assuring the losing party that the rules of the game were fair: "[V]alidity and moral authority of a conclusion largely depend on the mode by which it was reached. . . . No better . . . way [has] been found for generating the feeling, so important to a popular government, that justice has been done."[79]

Subsequent to *Molerio v. Federal Bureau of Investigation*,[80] the District of Columbia Court of Appeals revisited the question of secret justice in a visa application case reminiscent of *Allende*. In *Abourezk v. Reagan*,[81] a panel majority consisting of Judges Ruth Ginsburg and Harry Edwards, with Judge Bork dissenting, invoked the traditional principles of adversariness discussed above:

> It is a hallmark of our adversary system that we safeguard party access to the evidence tendered in support of a requested court judgment. The openness of judicial proceedings serves to preserve both the appearance and the reality of fairness in the adjudications of United States courts. It is therefore the firmly held rule that a court may not dispose of the merits of a case on the basis of *ex parte, in camera* submissions.[82]

The court set forth the traditional procedure for examining claims of privilege, authorizing the trial court to examine the evidence "*in camera* and alone for the limited purpose of determining whether the asserted privilege is genuinely applicable."[83] Should the court uphold the privilege, the opinion emphasized, "then the court may not rely upon the information in reaching its judgment."[84]

The requirements of adversariness are not without some limited ex-

78. *Id.* at 1226-27.

79. Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 171-72 (1951) (Frankfurter, J., concurring).

80. 749 F.2d 815 (D.C. Cir. 1984).

81. 785 F.2d 1043 (D.C. Cir. 1986), *aff'd*, 484 U.S. 1 (1987).

82. *Id.* at 1060-61.

83. *Id.*

84. *Id.*

ceptions, however, as the majority in *Abourezk* acknowledged.[85] The most traditional exception is when one party seeks to prevent use of material in litigation by asserting an evidentiary privilege.[86] In such a situation, the proponent of the privilege claim must perforce be "free to request *in camera* review to establish the fact" of the privilege.[87] To do otherwise would negate the privilege in the act of its assertion.[88] The opponent of the privilege claim may also have the right to request *in camera* review if there is extrinsic evidence that the material itself might demonstrate the inapplicability of the privilege claim.[89] The court's authority in such cases, however, is limited to determining admissibility of the disputed evidence. The court may not utilize the disputed evidence in the determination of the underlying dispute.

An extensive body of law concerning *in camera* review has developed in the context of FOIA litigation. Although it is true that as a consequence of such *ex parte* proceedings the court is authorized to definitively decide contested issues,[90] the only substantive issue addressed in such cases is the plaintiff's right of access to the disputed documents. As such, FOIA cases are sui generis. They reflect the fact that FOIA grants a statutory right to information contained in government files, limited by built-in exemptions for certain kinds of public documents.[91] To require a full adversary proceeding in such cases would destroy one purpose of the legislation—to limit public only access to those documents not privileged.[92]

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85. *Id.*

86. *See supra* notes 27-44 and accompanying text.

87. United States v. Zolin, 491 U.S. 554, 569 (1989) (lawyer-client privilege).

88. "If a petitioner were permitted to participate in the debate on discoverability, he could in essence win before he loses. He might ascertain the desired information, even if the court later denied formal disclosure." *In re Eisenberg*, 654 F.2d 1107, 1112 (5th Cir. 1981).

89. *See Zolin*, 491 U.S. at 568-69.

90. *See* 5 U.S.C.A. § 552(a)(4)(B) (West 1977); Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974).

91. *See, e.g.*, Stein v. Department of Justice, 662 F.2d 1245 (7th Cir. 1981); Weinberger v. Catholic Action of Hawaii/Peace Educ. Project, 454 U.S. 139 (1981) (FOIA restriction trumps right granted by the National Environmental Policy Act of 1969).

92. Even in FOIA litigation, at least one federal judge has challenged the use of *ex parte* proceedings to determine privilege claims. In Military Audit Project v. Bush, 418 F. Supp. 876 (D.D.C. 1976), Judge Gerhard Gesell commented:

> [A] Federal Judge can be placed in an untenable position which ignores fundamental considerations of due process. Should the Court choose to proceed *in camera* in its discretion, the citizen is denied access to the papers and as a practical matter neither he nor his counsel have any opportunity to question the factual grounds on which exemption is sought. . . .
>
> . . . .
>
> Is it not alien to our entire jurisprudence that courts are to function *ex parte* in private without benefit of the adversary process? Will it not degrade the judiciary if

After discussing this traditional exception to the adversariness rule, Judge Ginsburg's *Abourezk* opinion acknowledged the Circuit Court's prior opinion in *Molerio*[93] as the "one case in point" standing for an additional exception: "Only in the *most extraordinary circumstances* does our precedent countenance court reliance upon *ex parte* evidence to decide the merits of a dispute."[94] This Article poses the question of what would constitute such "extraordinary circumstances" (which generally arise in the context of alleged threats to national security), and how the interests of justice can be best served when they are present.[95]

V. The "National Security" Trap

In the nuclear age and the era of the Cold War it was unavoidable that litigation over claims of government secrecy would proliferate, and that inevitability is reflected in numerous decisions in the federal reporters over the past several decades dealing with issues of classified government information and/or the rights of employees in jobs designated by the government as sensitive.[96] As early as 1973, it had already been estimated that the executive branch's inventory of classified documents already exceeded one billion and that up to one hundred million new documents were being classified each year.[97] Without question, there is some information that the government must be able to shield in the interest of national security. The most committed first amendment advocate

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> it is used as a mechanism for resolving statutory rights on the basis of undisclosed representations made in chambers to judges by parties having a direct personal interest in the outcome? Surely our whole jurisprudence since the Magna Carta and the abolition of Star Chamber proceedings requires that the judiciary in both fact and appearance remain neutral, independent of Executive or legislative influence. The adversary system is a well-tested safeguard for preserving the integrity of the judicial process. It is the duty of a judge wherever possible to resolve the rights of citizens upon facts and arguments that are presented in an adversary context exposed to public view with all the protections fair hearing and due process provide.

Id. at 878.

93. *See supra* notes 2-8 and accompanying text.

94. Abourezk v. Reagan, 785 F.2d 1043, 1061 (D.C. Cir. 1986) (emphasis added), *aff'd*, 484 U.S. 1 (1987); *accord* Naji v. Nelson, 113 F.R.D. 548, 552 (N.D. Ill. 1986).

95. It is true that the cases requiring adversary participation often include dicta suggesting that special rules may govern when national security information is involved. *See* Dennis v. United States, 384 U.S. 855, 875 (1966); Jencks v. United States, 353 U.S. 657, 670 (1957) ("It is unquestionably true that the protection of vital national interests may militate against public disclosure of documents in the Government's possession.").

