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The State Secrets Privilege in the Post-9/11 Era

Steven D. Schwinn*

Introduction

On February 9, 2009, a lawyer from the Department of Justice stood before a three-judge panel of the United States Court of Appeals for the Ninth Circuit to answer a much anticipated question in a case involving government extraordinary rendition and torture: Would the new administration, under President Obama, defend the position of the Bush administration and seek complete dismissal of the case because it involved a state secret?

The attorney's answer: Yes.¹

This answer baffled many. After all, President Obama came to office promising a new era of government openness and transparency.² He promised to discontinue many of the controversial policies in the Bush administration's "War on Terror."³ Specifically, he promised to reevaluate the Government's position on the state secrets privilege.⁴

The state secrets privilege started as a common law evidentiary privilege that protected evidence if there was a

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1. Audio file: Oral argument in *Mohamed v. Jeppesen Dataplan, Inc.*, 563 F.3d 992 (9th Cir. 2009), *amended and superseded by* 579 F.3d 949 (9th Cir. 2009), *petition for reh'g en banc granted by* 586 F.3d 1108, *available at* http://www.ca9.uscourts.gov/media/view_subpage.php?pk_id=0000002777.

2. *See, e.g.*, Barack Obama, U.S. President, Remarks by the President on National Security (May 21, 2009), *available at* http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-On-National-Security-5-21-09/.

3. *Id.*

4. *Id.*

“reasonable danger that compulsion of the evidence [would] expose military matters which, in the interest of national security, should not be divulged.”⁵ In the cases involving secret executive programs developed in the wake of the 9/11 attacks, however, the Government has repeatedly pressed to turn the privilege into something more like a justiciability doctrine—a claim that would foreclose all litigation on a matter when the very subject of litigation is a state secret.

If that is not dramatic enough, the Government also presented a new argument in the post-9/11 cases: that the state secrets privilege was rooted in the President’s Article II powers in the Constitution.⁶ This argument amplified the Government’s already sweeping state secrets claims and, if accepted by the courts, meant that the administration could effectively shut down all judicial challenges against the Government, or its partners, based only on the claimed harms resulting from these programs.

The Government’s arguments predictably spawned criticism. In response, the new administration announced that it would review all pending cases in which the prior administration had maintained this extraordinary claim.⁷ Additionally, Congress reintroduced legislation to rein in the administration and control the use of the privilege.⁸ Given the Government’s continuing position on the state secrets privilege, as well as several court rulings on that privilege, the proposed legislation falls short.

This Article examines the Government’s position on the state secrets privilege in the post-9/11 cases. It argues that the Government’s new position, first under President Bush and now under President Obama, marks an important and disturbing change in how it considers and treats the privilege. In these cases, the Government has dramatically expanded the privilege in four discrete dimensions. First, the Government

5. *United States v. Reynolds*, 345 U.S. 1, 10 (1953).

6. *See, e.g., Mohamed*, 563 F.3d at 1003.

7. Steven Aftergood, *Eric Holder on State Secrets, OLC Opinion*, *SECURITY NEWS*, Feb. 2, 2009, <http://www.fas.org/blog/secretcy/2009/02/holder.html>.

8. State Secret Protection Act of 2009, S. 417, 111th Cong. (1st Sess. 2009); State Secret Protection Act of 2009, H.R. 984, 111th Cong. (1st Sess. 2009).

has argued that the state secrets privilege has constitutional roots. Next, it has attempted to minimize the roles of the courts in policing the privilege. Third, it has negated private litigants' interests in their cases against the Government and its partners. Finally, it has argued that courts must completely dismiss those cases in which it decrees that the very subject matter is a state secret.

If reform efforts are to succeed, they must take account of these characteristics of the Government's position, as well as the reported decision of one circuit court.

To appreciate the significance of the changes in the Government's position, it helps to put them in historical and jurisprudential perspective. Thus, this Article starts by tracing the sources of the state secrets privilege. It shows how the contemporary state secrets privilege evolved from two related but distinct cases—one creating a complete bar to a very narrow category of litigation, and the other creating an evidentiary privilege.

This Article then examines the applications of the state secrets privilege in the last three decades, in the cases that form the basis of the Government's claims today. I argue that the cases fall roughly into two categories, correlating with the two sources of the state secrets privilege. Thus, cases in one category treat the privilege as a common law evidentiary privilege, while cases in the other treat it more like a justiciability issue.

Next, the Article examines the Government's position on the state secrets privilege in the post-9/11 cases. I argue that the Government's position on the privilege builds on the second category of cases explained above. I also show that the Government in these cases makes the novel claim that the state secrets privilege is rooted in the Constitution. As a result, the Government claims a dramatically expanded privilege, which, if adopted by the courts, could mean that the Government could entirely shut down cases, with little judicial intervention, merely by asserting that their very subject matter is a state secret. This expanded view of the state secrets doctrine lacks support in the history and the precedent of the privilege.

I. The Sources of State Secrets

The state secrets privilege derives primarily from two cases: *Totten v. United States*⁹ and *United States v. Reynolds*.¹⁰ But while these two cases share some common ground, they represent two entirely distinct principles. *Totten* represents a complete ban on litigation that involves clandestine government contracts, or spy contracts.¹¹ The “*Totten* ban” therefore operates to cut off any litigation on a spy contract on the pleadings.¹² It is similar to justiciability doctrines that prevent the courts from hearing whole categories of cases, except that the *Totten* ban does not have the same constitutional pedigree.

Reynolds, in contrast, is a common law evidentiary privilege. The “*Reynolds* privilege” therefore protects evidence that contains a state secret.¹³ Unlike the *Totten* ban, it need not end the case, unless an essential claim or defense hinges only on protected evidence and cannot be established with alternative, non-privileged evidence.¹⁴

This section includes a discussion of the *Totten* ban and the *Reynolds* privilege, starting with *Totten* and *Reynolds* themselves. The section concludes by highlighting the differences between the *Totten* ban and the *Reynolds* privilege, drawing on the Supreme Court’s most recent foray into the area in *Tenet v. Doe*.¹⁵

A. *The Totten Ban*

Totten brought a claim against the United States on behalf of his intestate, William A. Lloyd, for breach of contract.¹⁶ Lloyd contracted with President Lincoln in July 1861 to

9. 92 U.S. 105 (1875).