96. *See, e.g.*, Department of the Navy v. Egan, 484 U.S. 518 (1988); Webster v. Doe, 486 U.S. 592 (1988); Haig v. Agee, 453 U.S. 280 (1981); Snepp v. United States, 444 U.S. 507 (1980); New York Times Co. v. United States, 403 U.S. 713 (1971) (Pentagon Papers case); Schneider v. Smith, 390 U.S. 17 (1968); United States v. Robel, 389 U.S. 258 (1967); Greene v. McElroy, 360 U.S. 474 (1959); Cole v. Young, 351 U.S. 536 (1956).

97. *See* Dunn, *Judging Secrets*, 31 VILL. L. REV. 471, 472-73 (1986).

must concede that even the strong presumption against prior restraints must be tempered to permit protection of information concerning troop movements in time of war.[98] Even those who conclude from recent experience that government claims of imminent danger to the national security are as reliable as those of the proverbial shepherd boy[99] must concede that there are occasions when the wolves do attack the sheep. The question is how should we go about determining when the wolves really are at hand, and how may constitutional values best be protected even when they are at hand.

The current judicial tendency to give wide deference to government national security claims when they come into conflict with constitutional values[100] is unjustified by the realities of governmental operations. Bureaucrats will almost always opt for secrecy.[101] Even if government officials have the utmost confidence in the propriety and wisdom of their stewardship of public affairs, total openness can only provide ammunition for their critics and political opponents. Since they have the unilateral ability to publicize only those actions and documents that reflect favorably upon themselves, bureaucratic claims of privilege should of necessity be viewed with some amount of skepticism. The preeminent first amendment scholar Professor Thomas Emerson commented a few years ago:

> The secrecy attached to many national security issues allows the government to invoke national security claims in order to cover up embarrassment, incompetence, corruption or outright violation of law. And subsequent events almost always demonstrate that the asserted dangers to national security have been grossly exaggerated. To put it another way, when national security claims are advanced, there may well be a confusion of the interests of the ad-

98. *See New York Times Co.*, 403 U.S. at 726 (Brennan, J., concurring) (Pentagon Papers case).

99. *See generally* Dunn, *supra* note 97.

100. *See Egan*, 484 U.S. 518; Central Intelligence Agency v. Sims, 471 U.S. 159 (1985); *Agee*, 453 U.S. 280; *Snepp*, 444 U.S. 507; Knopf v. Colby, 509 F.2d 1362 (4th Cir.), *cert. denied*, 421 U.S. 992 (1975); United States v. Marchetti, 466 F.2d 1309 (4th Cir.), *cert. denied*, 409 U.S. 1063 (1972); *see also* Note, *Keeping Secrets: Congress, the Courts and National Security Information*, 103 HARV. L. REV. 906 (1990); Comment, *A Nation Less Secure: Diminished Public Access to Information*, 21 HARV. C.R.-C.L. L. REV. 409 (1986).

101. For a recent discussion and citation of authorities illustrating "the executive branch's proclivity for excessive secrecy," see Note, *A Handyman's Guide to Fixing National Security Leaks: An Analytical Framework for Evaluating Proposals to Curb Unauthorized Publication of Classified Information*, 5 J.L. & POL. 759, 768-70 (1989). *See also* Kaiser, *The Amount of Classified Information: Causes, Consequences, and Correctives of a Growing Concern*, 6 GOV'T INFO. Q. 247, 252-54 (1989).

ministration in power with the interests of the nation.[102]

Less caustic, but equally skeptical, was the observation of former Solicitor General Erwin Griswold, the advocate of the government's state secrets claim in the Pentagon Papers case:[103]

> It quickly became apparent to anyone who has considerable experience with classified material that there is massive overclassification and that the principal concern of the classifiers is not with national security, but rather with governmental embarrassment of one sort or another. . . . [T]here is very rarely any real risk to current national security from the publication of facts relating to transactions in the past, even the fairly recent past. This is the lesson of the Pentagon Papers experience.[104]

Particularly instructive in this regard was the concurring opinion of Justice White in the Pentagon Papers case. Despite his opposition to prior restraint of information, Justice White confidently predicted that "revelation of these documents will do substantial damage to public interests."[105] History confirms, as both Emerson and Griswold noted, that his concerns were unfounded and his reliance on constitutional principle justified.

One of the few members of the Supreme Court who has taken an unequivocal position against prior restraints was Justice Douglas, who commented in the Pentagon Papers case, "The dominant purpose of the First Amendment was to prohibit the widespread practice of governmental suppression of embarrassing information. . . . Secrecy in government is fundamentally anti-democratic, perpetuating bureaucratic errors."[106]

In recent years, exaggerated claims of national security and/or executive privilege have been invoked in an effort to conceal the Watergate

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102. Emerson, *National Security and Civil Liberties*, in THE FIRST AMENDMENT AND NATIONAL SECURITY 84-85 (1984). A 1985 congressional staff report came to a similar conclusion: "All too often, documents are classified to protect politically embarrassing information or to hide government misconduct." SUBCOMM. ON CIVIL AND CONSTITUTIONAL RIGHTS, COMM. ON THE JUDICIARY, AND SUBCOMM. ON CIVIL SERVICE, COMM. ON POST OFFICE AND CIVIL SERVICE, PRELIMINARY JOINT STAFF STUDY ON THE PROTECTION OF NATIONAL SECRETS, 99th Cong., 1st Sess., *reprinted in* CONGRESSIONAL RESEARCH SERVICE REPORT FOR CONGRESS, PROTECTING CLASSIFIED INFORMATION: A COMPILATION AND INDEX OF MAJOR FINDINGS AND RECOMMENDATIONS, 1985-1987 (1985).

103. New York Times Co. v. United States, 403 U.S. 713 (1971).

104. Griswold, *Secrets Not Worth Keeping; The Courts and Classified Information*, Wash. Post, Feb. 15, 1989, at A25, col. 3. It is noteworthy that 18 years earlier, Dean Griswold's brief warned the Court that publication of the "Pentagon Papers" would pose a "grave and immediate danger to the security of the United States." LANDMARK BRIEFS AND ARGUMENTS OF THE UNITED STATES: CONSTITUTIONAL LAW 127 (P. Kurland & G. Casper eds. 1975) (quoted in Fisher, *Congressional-Executive Struggles Over Information: Secrecy Pledges*, 42 ADMIN. L. REV. 89, 107 (1990)).

105. 403 U.S. at 731 (White, J., concurring).

106. *Id.* at 723-24 (Douglas, J., concurring).

break-in,[107] the burglary at the office of Daniel Ellsberg's psychiatrist,[108] conduct during the war in Vietnam and the bombing of Cambodia,[109] the wiretapping of radical domestic political organizations,[110] the sale of arms to the Ayatollah,[111] and the diversion of the proceeds of the Iran arms sale to the Nicaraguan Contras.[112] It took this author five years of strenuous litigation of a state secrets claim, including an appeal to the Circuit court and a change in trial judges, to obtain from the FBI a document revealing that the reason it had conducted a mail cover at the national offices of the Socialist Workers Party (SWP) was that the SWP was actively involved in protest activities against the war in Vietnam.[113]

In one of the more egregious recent invocations of the state secrets privilege, the Department of Justice aborted the prosecution of former CIA official Joseph Fernandez on Iran-Contra related charges by refusing to permit release, under CIPA, of documents that would reveal information about CIA facilities in Central America previously disclosed but not officially confirmed by the government. The Independent Counsel appointed to prosecute the case referred to the alleged secrets at stake as "fictional."[114]

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107. United States v. Nixon, 418 U.S. 683 (1974).