10. 345 U.S. 1 (1953).

11. See generally *Tenet v. Doe*, 544 U.S. 1, 8-9 (2005) (noting the impact of the *Totten* bar and its effect on the claim itself).

12. *Id.*

13. See generally *Reynolds*, 345 U.S. at 10-11.

14. See generally *Tenet*, 544 U.S. at 8-9 (explaining the *Reynolds* evidentiary privilege).

15. 544 U.S. 1 (2005).

16. *Totten v. United States*, 92 U.S. 105, 105 (1875).

“proceed South and ascertain the number of troops stationed at different points in the insurrectionary States, procure plans of forts and fortifications, and gain such other information as might be beneficial to the Government of the United States.”¹⁷ Lloyd was Lincoln’s spy, and the President agreed to pay him two hundred dollars per month for his services.¹⁸

Lloyd satisfied his part of the contract, but, after the war, the Government only reimbursed him for expenses.¹⁹ It did not pay him the two hundred dollars per month it owed for his services.²⁰ Nevertheless, the Court of Claims ruled against Totten and dismissed the case, holding that the President lacked authority to bind the United States to the contract in the first place.²¹

The Supreme Court upheld the dismissal, but for different reasons.²² In contrast to the Court of Claims, the Supreme Court ruled unequivocally that the President had authority as commander-in-chief to bind the United States to a spy contract during the war.²³ But the Court also ruled that the contract itself was a secret.²⁴ The Court’s language is worth quoting at length:

The service stipulated by the contract was a secret service; the information sought was to be obtained clandestinely, and was to be communicated privately; the employment and the service were to be equally concealed. Both employer and agent must have understood that the lips of the other were to be for ever sealed respecting the relation of either to the matter. This condition of the engagement was implied from the nature of the employment, and is implied in all secret employments of the government in time of war, or upon matters

17. *Id.* at 105-06.

18. *Id.* at 106.

19. *Id.*

20. *Id.*

21. *Id.* at 106-07.

22. *Id.* at 107.

23. *Id.* at 106.

24. *Id.* at 106-07.

affecting our foreign relations, where a disclosure of the service might compromise or embarrass our government in its public duties, or endanger the person or injure the character of the agent.²⁵

The Court ruled that the secrecy of the contract meant that it could not be litigated.²⁶ The Court cited “public policy” to justify its holding and explained that if government spy contracts could be litigated, the whole secret service operation might be exposed, threatening national security and effectively shutting down the service.²⁷ In addition, any secret agent, or, presumably, even any putative secret agent, could unilaterally threaten the entire service by exposing it in any run-of-the-mill, real or imagined, employment dispute.²⁸ The Court later called this threat “graymail.”²⁹ Moreover, any suit on a secret contract would itself breach that contract, because it would reveal the very secret that the contract was meant to preserve.³⁰

The Court dismissed Totten’s case on these public policy considerations alone, without citing a single case or any other legal authority in support of its ruling.³¹ In closing dicta, however, the Court suggested a more concrete basis for its decision by aligning this new principle with common law privileges respecting communications between clergy and parishioner, husband and wife, client and counsel, and patient and doctor.³² The Court determined that this type of communication involves “matters which the law itself regards as confidential;” a suit that requires this type of disclosure cannot be maintained.³³

25. *Id.* at 106.

26. *Id.* at 107.

27. *Id.* at 106-07.

28. *Id.*

29. *Tenet v. Doe*, 544 U.S. 1, 11 (2005).

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

31. *Id.* at 106-07.

32. *Id.* at 107.

33. *Id.*

B. *The Reynolds Privilege*

Reynolds involved a negligence claim against the Federal Government by widows of civilians killed in the crash of an Air Force B-29.³⁴ The plaintiffs moved during discovery for an order requiring production of the Air Force's official accident report.³⁵ The Government opposed the motion, arguing that the report was privileged based on an ill-defined claim that the proceedings of investigatory boards of the armed services should be categorically protected from disclosure.³⁶ The district court rejected the Government's arguments, suggesting that the "well-recognized common-law privilege protecting state secrets" might have worked better.³⁷

The Government took the hint, and the Secretary of the Air Force filed a formal claim of the state secrets privilege with the district court on August 9, 1950.³⁸ The district judge reviewed the report in camera "so that he might determine whether all or any part of the documents contain, to use the words of his order, 'matters of a confidential nature, discovery of which would violate the Government's privilege against disclosure of matters involving the national or public interest.'"³⁹ The district judge ordered the Government to produce the report, but the Government declined.⁴⁰ The judge issued an order "that the facts in plaintiffs' favor on the issue of negligence be taken as established and prohibiting the defendant from introducing evidence to controvert those facts."⁴¹ The court then held a hearing on damages and

34. *United States v. Reynolds*, 345 U.S. 1, 2-3 (1953). See also LOUIS FISHER, *IN THE NAME OF NATIONAL SECURITY: UNCHECKED PRESIDENTIAL POWER AND THE REYNOLDS CASE* (2006); BARRY SIEGEL, *CLAIM OF PRIVILEGE* (2008).

35. *Brauner v. United States*, 10 F.R.D. 468, 469 (E.D. Pa. 1950), *aff'd sub nom. Reynolds v. United States*, 192 F.2d 987 (3d Cir. 1951), *rev'd*, 345 U.S. 1 (1953).

36. *Id.* at 472.

37. *Id.* at 471-72.

38. See *Reynolds v. United States*, 192 F.2d 987, 990 (3d Cir. 1951), *aff'g Brauner v. United States*, 10 F.R.D. 468 (E.D. Pa. 1950), *rev'd*, 345 U.S. 1 (1953).

39. *Id.* at 996.

40. *Id.* at 990.