108. United States v. Ehrlichman, 376 F. Supp. 29 (D.D.C. 1974).

109. New York Times Co. v. United States, 403 U.S. 713 (1971).

110. United States v. United States Dist. Court, 407 U.S. 297 (1972).

111. Safire, *This Bud's For You*, N.Y. Times, Mar. 14, 1988, at A19, col. 5.

112. *See infra* note 114 and accompanying text (discussing the aborted Fernandez prosecution).

113. Paton v. La Prade, 469 F. Supp. 773 (D.N.J. 1978). The FBI's mail cover application included the following in its detailed justification:

> SWP has been able to bring its message to large numbers of American citizens by virtue of its control and domination of the National Peace Action Coalition and the Student Mobilization Committee to End the War in Vietnam. . . . These organizations are in the forefront among antiwar groups in the United States. These activities offer the SWP a major role in planning, promoting and executing antiwar demonstrations, some of which have in the past created violence.

Id. at 775.

114. Johnston, *Case Dismissed in Iran-Contra Affair, Clearing Agent*, N.Y. Times, Nov. 25, 1989, at 1, col. 1. *Fernandez* provides a unique application of the government-secrets problem because the Department of Justice, a political ally of defendant Fernandez, controlled the CIPA decision, while the actual prosecution of the case was in the hands of the Independent Counsel. The case also demonstrates the frailty of national security claims that are not subject to adversarial challenge. In *Fernandez*, adversarial confrontation was provided by the Independent Counsel, who also had access to the allegedly sensitive information. He commented as follows on the Attorney General's claim of privilege:

> The supporting affidavits of the intelligence officials in *Fernandez* are based largely on speculation about the effect that public acknowledgement of CIA stations might have on intelligence-gathering capabilities. None of these assessments of risk are supported by hard data about the state of affairs in the countries at issue, about the sources of potential risk, or about the measures that could be taken to compensate for these risks.

The substantial record of abuse of the state secrets privilege by the federal government signals a need for rigorous testing of such claims in the courts. Unfortunately, the more recent record of the federal judiciary suggests this power has been exercised mainly in the breach,[115] and indicates that unless the *Reynolds*[116] doctrine is modified, constitutional rights will be unnecessarily sacrificed in the name of national security.[117]

VI. Must We Trust the Judiciary?

It is apparently the view of courts that have adopted the *Molerio*[118] position that the neutral and impartial judge will adequately protect the rights of the litigant who is denied access to decisive evidence. In *Patterson v. Federal Bureau of Investigation*,[119] the Court of Appeals self-consciously acknowledged the plaintiff's "anomalous situation of having to defend against a motion for summary judgment without being privy to the very documents necessary for such a defense."[120] "However, the remedy for the unfairness," the court decided, "is an *in camera* examination by the trial court of the withheld documents and any supporting or explanatory affidavits."[121] The court then went to pains to assure the plaintiff that "[o]n the basis of our *in camera* review of the documents we have no hesitation in stating that there is nothing derogatory in them regarding [the plaintiff] or any member of his family."[122]

Assuming it is reasonable to hold that in suits between private parties the judge is a neutral third force, does the same hold true in litigation between a citizen and the government accused of violating that citizen's rights? It would seem more appropriate to totalitarian regimes to compel a citizen to rely totally and exclusively upon the protection and largesse of one branch of government in disputes with another. Justice White reasoned in *Duncan v. Louisiana*:[123]

> Those who wrote our [federal and state] constitutions knew from history and experience that it was necessary to protect against . . .

L. Walsh, Second Interim Report to Congress by Independent Counsel for Iran/Contra Matters 2 (Dec. 11, 1989).

115. *See supra* note 101 and accompanying text.

116. 345 U.S. 1 (1953).

117. For another critique of the use of perceived threats to national security to undermine constitutional values and structures, see Lobel, *Emergency Power and the Decline of Liberalism*, 98 YALE L.J. 1385 (1989).

118. 749 F.2d 815 (D.C. Cir. 1984).

119. 893 F.2d 595 (3d Cir. 1990), *aff'g* 705 F. Supp. 1033 (D.N.J. 1989).

120. *Id.* at 600.

121. *Id.*

122. *Id.* at 601 n.10.

123. 391 U.S. 145 (1968).

> judges too responsive to the voice of higher authority. The framers of the constitutions strove to create an independent judiciary but insisted upon further protection against arbitrary action. . . . [T]he jury trial provisions in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power—a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges.[124]

While much of the concern of the Founders over "the compliant, biased, or eccentric judge"[125] focused on protecting the criminally accused, that concern is probably even more applicable to cases involving suits against the law enforcement arm of government by a citizen suffering injury as a result of the government's investigative activities. Whereas the stake of the government in any single criminal prosecution is quite limited, its stake is quite high where government officers are being actively prosecuted by private parties for official wrongdoing. Nor in this era of highly politicized federal judicial appointments is it improperly disparaging of a district judge under consideration for elevation to a higher court to suggest that he or she might not be totally and absolutely disinterested when asked to rule in such a dispute.

Aside from any possible personal stake, there is no reason to assume that because an individual has achieved a position on the federal bench, he or she is a totally impartial and unbiased observer in the kinds of value-laden litigation that are usually attendant when claims of state secrets are invoked. As Justice Brennan observed, "[J]udges are human beings whose judgment necessarily reflects the press of human events."[126]

More importantly, apart from the possibility of conscious or unconscious bias, a judge is seldom in a position to provide effective representation to the absent party in an *in camera* review. Even the most conscientious judge is unlikely to be as cognizant of the subtle nuances of law and fact as the advocate-lawyer. Small clues that might be of highly significant evidentiary value to an advocate immersed in the facts and litigation strategy of a case may be wasted on a "neutral" judge, especially when the proponent of the privileged material has unchallenged access to the judge's eyes and thought processes to lead them in whatever direction desired. Especially in cases against public officials based on novel legal theories, such as those discussed in Part I,[127] significant items hidden within pages of "privileged" documents might be overlooked.

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124. *Id.* at 156.

125. *Id.*

126. Brennan, *Reason, Passion, and "The Progress of the Law,"* 10 CARDOZO L. REV. 3, 6 (1988).

127. *See supra* notes 18-23.

This point was made by Justice White in his opinion for the Court in *Alderman v. United States*,[128] which concerned a criminal defendant's right of access to wiretap logs to determine whether the prosecution's case might have been tainted by illegally acquired evidence. The Court rejected the government's claim that *in camera* review of the logs by the judge would be adequate to protect the defendant's rights:

> Adversary proceedings are a major aspect of our system of criminal justice. Their superiority as a means for attaining justice in a given case is nowhere more evident than in those cases, such as the ones at bar, where an issue must be decided on the basis of a large volume of factual materials, and after consideration of the many and subtle interrelationships which may exist among the facts reflected by these records. As the need for adversary inquiry is increased by the complexity of the issues presented for adjudication, and by the consequent inadequacy of *ex parte* procedures as a means for their accurate resolution, the displacement of well-informed advocacy necessarily becomes less justifiable.[129]

The Court emphasized the need for such an adversary proceeding in order to reduce the incidence of error "by guarding against the possibility that the trial judge, through lack of time or unfamiliarity with the information contained in and suggested by the materials, will be unable to provide the scrutiny" that the law demands.[130] The significance of *Alderman* for the present discussion is heightened because *Alderman* entailed charges of espionage, and thus the Court was dealing with alleged na-

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128. 394 U.S. 165 (1969).

129. *Id.* at 183-84. The scope of *Alderman* was restricted in Taglianetti v. United States, 394 U.S. 316 (1969) (per curiam), in which the Court held:

> Nothing in [*Alderman*] requires an adversary proceeding and full disclosure for resolution of every issue raised by an electronic surveillance. On the contrary, an adversary proceeding and disclosure were required in those cases, not for lack of confidence in the integrity of government counsel or the trial judge, but only because the *in camera* procedures at issue there would have been an inadequate means to safeguard a defendant's Fourth Amendment rights. . . . Under the circumstances presented here, we cannot hold that "the task is too complex, and the margin for error too great, to rely wholly on the *in camera* judgment of the trial court."

Id. at 317-18 (citations omitted). The Tenth Circuit adopted similar reasoning, focusing on the relative simplicity of the factual issue, to distinguish *Alderman* in Trujillo v. Sullivan, 815 F.2d 597, 616 (10th Cir.), *cert. denied*, 484 U.S. 929 (1987). *See also* Pennsylvania v. Ritchie, 480 U.S. 39 (1987) (reversing a decision of the Pennsylvania Supreme Court to permit counsel for an accused child molester to search the prosecution's files in a hunt for exculpatory information). Acknowledging that its ruling would deny the defendant "the benefits of an 'advocate's eye,' " the court declared that "an *in camera* review by the trial court will serve [defendant's] interest without destroying the Commonwealth's need to protect the confidentiality of those involved in child-abuse investigations." *Id.* at 60-61. Neither the majority nor the dissent cited *Alderman*.

130. *Alderman*, 394 U.S. at 184.

tional security information.[131]

Alderman was consistent with a case decided two years earlier, *Dennis v. United States*,[132] which considered the right of defense counsel to examine prior grand jury testimony of several prosecution witnesses for possible impeachment purposes. The Court observed, "In our adversary system, it is enough for judges to judge. The determination of what may be useful to the defense can properly and *effectively be made only by an advocate*."[133]

While *Alderman*, *Jencks*, and *Dennis* persuasively argue that the judge cannot adequately perform the advocacy role of the lawyer, later cases seem to have all but forgotten their teachings.[134] The drift from the requirement of adversarial confrontation was challenged by Justices Marshall and Brennan, in 1974, in a dissent from the denial of a writ of certiorari.[135] The case concerned the denial to a defendant in a tax prosecution of access to an investigation report prepared by an Internal Revenue Service agent in connection with his trial testimony. The Court of Appeals held that the defendant was entitled to the report under the Jencks Act,[136] but went on to examine the report itself and determined that "[it] would have been of no assistance to defendant" and, therefore, failure to produce it was harmless error.[137] Justice Marshall asserted that the decision was inconsistent with *Alderman*, *Dennis*, and *Jencks*. According to Justice Marshall, the Jencks Act, which Congress had adopted in response to the case for which it was named, "makes clear that it is not ordinarily part of the business of the federal judiciary to determine whether the defense could effectively utilize a producible state-

131. In *Alderman*, possible concern for damage to the public interest by disclosure of the privileged material to the defendant was minimized because "disclosure will be limited to the transcripts of a defendant's own conversations and of those which took place on his premises," and it could therefore "be safely assumed that much of this he will already know." *Id.* at 184-85. While *Alderman* did not involve documents that the government was proposing to use as substantive evidence, it did involve the "derivative-evidence doctrine," which requires the government to prove that its illegal wiretapping did not taint the prosecution. *See* Oregon v. Elstad, 470 U.S. 298, 344 (1985) (Brennan, J., dissenting).

132. 384 U.S. 855 (1966).

133. *Id.* at 875 (emphasis added). The *Dennis* opinion also stated: "Trial judges ought not to be burdened with the task or the responsibility of examining sometimes voluminous grand jury testimony in order to ascertain inconsistencies with trial testimony." *Id.*; *see also* Jencks v. United States, 353 U.S. 657, 668-69 (1957) ("Because only the defense is adequately equipped to determine the effective use for [the] purpose of discrediting the Government's witness and thereby furthering the accused's defense, the defense must initially be entitled to see [the disputed documents] to determine what use may be made of them.").

134. *See supra* notes 2-33 and accompanying text.

135. Erckman v. United States, 416 U.S. 909 (1974).

136. 18 U.S.C. § 3500 (1988); *see supra* note 54 and accompanying text.

137. *Erckman*, 416 U.S. at 910 (Marshall, J., with Brennan, J., dissenting).

ment."[138] He then reiterated the difficulty of a judge performing the role of an advocate, which had been the rationale for those earlier decisions: "A judge—especially an appellate judge whose only contact with a case is through an examination of a cold record—simply does not have the familiarity with the intimate details of a case necessary to make an adequate determination of the full impeachment value of a witness' prior statement."[139] The dissent quoted *Alderman* to the effect that adversariness was essential in order to reduce the incidence of error " 'by guarding against the possibility that the . . . judge, through lack of time or unfamiliarity with the information contained in and suggested by the materials, will be unable to provide the scrutiny . . . demand[ed].' "[140] Justice Marshall noted that in *Alderman* the Court had insisted on an adversary proceeding despite the national security interests at stake.[141]

The United States has long prided itself on the independence of its federal judiciary. As the cited cases remind us, however, even independent judges cannot replace adversarial confrontation.

VII. A Modest Proposal

The first principle of constitutional law is that "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury."[142] The rhetoric of *Marbury v. Madison*, however, fails to anticipate the reality of *Reynolds v. United States*,[143] which holds that "even the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that military secrets are at stake."[144]

Molerio[145] and *Patterson*[146] present the proverbial hard cases.[147] They are at the intersection where the irresistible force (a prima facie claim of violation of fundamental rights) meets the immovable object (national security privilege). Under their holdings, a plaintiff may not only be denied access to evidence needed in order to "claim the protec-

138. *Id.* at 912 (Marshall, J., with Brennan, J., dissenting).

139. *Id.* at 913 (Marshall, J., with Brennan, J., dissenting).

140. *Id.* at 914 (Marshall, J., with Brennan, J., dissenting) (quoting Alderman v. United States, 394 U.S. 165, 184 (1969)).

141. *See Alderman*, 394 U.S. at 184.

142. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803).