41. *Id.* at 991.

entered judgment for the plaintiffs.⁴²

The Government appealed, arguing that “it is within the sole province of the Secretary of the Air Force to determine whether any privileged material is contained in the documents and that his determination of this question must be accepted by the district court without any independent consideration of the matter by it.”⁴³ The Third Circuit flatly rejected this claim with prescient language:

On the contrary we are satisfied that a claim of privilege against disclosing evidence relevant to the issues in a pending law suit involves a justiciable question, traditionally within the competence of the courts, which is to be determined in accordance with the appropriate rules of evidence, upon the submission of the documents in question to the judge for his examination in camera. Such examination must obviously be ex parte and in camera if the privilege is not to be lost in its assertion. But to hold that the head of an executive department of the Government in a suit to which the United States is a party may conclusively determine the Government’s claim of privilege is to abdicate the judicial function and permit the executive branch of the Government to infringe the independent province of the judiciary as laid down by the Constitution.⁴⁴

In short, the state secrets privilege was an evidentiary privilege to be invoked against evidence, not an entire case, with meaningful judicial oversight.

The Supreme Court in *Reynolds* affirmed this principle, even as it overturned the lower courts on the application of the privilege in the case.⁴⁵ Thus, the Court referenced several cases, including *Totten*, for the proposition that the “privilege

42. *Id.*

43. *Id.* at 996-97.

44. *Id.* at 997 (citations omitted).

45. *United States v. Reynolds*, 345 U.S. 1, 12 (1953).

against revealing military secrets . . . [was] well established in the law of evidence”⁴⁶ and looked to “an analogous privilege, the privilege against self-incrimination,” for guidance on its application.⁴⁷ Importantly, nothing in the decision suggested that the privilege was rooted in the Constitution or separation-of-powers considerations. If anything, such considerations cut the other way. In calibrating the appropriate level of judicial oversight, the Court wrote that “[j]udicial control over the evidence in a case cannot be abdicated to the caprice of executive officers.”⁴⁸

The Court used a two-step process to evaluate the formal claim of the privilege by the Secretary of the Air Force “indicating a reasonable possibility that [state] secrets were involved.”⁴⁹ In the first step, the Court determined how thoroughly to evaluate the claim, which is based upon the plaintiff’s need for information in pursuing his or her case.⁵⁰ “In each case, the showing of necessity which is made will determine how far the court should probe in satisfying itself that the occasion for invoking the privilege is appropriate.”⁵¹

A significant need—for example, a case where a plaintiff’s claim would fail without the material—results in a significant review, including an *in camera*, *ex parte* review of the material. Moreover, courts should apply great scrutiny: “[w]here there is a strong showing of necessity, the claim of privilege should not be lightly accepted.”⁵² In contrast, a lesser need—for example, a case where a plaintiff might rely on non-privileged material—results in a deferential review of the claim.⁵³

As to the first step, the Court ruled that the plaintiffs’ need was “dubious,” because they failed to pursue the underlying information about the crash from an alternative and available non-privileged source, the surviving crew members.⁵⁴ As a result, the Court ruled that it could evaluate the privilege

46. *Id.* at 6-7.

47. *Id.* at 8.

48. *Id.* at 9-10.

49. *Id.* at 11.

50. *Id.*

51. *Id.*

52. *Id.* at 11.

53. *See id.* (“*A fortiori*, where necessity is dubious, a formal claim of privilege, made under the circumstances of this case, will have to prevail.”).

54. *Id.*

based upon a deferential review of the Secretary's claim alone, and not based upon an in camera examination of the report itself.⁵⁵

In the second step, after evaluating the claim, the Court denied access to the report. At this stage, the Court engaged in no balancing. Instead, the successful invocation of the privilege was absolute. "[E]ven the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that military secrets are at stake."⁵⁶ Presumably, as with any other evidentiary privilege, an unsuccessful invocation would have resulted in an order to produce the evidence.

The Court's denial alone, however, did not end the case. The Court remanded the case, permitting it, at least theoretically, to proceed on any available non-privileged evidence.⁵⁷

C. *The Totten Ban and the Reynolds Privilege in Contrast*

The Court did not seriously address the relationship between the *Totten* bar and the *Reynolds* privilege until 2005, when it dismissed another spy case.⁵⁸ In *Tenet v. Doe*, two foreign nationals sued the director of the Central Intelligence Agency ("CIA") and the United States for failure to satisfy their part of the plaintiffs' contract for espionage services during the Cold War, a case that seemed very much like *Totten*.⁵⁹ Unlike *Totten*, however, the plaintiffs in *Tenet* did not merely allege breach of contract. Instead, they alleged that the Government's failure to meet an obligation to provide them with continued financial support violated their equal protection and due process rights.⁶⁰

The lower courts ruled that this difference allowed the plaintiffs to dodge the *Totten* bar. They limited *Totten* to its most narrow facts—a *breach of contract* claim on a spy contract—and ruled that *Totten*, therefore, did not bar the

55. *Id.* at 12.

56. *Id.* at 11.

57. *Id.* at 12.

58. *Tenet v. Doe*, 544 U.S. 1 (2005).

59. *Id.* at 1.

60. *Id.* at 5.

plaintiffs' *constitutional* claims.⁶¹ The Ninth Circuit held that *Reynolds* recast the *Totten* bar as merely an early and extreme version of the *Reynolds* privilege.⁶² Both lower courts ruled that the Federal Government could exclude evidence based on the *Reynolds* state secrets privilege, but that *Totten* did not bar the suit entirely.⁶³

The Supreme Court reversed and dismissed the case based on a rote application of the *Totten* bar. The Court ruled that the lower courts read *Totten* too narrowly—that by its plain terms *Totten* applies to all “lawsuits premised on alleged espionage agreements.”⁶⁴ Citing *Reynolds* itself, the Court wrote:

“[W]here the very subject matter of the action, a contract to perform espionage, was a matter of state secret,” we declared that such a case was to be “dismissed *on the pleadings without ever reaching the question of evidence*, since it was so obvious that the action should never prevail over the privilege.”⁶⁵

The Supreme Court affirmed that *Totten* applied only to cases involving spy agreements, but it also held that *Totten* applied to any case involving spy agreements, no matter the cause of action.⁶⁶

61. *Tenet v. Doe*, 329 F.3d 1135, 1145-55 (9th Cir. 2003); *Doe v. Tenet*, 99 F. Supp. 2d 1284, 1289-94 (W.D. Wash. 2000).