143. 345 U.S. 1 (1953); *see supra* notes 34-45 and accompanying text.

144. 345 U.S. at 11.

145. Molerio v. Federal Bureau of Investigation, 749 F.2d 815 (D.C. Cir. 1984).

146. Patterson v. Federal Bureau of Investigation, 893 F.2d 595 (3d Cir. 1990), *aff'g* 705 F. Supp. 1033 (D.N.J. 1989).

147. *See supra* notes 2-8, 18-29 and accompanying text.

tion of the laws,"[148] but may also have his or her case dismissed because the government defendant claims that secrecy is needed to protect national security.[149] This Article suggests that there ought to be a means of protecting genuine national security interests without sacrificing protection of fundamental rights.[150]

The earlier cases that appear to uphold claims of national security over the right to an adversarial hearing are distinguishable from *Molerio* and *Patterson*. Some are suits between private parties in which one party seeks to use information protected by the state secrets privilege. Even in such cases, dissenting voices protested against secret justice because rules "for unexplicated imposition of arbitrary fiat . . . are potentially frightening."[151]

Whether or not the federal government has an overriding interest in the sanctity of its secrets when sought in aid of purely private litigation, the government's claim is substantially weakened when it is itself the accused wrongdoer. This is especially true when the claimant asserts violation of a fundamental right and can present a prima facie case even without resort to the government's material.[152] In such cases, plaintiff's right to relief flows directly from the Constitution and is probably not subject to defeasance unless Congress provides "another remedy, equally

148. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803).

149. Of course, the judge must examine the evidence and confirm the government defendant's claim, but as pointed out *supra* Part V, the judge does not necessarily know all the rules of the game, and, in addition, may not be completely impartial.

150. Similar concerns are voiced in Glennon, *Publish & Perish: Congress' Effort to Snip Snepp (Before and AFSA)*, 10 MICH. J. INT'L LAW 163, 175 (1989).

151. Farnsworth Cannon, Inc. v. Grimes, 635 F.2d 268, 283 (4th Cir. 1980) (Murnaghan, J., dissenting). A variety of solutions for resolving this problem in private litigation was offered in *Grimes*, a civil suit for wrongful interference with contractual relations between plaintiff and the Department of the Navy. The district court dismissed the case because the plaintiff was unable to establish a prima facie claim without the privileged evidence. *Id.* at 270. The majority of the original hearing panel in the appeals court reversed on the ground that plaintiff had established a prima facie case without the privileged material and suggested that upon remand the parties waive a jury trial to permit an *in camera* trial and that the attorneys seek security clearance from the government. *Id.* at 273, 276. After rehearing en banc, the panel opinion was reversed and the case ordered dismissed because it was "evident that any attempt on the part of the plaintiff to establish a prima facie case would so threaten disclosure of state secrets that the overriding interest of the United States and the preservation of its state secrets precludes any further attempt to pursue this litigation." *Id.* at 281. A dissent on behalf of three members of the court urged a more flexible balancing formula, suggesting that the district court be instructed to consider whether "the privilege so far obstructs normal proof in respect of the issues presented by the parties as to deprive the litigation process of its essential utility for fair resolution" of the issues, and whether the "danger of inadvertent compromise of the protected state secrets outweigh[ed] the public and private interests in attempting formally to resolve the dispute while honoring the privilege." *Id.* at 282 (Phillips, J., dissenting). Judge Murnaghan wrote a separate dissent.

152. *See* Liuzzo v. United States, 508 F. Supp. 923 (E.D. Mich. 1981).

effective."[153] According to the teachings of *Marbury*, to deny such a plaintiff the right to a remedy would constitute a denial of "the very essence of civil liberty."[154] It was upon this principle that the Supreme Court founded the right of a direct cause of action under the Constitution for violation of rights by federal officials in *Bivens*.[155]

Courts have recognized the unfairness and impropriety of allowing the government to prosecute a criminal defendant while withholding evidence in order to protect national security.[156] Is such government conduct any more acceptable when the plaintiff invokes the judicial process to enforce a constitutional right, which *Marbury* says is the very essence of civil liberty?[157] The Federal Advisory Committee on the Rules of Evidence recognized this problem when it proposed evidence rules for the federal courts. Proposed Rule 509(e) provided:

153. *See* Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 397 (1971). Although there is no clear holding to that effect, it is at least implied in *Bivens* dicta that Congress could not take away the right to sue in such situations without providing an alternative remedy. More recently the Court has observed that a " 'serious constitutional question' . . . would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim." Webster v. Doe, 486 U.S. 592, 603 (1988) (quoting Bowen v. Michigan Academy of Family Physicians, 476 U.S. 667, 681 n.12 (1986)). If, on the other hand, the plaintiff's claim arises out of the government's proprietary activities for which the government has waived its sovereign immunity—and, thus, "is a defendant only on terms to which it has consented," Reynolds v. United States, 345 U.S. 1, 12 (1953)—it does not offend notions of fair play and substantial justice to preclude plaintiff's suit. It exists only by grace of the sovereign's waiver in the first place; and what the sovereign giveth, the sovereign may taketh away. *See* United States v. Sherwood, 312 U.S. 584, 590 (1941).

154. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803).

155. 403 U.S. 388, 397 (1971). Molerio v. Federal Bureau of Investigation, 749 F.2d 815 (D.C. Cir. 1984), concerned a claim of direct violation of the First Amendment: the denial of a job to plaintiff because of his father's political associations. Patterson v. Federal Bureau of Investigation, 893 F.2d 595 (3d Cir. 1990), *aff'g* 705 F. Supp. 1033 (D.N.J. 1989), concerned privileged evidence going both to a *Bivens*-type claim and to a statutory claim under the Privacy Act. Even the statutory claim in *Patterson*, however, involved enforcement of a provision of the Privacy Act specifically directed at the protection of fundamental rights provided by the First Amendment. It is arguable that even in the absence of the Privacy Act, the government's actions would constitute a direct violation of the First Amendment itself. *See* Paton v. La Prade, 524 F.2d 862 (3d Cir. 1975); Elke, *The Privacy Act of 1974*, in PRIVACY LAW AND PRACTICE ¶ 2.07[7] (1987). The *Bivens*-type claim in the *Patterson* case presents a somewhat ambiguous version of the problem under consideration. On the one hand, the plaintiff did assert a prima facie claim of government violation of his first amendment right to correspond, which the district court resolved against plaintiff by deciding that the *ex parte* government submissions proved the government had not violated his rights. On the other hand, the court of appeals treated the issue as a typical privilege question in which denial of plaintiff's discovery demand took the disputed material out of the case and left plaintiff unable to demonstrate a prima facie case because he could not identify the proper defendant. *See* Salisbury v. United States, 690 F.2d 966 (D.C. Cir. 1982).

156. *See supra* notes 46-60 and accompanying text.

157. Several commentators have argued for parallel treatment of civil defendants when the government institutes the action. *See supra* note 53.

> If a claim of privilege for a state secret is sustained in a proceeding to which the government is a party and it appears that another party is thereby deprived of material evidence, the judge shall make any further orders which the interests of justice require, including striking the testimony of a witness, declaring a mistrial, finding against the government upon an issue as to which the evidence is relevant, or dismissing the action.

The Advisory Committee noted the variety of situations in which this rule might apply, but left ambiguous its intent regarding the rule's application in cases such as those under discussion. The Committee did acknowledge, however, that precedents "indicat[ed] unwillingness to allow the government's claim of privilege for secrets of state to be used as an offensive weapon against it" when it related to an element of a plaintiff's claim against the government.[158]

Proposed Rule 509(e) was not adopted by Congress, nor was any of the rest of the detailed proposal for determining evidentiary privileges in the federal courts. Congress instead adopted a bare-bones Rule 501, which provides that privileges in the federal courts shall be determined according to "the principles of the common law as they may be interpreted . . . in the light of reason and experience."[159] The legislative history suggests that the proposed privilege rule was "extremely controversial" and

> [s]ince it was clear that no agreement was likely to be possible as to the content of specific privilege rules, and since the inability to agree threatened to forestall or prevent passage of an entire rules package, the determination was made that the specific privilege rules proposed by the Court should be eliminated and a single rule (rule 501) substituted, leaving the law in its current condition to be developed by the courts of the United States utilizing the principles of the common law.[160]

Among the most vociferous critics of the proposed rule was the Department of Justice, which protested that the drafters had substantially undermined existing rules of government privilege. It is, therefore, of substantial import that the Justice Department did not object to the proposed consequences of a privilege finding set forth in Rule 509(e).[161]

158. Proposed FED. R. EVID. 509 advisory committee's note, *reprinted in* 2 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE 509-7 to -8 (1990).

159. FED. R. EVID. 501.

160. SENATE COMM. ON THE JUDICIARY, FEDERAL RULES OF EVIDENCE, S. REP. NO. 1277, 93d Cong., 2d Sess. 6 (1974).

161. See the proposed redraft of Rule 509 contained in a memorandum entitled "Department of Justice Analysis and Recommendations Regarding Revised Draft of Proposed Rules of Evidence for the U.S. Courts and Magistrates," which was enclosed with a letter from Deputy Attorney General Kleindienst to Judge Albert Maris, chairman of the Advisory Com-

Even though parts of the proposed rule engendered serious controversy, there is authority that they provide guidance as to how privileges are to be determined and implemented under Rule 501. As one commentator noted, while they "do not have the force of law, they do provide standards reflective of the 'reason and experience' mentioned in Rule 501."[162] One district court judge observed:

> What more accurate expression of the principles of the common law and of the application of reason and experience could exist than a draft that was developed by a representative committee of bench, bar and scholars, twice published and commented on by the bench and bar, adopted by the Judicial Conference and finally forwarded by the Supreme Court to Congress for promulgation.[163]

In *Liuzzo v. United States*,[164] the same judge, Charles Joiner, applied proposed Rule 509(e) as if it had been enacted.[165] The plaintiffs in *Liuzzo* asserted that the government was liable for an FBI informant's participation in the killing of a civil rights worker. The United States claimed privilege as to a relevant FBI report. The court said it would uphold the privilege on the condition that a finding of liability be entered against the government. The court found that the plaintiffs "have presented the court with a case which is neither frivolous nor beyond belief."[166] Justifying entry of a judgment for the plaintiffs, the court declared:

> [T]his approach is appropriate in this type of case because it allows plaintiffs to realize their goals—the award of money damages for their losses—while not intruding on the internal processes of the executive branch. Nor is the government unduly penalized by the court's resolution of this issue. . . . When government claims the right to refuse information as to its conduct on the theory that harm would come to its efforts to protect society, that same society can recompense plaintiffs for their injuries.[167]

According to the court, if the government felt it could not reveal the information, the only issue left to decide was whether "the plaintiffs are 'deprived of material evidence' " by the grant of the privilege.[168] If so, the court would follow the guidance of proposed Rule 509(e) and enter

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mittee (Aug. 9, 1971), *reprinted in* 117 CONG. REC. 33,648, 33,651-53 (1971), *cited in* 2 D. LOUISELL & C. MUELLER, FEDERAL EVIDENCE 950 (1985).

162. M. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE 308 (2d ed. 1986); *see* Citibank, N.A. v. Andros, 666 F.2d 1192 (8th Cir. 1981).

163. *In re* Grand Jury Proceedings, 434 F. Supp. 648, 650 n.1 (E.D. Mich. 1977), *aff'd*, 570 F.2d 562 (6th Cir. 1978).

164. 508 F. Supp. 923 (E.D. Mich. 1981).

165. *Id.* at 939 n.14.

166. *Id.* at 940.

167. *Id.* at 940-41.

168. *Id.* at 941 (quoting proposed FED. R. EVID. 509(e)).

judgment of liability for plaintiffs, subject to proof of damages.[169] In dicta, the court acknowledged that such a result "may not be appropriate in a 'state secrets' case,"[170] but did not explain why defendants deprived of material evidence on state secrets grounds would be any less entitled to redress of their rights than ones denied such evidence on the basis of any other privilege.[171] If the remedy would not compromise the privilege, but merely guarantee redress for the plaintiffs "in the interest of justice," it should be irrelevant whether the claim of privilege is based on a military secret or some other reason. Regardless of the basis for the privilege, the government keeps its secret and the plaintiffs receive their due. Admittedly, even under the abandoned Rule 509(e) procedure, relief for the plaintiffs was not mandatory, but subject to "the interest of justice." Nevertheless, if the "interest of justice" standard is to be more than an excuse for endorsing government privilege claims, it must be closely confined. This can be accomplished by the following set of procedures:

(1) If the government makes a proper and colorable claim of the state secrets privilege, and the court also finds that the plaintiff can establish a prima facie claim of a right to relief for violation of a fundamental right, the court should follow Judge Joiner's precedent in *Liuzzo* and give the government a choice of accepting an appropriate sanction to compensate the plaintiff for loss of the evidence or disclosing the evidence to plaintiff under protective order.[172]

(2) If the government discloses the evidence, the case might be disposed of by summary judgment following an *in camera* hearing, when necessary. If summary judgment is not warranted and a jury trial has been demanded, the court could require a waiver of jury trial.[173] While

169. *Id.*; *cf.* Salisbury v. United States, 690 F.2d 966, 975 (D.C. Cir. 1982).

170. *Liuzzo*, 508 F. Supp. at 941.

171. Commentators have relied on similar unexplained presumptions. *See, e.g.*, Zagel, *The State Secrets Privilege*, 50 MINN. L. REV. 875 (1966). Zagel notes that even prior to proposed Rule 509(e) a court could enter sanctions against the government for failure to produce the information under Federal Rule of Civil Procedure 37(b), but then goes on to suggest that this would "ordinarily" be inappropriate when a government defendant invokes a state-secrets claim. *Id.* at 906-07.