62. *See Tenet*, 329 F.3d at 1152-53.

63. *Id.* at 1145-55; *Tenet*, 99 F. Supp. 2d at 1289-94.

64. *Tenet*, 544 U.S. at 9.

65. *Id.* (quoting *Reynolds v. United States*, 345 U.S. 1, 11 n.26 (1953) (citing *Totten v. United States*, 92 U.S. 105 (1875))).

66. The Court had previously affirmed the “more sweeping holding in *Totten*.” *Tenet*, 544 U.S. at 9 (citing *Weinberger v. Catholic Action of Haw./Peace Educ. Project*, 454 U.S. 139 (1981)). The Court in *Weinberger*, however, merely quoted and cited *Totten* as support, and only by analogy, for its dicta that the Navy’s full compliance with portions of the National Environmental Policy Act of 1969 (“NEPA”), Pub. L. No. 91-190, 83 Stat. 852, was “beyond judicial scrutiny.” *Weinberger*, 454 U.S. at 146. Ultimately, the Court held that whether or not the Navy has complied with NEPA “to the fullest extent possible” was beyond judicial review. *Id.* at 142. In other circumstances, the Court has stated that “public policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as

At the same time, the Court drew a clear line between *Totten* and *Reynolds*. *Totten*, it ruled, established a complete bar to litigation.⁶⁷ *Reynolds*, in contrast, established an evidentiary privilege.⁶⁸ In explaining the difference, the Court wrote, “[t]he [*Reynolds*] state secrets privilege and the more frequent use of in camera judicial proceedings simply cannot provide the absolute protection we found necessary in enunciating the *Totten* rule.”⁶⁹

The state secrets privilege announced in *Reynolds*, to be sure, drew support from *Totten*, “[b]ut that in no way signaled [the Court’s] retreat from *Totten*’s broader holding that lawsuits premised on alleged espionage agreements are altogether forbidden.”⁷⁰

Thus *Tenet* affirmed what *Totten* and *Reynolds* previously held and drew a sharp line between them. The *Totten* bar applies to cases involving a government spy contract; it prevents the entire case from going forward. In contrast, the *Reynolds* evidentiary privilege applies to evidence; it may protect evidence that contains state secrets, but it does not prevent a plaintiff’s case from proceeding on the basis of alternative, non-privileged evidence.

II. The State Secrets Privilege: Two Variations

Courts have taken the *Totten* ban and the *Reynolds* privilege in different, and sometimes surprising, directions. But at the end of the day, the cases applying these doctrines fall into two categories. In the first—the “*Reynolds* cases”—courts, following *Reynolds*, treat the state secrets privilege as a common law evidentiary privilege. These cases consider an assertion of the privilege on evidence, usually in discovery, and thoughtfully assess whether and how the case might proceed without any privileged evidence.

confidential, and respecting which it will not allow the confidence to be violated.” *Totten*, 92 U.S. at 107. The Court confronted a similar situation in *Tenet*. *Weinberger* thus reaffirms *Totten*, but nothing in *Weinberger* suggests that the *Totten* bar applies to cases other than those involving spy contracts.

67. *Tenet*, 544 U.S. at 7-11.

68. *Id.*

69. *Id.* at 11.

70. *Id.* at 9.

In the second category—the “*Totten* cases”—courts, trending more toward *Totten*, often treat the state secrets privilege more as a rule of justiciability. The courts in these cases are quicker to dismiss based only on the Government’s assertion that the very subject matter of the case is a state secret.

This section discusses both categories in some detail in order to provide the background for assessing the shifts in the state secrets privilege in the post-9/11 cases.

A. *The Reynolds Cases*

The *Reynolds* cases tend to treat the state secrets privilege as a common law evidentiary privilege, following *Reynolds* itself.⁷¹ In other words, the courts in these cases consider state secrets claims on the evidence, usually during discovery, and determine whether the evidence contains state secrets. If it does, the courts then determine whether and how to proceed without the privileged evidence. These courts thus treat the state secrets privilege like any other evidentiary privilege.

The characteristics of these cases include: treating the privilege as evidentiary, rather than constitutional; serious considerations of a plaintiff’s need for the information; meaningful scrutiny of the Government’s claim of privilege, often including in camera review of the material sought to be protected, not just a review of the supporting affidavit; and serious consideration of alternative non-privileged sources for the information. These cases exhibit such characteristics even when the Government moves to dismiss, or for summary judgment on the pleadings, because, for example, the plaintiff cannot establish standing or a prima facie case without the privileged evidence.

These characteristics are illustrated in a series of cases out of the United States Court of Appeals for the District of Columbia Circuit. In *Ellsberg v. Mitchell*, the court ruled that the district court had properly protected certain evidence from

71. See generally *United States v. Reynolds*, 345 U.S. 1 (1953); *In re Sealed Case*, 494 F.3d 139 (D.C. Cir. 2007); *In re United States*, 872 F.2d 472 (D.C. Cir. 1989); *Molerio v. FBI*, 749 F.2d 815 (D.C. Cir. 1984); *Ellsberg v. Mitchell*, 709 F.2d 51 (D.C. Cir. 1983); *Halkin v. Helms (Halkin II)*, 690 F.2d 977 (D.C. Cir. 1982); *Halkin v. Helms (Halkin I)*, 598 F.2d 1 (D.C. Cir. 1978).

discovery after it reviewed the underlying material and various affidavits supporting the Government's assertion of the privilege.⁷² But in so ruling, the court also offered its own reasons for close judicial examination of assertions of the privilege:

The head of an executive department can appraise the public interest of secrecy as well (or perhaps in some cases better) than the judge, but his official habit and leaning tend to sway him toward a minimizing of the interest of the individual. Under the normal administrative routine the question will come to him with recommendations from cautious subordinates against disclosure and in the press of business the chief is likely to approve the recommendation about such a seemingly minor matter without much independent consideration. . . . Thus, to ensure that the state secrets privilege is asserted no more frequently and sweepingly than necessary, it is essential that the courts continue critically to examine instances of its invocation.⁷³

Thus the court should closely examine an assertion of the state secrets privilege, even as it accords "considerable deference"⁷⁴ to the executive and judges only whether the Government has established a "reasonable danger"⁷⁵ that disclosure will result in harm. The court wrote that, in determining whether and how to review materials sought to be protected, it should consider both the litigant's need for the material⁷⁶ and "the government's allegations of danger to national security in the context of all the circumstances surrounding the case."⁷⁷

Both the district court and the D.C. Circuit closely scrutinized the Government's assertions of the state secrets privilege. They both reviewed in camera the underlying

72. *Ellsberg*, 709 F.2d at 59.

73. *Id.* at 58 (citations omitted).

74. *Id.*

75. *Id.* (quoting *United States v. Reynolds*, 345 U.S. 1, 10 (1953)).

76. *Id.* at 58.

77. *Id.* at 59.

material regarding the defendant's electronic surveillance of the plaintiffs, as well as the affidavits supporting the claims of privilege. The D.C. Circuit upheld the district court's decision with regard to most of the Government's assertions of the privilege. But it overruled the district court on one key aspect: it closely examined the Government's assertions and ruled that the Government insufficiently justified—and thus the lower court improperly granted—protection of key evidence for the plaintiffs, i.e., the names of Attorneys General who authorized the surveillance.⁷⁸

Both courts also treated the privilege as an evidentiary privilege, not a constitutional principle that would mandate dismissal. To be sure, this treatment squared with the procedural posture of the case: the Government asserted the privilege largely in the context of discovery, not as a basis to dismiss the case on the pleadings.⁷⁹ Even so, the circuit court could not have been clearer that the privilege was categorically evidentiary.⁸⁰ The court held that “the uniform rule governing civil suits brought by private parties is that the effect of invocation of a state secrets privilege is simply to remove from the case the material in question.”⁸¹ The *Ellsberg* court ruled that this general principle applied to the case; therefore, dismissal of any portion of the suit would be appropriate “only if the plaintiffs were manifestly unable to make out a prima facie case without the requested information.”⁸²

Ellsberg thus holds that where a plaintiff's need for the material is strong, courts should closely scrutinize assertions of executive privilege through in camera examinations of supporting affidavits, as well as the underlying material the

78. *Id.* at 59-60. The court went one step further in its scrutiny and ruled that, where the plaintiffs made a compelling showing of need for the information, “the trial judge should insist . . . that the formal claim of privilege be made *on the public record*,” *id.* at 63 (emphasis added), as well as a *public* defense of the assertion of privilege, or else an explanation why such a public defense would endanger national security. *Id.* at 63-64.

79. *Id.* at 52-56.

80. *Id.* at 65.

81. *Id.* The court wrote that this “uniform rule” applied in all but one special situation: where the Government asserts the privilege against material in a plaintiff's possession in a case between two private litigants. *Id.* at 58 (citing *Farnsworth Cannon, Inc. v. Grimes*, 635 F.2d 268, 281 (4th Cir. 1980) (en banc) (per curiam)).

82. *Id.* at 65.

party is seeking to protect.⁸³ In cases of compelling need, courts should also require the Government to defend its claim of privilege publicly.⁸⁴ Therefore, if the court grants the privilege, the case will move forward without the protected material. Dismissal of any claim is only appropriate if the protected material is essential to the claim.

The *Ellsberg* court articulated these principles in a case where the Government asserted the state secrets claim largely in discovery, but the D.C. Circuit has affirmed these principles in a line of cases where the Government moved for complete dismissal on the pleadings.⁸⁵ As in *Ellsberg*, the courts in these cases treated the privilege as an evidentiary privilege and carefully examined the Government's claim of privilege.⁸⁶ Because these cases involved complete dismissal, the courts also looked carefully at alternative, non-privileged sources of information that would permit the plaintiffs' claims to go forward.⁸⁷

Thus, in *Halkin v. Helms* ("*Halkin I*"), the court ruled on the Government's assertion of the state secrets privilege in response to the plaintiffs' claims that the National Security Agency ("NSA") conducted warrantless interceptions of their international wire and telephone communications in violation of their constitutional and statutory rights.⁸⁸ The Government filed a motion to dismiss based upon the formal claim of the state secrets privilege by the Secretary of Defense.⁸⁹ The Secretary argued that discovery or even a responsive pleading would necessarily disclose the identity of those targeted, the nature of the intercepted communications, and the methods of interception—all of which are state secrets.⁹⁰

The court ruled in favor of the Government and even granted the privilege with respect to one NSA program for

83. *Id.* at 69.

84. *Id.* at 63-64 & n.53.

85. *See, e.g., In re Sealed Case*, 494 F.3d 139 (D.C. Cir. 2007); *In re United States*, 872 F.2d 472 (D.C. Cir. 1989); *Molerio v. FBI*, 749 F.2d 815 (D.C. Cir. 1984); *Halkin I*, 598 F.2d 1 (D.C. Cir. 1978).

86. *See, e.g.,* cases cited *supra* note 85.

87. *See, e.g.,* cases cited *supra* note 85.

88. *Halkin I*, 598 F.2d at 11.

89. *Id.* at 4.

90. *Id.* at 8.

which the district court denied the privilege.⁹¹ In doing so, however, it carefully probed the Government's claim based on the plaintiffs' extraordinary need: the plaintiffs' case depended on the information in the evidence that the defense was seeking to protect.⁹² The court thus ruled that the district court properly examined in camera three government affidavits and the testimony of the NSA deputy director before ruling on the privilege.⁹³ Moreover, it examined available non-privileged alternatives to the privileged evidence and, only after careful review, ruled that alternatives would not allow the plaintiffs to establish a prima facie case.⁹⁴

The court remanded the case, permitting it to go forward on other evidence and other claims. When the case reached the D.C. Circuit again, in *Halkin II*, the Government claimed the privilege in discovery.⁹⁵ But in *Halkin II*, the D.C. Circuit held that the trial judge appropriately upheld the privilege on the basis of two affidavits of the director of the CIA.⁹⁶ After carefully reviewing the affidavits and exhaustively considering the plaintiffs' arguments (including arguments about specific measures the court should use to examine the Government's

91. *Id.* at 10-11.

92. *Id.* at 9. The court wrote:

In most cases [the Secretary's affidavit] would be sufficient to sustain the claim of privilege. Here, however, plaintiffs' suit depends upon the discovery of this information. Because it is the showing of necessity that determines how deeply the court must probe to satisfy itself of the validity of the claim the court below examined the in camera affidavits and testimony. We think this was proper. Moreover, we have reviewed the in camera materials ourselves and they reinforce our conclusion from the open affidavits that the state secrets claim must be upheld.

Id. (citation omitted).

93. *Id.* at 7.

94. *Id.* at 9. The full D.C. Circuit denied en banc review. *Id.* at 11. Two judges, Judge Bazelon and Chief Judge Wright, were in favor of en banc review. In a statement, written by Judge Bazelon and joined by Chief Judge Wright, they argued that the court did not go far enough in crediting the plaintiffs' "weighty Fourth Amendment interests" and the extent to which one of the surveillance programs had previously been made public. *Id.* at 11-18 (Bazelon, J., statement as to why he voted for rehearing en banc).

95. *Halkin II*, 690 F.2d 977, 989-90 (D.C. Cir. 1982).

96. *Id.* at 991.

claim), the court ruled that it need go no further in scrutinizing the Government's claim of privilege.⁹⁷ The court wrote that it was "self-evident that the disclosures sought here pose[d] a 'reasonable danger' to the diplomatic and military interests of the United States."⁹⁸ As a result, the court ruled that the plaintiffs lacked standing to establish their claim that they were targets of government surveillance.⁹⁹

The D.C. Circuit approached the state secrets privilege similarly in *Molerio v. FBI*.¹⁰⁰ In *Molerio*, the plaintiff claimed that the FBI refused to hire him as a special agent because of his father's political activities—an alleged violation of his statutory and constitutional rights.¹⁰¹ After answering portions of the complaint and providing some discovery, the Government asserted the state secrets privilege and moved for complete dismissal, claiming that it could not litigate the case without revealing secret information.¹⁰²

In an opinion authored by then-Judge Antonin Scalia, the court first ruled that the Government had satisfied the procedural requirements of the state secrets privilege.¹⁰³ The court specifically noted that the Government's motion to dismiss would be, and had been, treated as a motion for summary judgment.¹⁰⁴ The court's ruling is more consistent with the notion that the state secrets privilege is an evidentiary privilege, not an absolute bar to litigation. The court upheld the trial court's ruling that the state secrets privilege protected the Government's reasons for not hiring the plaintiff, based on an in camera review of affidavits of the acting attorney general and the assistant director in charge of the Intelligence Division.¹⁰⁵ But before upholding summary judgment, the court conducted a detailed review of the alternative, non-privileged evidence that might allow the

97. *Id.* at 991-97.

98. *Id.* at 993.

99. *Id.* at 998.

100. 749 F.2d 815 (D.C. Cir. 1984).

101. *Id.* at 818-19.

102. *Id.* at 819.

103. *Id.* at 821. The procedural requirements were at issue because the plaintiff claimed that the acting attorney general did not review all the relevant underlying material, including his father's FBI file. *Id.*

104. *Id.* at 820.

105. *Id.* at 822.

plaintiff to establish his case.¹⁰⁶ The court ultimately ruled that the evidence for each claim was insufficient.¹⁰⁷

In *In re United States*, the Government moved for complete dismissal of a suit by a plaintiff claiming that FBI surveillance and political action programs caused injuries to her and her deceased spouse.¹⁰⁸ Both the district court and the court of appeals, on mandamus review, rejected the claim and allowed the suit to go forward.¹⁰⁹ The D.C. Circuit “carefully reviewed” the Government’s supporting affidavit and rejected the Government’s claim of privilege, writing that “[w]e share the district court’s confidence that it can police the litigation so as not to compromise national security.”¹¹⁰ The fact that the plaintiff already received much of the sought-after information through the Freedom of Information Act (“FOIA”) bolstered the court’s decision to allow the case to proceed, because the plaintiff possessed, through FOIA, an alternative, non-privileged source of the information.¹¹¹ The court noted that the Government’s motion was extraordinary and explained that the “[d]ismissal of a suit, and the consequent denial of a forum

106. *Id.* at 822-25.

107. *Id.* In a passage indicative of the D.C. Circuit’s balanced approach to the state secrets privilege, the court wrote:

It seems to us, however, that the effect of our determination with regard to the state secrets privilege is to prevent this issue from proceeding. As noted earlier, we honored the invocation of that privilege because we satisfied ourselves that the in camera affidavit set forth the genuine reason . . . [that it] could not be disclosed without risking impairment of the national security. As a result of that necessary process, the court 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. . . . Here . . . we know that further activity in this case would involve an attempt, however well intentioned, to convince the jury of a falsehood.

Id. at 825.

108. 872 F.2d 472, 473-74 (D.C. Cir. 1989).

109. *Id.* at 474.

110. *Id.* at 480.

111. *Id.* at 478-79.

without giving the plaintiff her day in court [was] draconian.”¹¹² Once again, the court closely examined the Government’s claim and treated state secrets as an evidentiary privilege.