172. In Salisbury v. United States, 690 F.2d 966, 975 (D.C. Cir. 1982), the Court of Appeals for the District of Columbia asserted that in United States v. Reynolds, 345 U.S. 1 (1953), the Supreme Court "indicated that the assertion by the government of the state secrets privilege [did] not compel the issuance by a court of any sanction whatsoever," and that the Court had "implied that such sanctions, if ever appropriate in the state secrets context, are to be used only infrequently." As explained above, however, *Reynolds* was a Tort Claims Act case in which the government was "a defendant only on terms to which it ha[d] consented." *Id.* at 12; *see supra* notes 34-36 and accompanying text.

173. If a court can deny a trial altogether to protect national security, how can it be precluded from denying a jury trial? The plaintiff has the right to waive a jury trial rather than be denied all relief; presumably the government would also prefer to do so in such cases. *See*

in camera proceedings are inconsistent with our Constitution's commitment to public trials,[174] they are less of an intrusion upon constitutional values than denial of a trial altogether.

(3) If sanctions are not feasible because of the nature of the case, and the government claims that disclosure even under protective order would intolerably burden national security interests, the government would be allowed to prove its contention in the face of a strong presumption against secret decisionmaking.

The third procedure is modeled on the stringent constitutional standard for issuance of prior restraints under the First Amendment. Like prior restraints, secret judicial decisions involve the subordination of fundamental rights in order to protect government secrecy. As with prior restraints, there must be a "heavy presumption against [the] constitutional validity" of such secret decisionmaking,[175] with a narrow escape hatch for those instances in which significant national security interests would truly be jeopardized. While a majority of the Supreme Court has never clearly defined that standard, Justice Brennan's concurring opinion in the Pentagon Papers case declared that issuance of such a prior restraint required "governmental allegation and proof that publication must inevitably, directly, and immediately cause the occurrence of an event kindred to imperiling the safety of a transport already at sea . . . ."[176] Two other members of the Court endorsed a similar standard: the disclosure must "surely result in direct, immediate, and irreparable

Note, *Keeping Secrets From the Jury: New Options for Safeguarding State Secrets*, 47 FORDHAM L. REV. 94, 98 (1978). Several reported cases have required nonjury trials under such circumstances. Loral Corp. v. McDonnell Douglas Corp., 558 F.2d 1130 (2d Cir. 1977), was a contract action pertaining to classified equipment produced for the Air Force. The court held that the litigants had effectively waived their rights to jury trial through their contractual provision to preserve the confidentiality of the classified material and proceeded to conduct a bench trial *in camera*. *Id.* at 1132. Halpern v. United States, 258 F.2d 36 (2d Cir. 1958), was a suit under the Invention Secrecy Act of 1951, 35 U.S.C. §§ 181-188, by an inventor to recover damages suffered as a result of an order of secrecy imposed on his military patent. The court held that a suit brought under the Act may be resolved by an *in camera*, nonjury trial. *Halpern*, 258 F.2d at 43. The court observed: "It should not be difficult to obtain a court reporter and other essential court personnel with the necessary security clearance," and that security could be further maintained by keeping witnesses sequestered. *Id.*

174. *See* Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980); Gannett Co. v. De Pasquale, 443 U.S. 368 (1979).

175. New York Times Co. v. United States, 403 U.S. 713, 714 (1971) (quoting Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963)); *cf.* In re Halkin, 598 F.2d 176, 194 n.43 (D.C. Cir. 1979) ("Since protective orders pursuant to Rule 26(c) pose dangers similar to other prior restraints, they should not be entered without the necessary 'procedural safeguards designed to obviate the dangers of a censorship system.' ") (citation omitted).

176. *New York Times Co.*, 403 U.S. at 726-27 (Brennan, J., concurring).

damage to our Nation or its people."[177] Because two other members of the Court were unwilling to permit any prior restraints whatsoever,[178] the Brennan-Stewart views provide the strongest guidance insofar as prior restraints are concerned. There is no reason to demand a different standard for disclosure of classified information at an *in camera* hearing. When a prior restraint is denied, public disclosure of the sensitive information is inevitable, whereas an *in camera* hearing under protective order provides reasonable assurance that disclosure will go no further than a member of the bar in good standing.

Although government attorneys will undoubtedly complain that they ought not be put to such a choice, such objections are not convincing. Except in the rarest of situations,[179] the risk posed by revealing even legitimately privileged information to a member of the bar in good standing under protective order is remote indeed. An attorney who violated such a protective order would face not only immediate contempt sanctions but probable disbarment, and might also be subject to criminal prosecution for disclosure of classified information.[180]

Although the concept of adversarial *in camera* proceedings is not supported by substantial case law, it has on occasion been recognized as a viable option. The Second Circuit suggested it in *Halpern v. United States*,[181] a suit brought under the Invention Secrecy Act.[182] The court instructed the district court to hold an *in camera* trial "if in its opinion such a proceeding can be held without running any serious risk of divulgence of military secrets."[183] The court noted that the scope of the state secrets privilege " 'is limited by its underlying purpose' "[184] and, therefore, is inapplicable "when disclosure to court personnel in an *in camera* proceeding will not make the information public or endanger the national security."[185] Noting that a court has authority to take measures to protect against disclosure of litigation material, the Fourth Circuit commented that dismissal of an action is warranted only when "no amount of effort and care on the part of the court and the parties will safeguard

177. *Id.* at 730 (Stewart, J., joined by White, J., concurring).

178. *See id.* at 714 (Black, J., concurring); *id.* at 720 (Douglas, J., concurring).

179. Two such situations are the disclosure of the sailing dates of transports, which was mentioned in Near v. Minnesota, 283 U.S. 697 (1931), or the disclosure of the name of an undercover agent whose safety would be put at risk.

180. 18 U.S.C. § 794(a) (1988); *see* New York Times Co., 403 U.S. at 733-37 (White, J., concurring).

181. 258 F.2d 36 (2d Cir. 1958).

182. *See supra* note 173.

183. *Halpern*, 258 F.2d at 43.

184. *Id.* at 44 (quoting Roviaro v. United States, 353 U.S. 53, 60 (1957)).

185. *Id.*

privileged material."[186]

In *Alderman v. United States*,[187] the Supreme Court acknowledged the possibility of disclosing privileged information *in camera* under protective order: "the trial court can and should, where appropriate, place a defendant and his counsel under enforceable orders against [the] unwarranted disclosure of the materials which they may be entitled to inspect."[188] Courts have held that, when necessary, disclosure can be limited to the attorney under an order not to reveal the privileged information to the client.[189]

While the risk to the government under the proposed procedures would be remote, the benefit to a system of justice would be immeasurable.[190] Even if the plaintiff were not personally permitted access to the privileged information, the participation of his or her advocate in the decisionmaking process would provide a measure of reassurance that justice had indeed been done.[191]

The facts in both *Molerio*[192] and *Patterson*[193] indicate the insubstantiality of potential government objections to the procedure proposed by this Article. In *Molerio*, the worst that would have happened, from the FBI's perspective, was that plaintiff's attorney would have been permitted access, under protective order, to an FBI memo explaining the alleged actual reasons for his denial of employment. The attorney could have determined if the secret memo provided justification for the defendant's actions or was a sham excuse for political discrimination. In the

186. Fitzgerald v. Penthouse Int'l, Ltd., 776 F.2d 1236, 1244 (4th Cir. 1985).

187. 394 U.S. 165 (1969) (discussing examination of sensitive wiretap logs to determine whether illegal interceptions had tainted the prosecution).