Most recently, the D.C. Circuit in *In re Sealed Case* upheld the Government’s successful assertion of the state secrets privilege, but permitted the case to proceed on the basis of alternative, non-privileged evidence.¹¹³ An employee of the Drug Enforcement Agency (“DEA”) brought a claim against a State Department official and a federal agent affiliated with the CIA for tapping and recording his telephone conversations in violation of his Fourth Amendment rights.¹¹⁴ In response to the plaintiff’s allegations, the Government prepared two inspector general reports.¹¹⁵ Subsequently, the Government moved to intervene and asserted the privilege with respect to portions of those reports.¹¹⁶ After reviewing both the supporting affidavits and the underlying reports, the district court upheld the privilege and dismissed the entire case.¹¹⁷ The court cited “three independent grounds: (1) The plaintiff cannot make out a prima facie case absent the protected material; (2) the state secrets privilege deprives the defendants of information required in their defense; and (3) the subject matter of the plaintiff’s complaint is a state secret.”¹¹⁸

The D.C. Circuit reviewed the affidavits and reports and upheld the Government’s claim of privilege.¹¹⁹ But it overturned the district court’s dismissal as to one of the two defendants.¹²⁰ In an analysis that sums up the D.C. Circuit’s approach to state secrets, the court addressed each ground for dismissal separately.¹²¹

First, the court ruled that even without the privileged portions of the reports the plaintiff may be able to establish his

112. *Id.* at 477.

113. 494 F.3d 139, 154 (D.C. Cir. 2007).

114. *Id.* at 141.

115. *Id.*

116. *Id.*

117. *Id.* at 142.

118. *Id.*

119. *Id.* at 144.

120. *Id.* at 154.

121. *Id.* at 144-54.

prima facie case based on the unprotected portions of the reports and other non-privileged evidence.¹²² Importantly, the court analyzed the alternative, non-privileged evidence and its potential effects on the plaintiff's claim in some detail.¹²³ The court noted that the CIA director's affidavit itself suggested that the unprotected portions of the reports could be segregated without revealing information that would harm national security.¹²⁴ Moreover, the plaintiff possessed declassified portions of a cable that quoted his telephone conversation, he had evidence of "a suspicious entry into his apartment,"¹²⁵ and he could call government officers to testify as to non-privileged matters relevant to his claims.¹²⁶ This evidence was indirect, to be sure, but the court ruled that it was sufficient to withstand the Government's motion to dismiss the entire case with respect to one of the two defendants.¹²⁷

Second, the court ruled that the Government's defense, which hinged on protected information, was insufficiently defined and too obscure to permit the court to dismiss the entire case.¹²⁸ The court distinguished *Molerio*, in which the privileged material conclusively demonstrated to the court that the Government "could not have committed the alleged acts,"¹²⁹ and suggested that the Government's defense here was murky and uncertain.¹³⁰ The court used language that underscored two characteristics of the D.C. Circuit's approach to state secrets—treating state secrets as an evidentiary privilege, and seriously considering the plaintiff's need for the information. After a careful examination of the Government's claims and its treatment of state secrets as an evidentiary privilege, the court wrote:

Under this court's precedent, a claim of state secrets privilege results in "no consequences save

122. *Id.* at 145-48.

123. *Id.*

124. *Id.*

125. *Id.* at 146.

126. *Id.* at 145-46.

127. *Id.* at 148.

128. *Id.* at 148-51.

129. *Id.* at 149.

130. *Id.* at 148-51.

those resulting from the loss of the evidence,” including “no alteration of pertinent substantive or procedural rules.” . . . Just as “[i]t would be manifestly unfair to permit a presumption of [unconstitutional conduct] to run against” the defendant when the privilege is invoked . . . it would be manifestly unfair to a plaintiff to impose a presumption that the defendant has a valid defense that is obscured by the privilege. There is no support for such a presumption among the other evidentiary privileges because a presumption would invariably shift the burdens of proof, something the courts may not do under the auspices of privilege.¹³¹

The court emphasized that “[i]t bears remembering that the loss of evidence to the state secrets privilege is to be treated like the loss of evidence when ‘a witness ha[s] died.’”¹³²

Next, in language that underscores the D.C. Circuit’s consideration of the plaintiff’s interests, the court wrote:

In suggesting that a defendant’s interests require dismissing actions because of plausible but not demonstrably valid defenses, our colleague ignores how this would abridge the rights of plaintiffs and discounts how the fundamental rights of defendants are protected by dismissing cases when privilege obscures a valid defense that is likely to cause the trier of fact to reach an erroneous conclusion . . . or upon a legitimate claim of immunity.¹³³

Finally, the court declined to adopt the Government’s position that “the very subject matter of the action . . . [is] a matter of state secret,”¹³⁴ requiring dismissal on the complaint

131. *Id.* at 149-50 (citations omitted).

132. *Id.* at 151 (quoting *Ellsberg v. Mitchell*, 709 F.2d 51, 64 (D.C. Cir. 1983)).

133. *Id.* (citations omitted).

134. *Id.* at 151 (quoting *United States v. Reynolds*, 345 U.S. 1, 11 (1953)).

alone.¹³⁵ The court distinguished *Totten* and *Doe*, limiting those cases to spy agreements and writing that this case involved no such secret agreement with the United States.¹³⁶ The court also recognized the significant interests of the plaintiff by quoting *In re United States*—specifically, that complete dismissal deprives the plaintiff of “her day in court” and “is indeed draconian.”¹³⁷ Finally, the court suggested that *Reynolds* provided no basis for complete dismissal and affirmed that case as supporting an evidentiary privilege, noting that “[i]n *Reynolds* itself, at the height of the Cold War, the Supreme Court remanded the FTCA [Federal Tort Claims Act] case to proceed without the privileged materials.”¹³⁸

The court seemed to acknowledge that under different circumstances the Government’s claim might be valid. The court distinguished *El-Masri*,¹³⁹ in which the Fourth Circuit dismissed the complaint upon the Government’s claim that the very subject matter of the litigation was a state secret.¹⁴⁰ The D.C. Circuit Court wrote that *El-Masri* dealt with the legality of a secret government program.¹⁴¹ Such a program is far different than the declassified evidence in *In re Sealed Case* that might form the basis of the plaintiff’s prima facie case. By implication, if *In re Sealed Case* involved a secret government program like the program in *El-Masri*, the court might well have dismissed the complaint based on the secrecy of the very subject matter of the suit. Supporting this conclusion, the court, in dicta, wrote that “[i]f the district court determines

135. *Id.* at 151-54.