188. *Id.* at 185; *accord* United States v. United States Dist. Court, 407 U.S. 297, 324 (1972); *cf.* United States v. Nixon, 418 U.S. 683, 715 n.21 (1974).

189. United States v. Truong Dinh Hung, 667 F.2d 1105, 1107-08 (4th Cir. 1981), *cert. denied*, 454 U.S. 1144 (1982). In Loral Corp. v. McDonnell Douglas Corp., 558 F.2d 1130, 1132 (2d Cir. 1977), the Second Circuit suggested the possibility of the attorneys' obtaining security clearance. A similar suggestion was made in Farnsworth Cannon, Inc. v. Grimes, 635 F.2d 268, 276 (4th Cir. 1980). Such a procedure seems neither feasible nor necessary.

190. While the Supreme Court has been extremely protective of late of the executive branch's authority to control access to classified information, *see* Department of the Navy v. Egan, 484 U.S. 518 (1988), it has not directly confronted the issue in the context now being discussed: denial of the right to sue for violation of a fundamental right. *Cf.* Webster v. Doe, 486 U.S. 592, 604 (1988) ("the District Court has the latitude to control any discovery process which may be instituted so as to balance respondent's need for access to proof which would support a colorable constitutional claim against the extraordinary needs of the CIA for confidentiality and the protection of its methods, sources, and mission").

191. *See supra* note 82 and accompanying text (comment of Justice Frankfurter).

192. Molerio v. Federal Bureau of Investigation, 749 F.2d 815 (D.C. Cir. 1984); *see supra* notes 2-4 and accompanying text.

193. Patterson v. Federal Bureau of Investigation, 893 F.2d 595 (3d Cir. 1990), *aff'g* 705 F. Supp. 1033 (D.N.J. 1989); *see supra* notes 18-21 and accompanying text.

alternative, the FBI would have been able to buy its way out of sharing the privileged document by compensating plaintiff for denial of a job.

In *Patterson*, plaintiff sought an order of expungement and statutory damages under his Privacy Act claim. The court denied relief on the ground that its *ex parte* examination of material submitted by the FBI overcame plaintiff's prima facie case that maintenance of information describing his exercise of first amendment rights was not pertinent to and within the scope of an authorized law enforcement activity.[194] Under the procedure suggested in this Article, unless the government could submit evidence justifying a judicial finding that disclosure of the government's information would result in direct, immediate, and irreparable damage, the government would have two choices, neither of which would likely threaten national security: either give plaintiff the relief requested or share the privileged information with plaintiff's attorney in an *in camera* hearing. Secret decisionmaking is far more threatening to the fabric of our constitutional democracy than either of these possible alternatives.

VIII. Postscript: The Politics of National Security

It should be no great surprise to any relatively astute and sophisticated observer of current affairs that the doctrine of government openness exemplified by cases like *Alderman v. United States*,[195] *Jencks v. United States*,[196] and *Dennis v. United States*[197] has fared poorly in the post-Warren Court years, a time during which the White House has been dominated by Presidents committed to the appointment to the federal bench of judges sympathetic to authoritarian notions. If any issue has divided liberal jurisprudents from their conservative counterparts in recent years, it has been the issue of national security versus open government.[198] It has been a recurrent issue on the legal/political agenda since the days of Joe McCarthy and the post-World War II loyalty investigations.[199]

194. *Patterson*, 705 F. Supp. at 1044.

195. 394 U.S. 165 (1969).

196. 353 U.S. 657 (1957).

197. 384 U.S. 855 (1966).

198. *See* Central Intelligence Agency v. Sims, 471 U.S. 159 (1985), *discussed in* Note, *A Nation Less Secure: Diminished Public Access to Information*, 21 HARV. C.R.-C.L. L. REV. 409 (1986); Haig v. Agee, 453 U.S. 280 (1981); Snepp v. United States, 444 U.S. 507 (1980); Environmental Protection Agency v. Mink, 410 U.S. 73 (1973); United States v. New York Times Co., 403 U.S. 713 (1971) (Pentagon Papers case).

199. *See, e.g.*, United States v. Robel, 389 U.S. 258 (1967); Cafeteria Workers Union v. McElroy, 367 U.S. 886 (1961).

The anti-Vietnam War movement, the Watergate scandal, and the exposure of J. Edgar Hoover's misuse of the FBI as a political police force helped temporarily to inspire a new spirit of openness in the land that resulted in, among other things, the enactment of the Freedom of Information Act and the Privacy Act in the first half of the 1970s. A political swing to the right, the escalation of the Cold War, the recapture of the White House by conservative forces in 1980, and the appointment of hundreds of conservative Republican judges to the federal bench brought notions of executive privilege and government secrecy back into full favor. It is not surprising that the *Molerio* opinion, for the first time sanctioning secret decisionmaking, is a product of the 1980s or that its author is Antonin Scalia, a guru of the legal conservative movement. It is no more surprising that the decision in *Kinoy v. Mitchell*[200] was written by a veteran civil rights crusader, both off and on the bench, Constance Baker Motley.

This history does not bode well for advocates who would erode the government's national security privilege at a time when the conservative judicial revolt has taken firm command of the Supreme Court and the federal judiciary. On the other hand, there can be little doubt that the Court's rulings on national security issues have been largely shaped by the cold war ideology to which conservative Republicans have been wedded for the past forty years. Perestroika, glasnost, and the rapid evaporation of the Red Menace would seem to afford an ideal backdrop for a fresh look at the legal doctrines constructed to protect Cold War political strategies, just as the demise of the Yellow Peril permitted judicial officers who had taken an oath to uphold the Constitution to reconsider doctrine, generated out of the needs and fears of World War II, that had permitted incarceration of large groups of American citizens solely on the basis of their ethnic origin.[201]

At a time when Americans of all political persuasions hail the daring and courage of East European democrats who invade secret police headquarters and destroy surveillance files from Bucharest to Prague and East Berlin, is it really so unthinkable that our own Supreme Court might take a fresh look at the scope of the national security privilege under a Constitution that we have long esteemed for its protection of individual liberty?

200. 67 F.R.D. 1 (S.D.N.Y. 1975); *see supra* notes 73-76 and accompanying text.

201. *Compare* Korematsu v. United States, 323 U.S. 214 (1944), *and* Hirabayashi v. United States, 320 U.S. 81 (1943), *with* Hirabayashi v. United States, 828 F.2d 591 (9th Cir. 1987), *and* Korematsu v. United States, 584 F. Supp. 1406 (N.D. Cal. 1984); *see* Bishop, *Day of Apology and 'Sigh of Relief'*, N.Y. Times, Aug. 11, 1988, at A16, col. 2.