136. *Id.* at 151.

137. *Id.* at 151 (quoting *In re United States*, 872 F.2d 472, 477 (D.C. Cir. 1989)).

138. *Id.*

139. 437 F. Supp. 2d 530 (E.D. Va. 2006), *aff’d*, 479 F.3d 296 (4th Cir. 2007).

140. *In re Sealed Case*, 494 F.3d at 152-53. The court also distinguished *Fitzgerald v. Penthouse Int’l, Ltd.*, 776 F.2d 1236 (4th Cir. 1985) and *Farnsworth Cannon, Inc. v. Grimes*, 635 F.2d 268 (4th Cir. 1980) (en banc) (per curiam). In those cases, however, the Fourth Circuit treated state secrets as an evidentiary privilege, similar to the approaches in *Halkin I* and *Halkin II*. *Fitzgerald* and *Farnsworth Cannon, Inc.* did not involve the same type of sweeping categorical claim that the Government made in *In re Sealed Case*. Thus the court’s distinction between those cases and *In re Sealed Case* did not provide any insight into whether the D.C. Circuit might recognize the Government’s claim in another case.

141. *In re Sealed Case*, 494 F.3d at 152-53.

that the subject matter of a case is so sensitive that there is no way it can be litigated without risking national secrets, then the case must be dismissed.”¹⁴²

But we must read this dictum and the court’s cursory treatment of *El-Masri* alongside its earlier language on *Totten*, *Reynolds*, and complete dismissals of cases involving state secrets. Taken together, within the larger context of the opinion, the court cannot be understood as endorsing the broader claim that a case might be dismissed because its very subject matter is a state secret. In the D.C. Circuit and the *Reynolds* cases, unlike the *Totten* cases, this question is, at most, open.

For all these reasons, the *Reynolds* cases reject the Government’s motion to dismiss on the basis of the “very subject matter of [the] action,”¹⁴³ and allow the case to proceed on alternative, non-privileged evidence.

Thus the *Reynolds* cases treat the state secrets doctrine as a common law evidentiary privilege. The courts in these cases carefully consider the plaintiff’s need for the evidence, they determine how deeply to probe into the Government’s claim of privilege, and they carefully determine whether and how to proceed in the case without any privileged evidence. They exhibit these characteristics even when dismissing an action because the privilege prevents a plaintiff from establishing a prima facie case. In short, they treat the state secrets privilege as they would treat any other evidentiary privilege.

For the courts in the *Totten* line of cases, the state secrets privilege is much more.

B. *The Totten Cases*

In contrast to the *Reynolds* cases, the *Totten* cases tend to treat the state secrets privilege more like a justiciability doctrine.¹⁴⁴ In other words, the courts in the *Totten* cases are

142. *Id.* at 153.

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

144. *See generally* *Totten v. United States*, 92 U.S. 105 (1875); *Sterling v. Tenet*, 416 F.3d 338 (4th Cir. 2005); *Kasza v. Browner*, 133 F.3d 1159 (9th Cir. 1998); *Black v. United States*, 62 F.3d 1115 (8th Cir. 1995); *Bareford v. Gen. Dynamics Corp.*, 973 F.2d 1138 (5th Cir. 1992), *vacated in part*, No. 91-2432, 1992 U.S. App. LEXIS 25805 (5th Cir. Oct. 14, 1992); *Fitzgerald v.*

quicker to dismiss a case because its very subject matter is a state secret. This approach prevents a plaintiff from establishing a case on other, non-privileged grounds. It means that whole categories of cases are inappropriate for judicial review.

The characteristics of these cases include little or no consideration of the plaintiff's need for the evidence; great deference to the Government in its assertion of the privilege; little consideration of whether and how to proceed without privileged evidence; and, of course, complete dismissal anytime the very subject matter of the case is a state secret.

Thus in *Farnsworth Cannon, Inc. v. Grimes*, an en banc Fourth Circuit reversed a three-judge panel of the Fourth Circuit and upheld the district court's summary dismissal of the plaintiff's claims upon the Government's assertion of the state secrets privilege.¹⁴⁵ In that case, the plaintiff, a defense contractor, alleged that a Navy employee wrongfully interfered with its prospective contract with the Navy.¹⁴⁶ In an opinion characteristic of the D.C. Circuit's approach to state secrets, a three-judge panel of the Fourth Circuit reversed and remanded the district court's dismissal.¹⁴⁷ The appellate court held that dismissal was not justified even if the very subject matter of the suit were a state secret or when the state secrets doctrine worked to deprive the defendant of a valid defense.¹⁴⁸ It also held that the plaintiff could attempt to use alternative, non-privileged evidence to establish its claim.¹⁴⁹

The full Fourth Circuit, sitting en banc, in a *per curiam* opinion running all of five paragraphs with no case citations, affirmed the district court's dismissal.¹⁵⁰ After examining the affidavit of the Secretary of the Navy, the court wrote 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

Penthouse Int'l, Ltd., 776 F.2d 1236 (4th Cir. 1985); *Farnsworth Cannon, Inc. v. Grimes*, 635 F.2d 268 (4th Cir. 1980) (en banc) (per curiam).

145. *Farnsworth Cannon, Inc.*, 635 F.2d at 281.

146. *Id.* at 268-70.

147. *Id.* at 276.

148. *Id.* at 269-73.

149. *Id.* at 273-75.

150. *Id.* at 281.

its state secrets precludes any further attempt to pursue this litigation.”¹⁵¹ The court apparently deferred completely to the Government, without a hint of consideration of alternative, non-privileged evidence or the plaintiff’s interest in the case.¹⁵² Four judges, including two on the original panel, dissented.¹⁵³

Citing *Farnsworth Cannon*, the Fourth Circuit, in *Fitzgerald v. Penthouse International, Ltd.*, again affirmed a district court’s dismissal of a plaintiff’s claim based on the Government’s assertion of the state secrets privilege.¹⁵⁴ In *Fitzgerald*, the plaintiff claimed that a publisher libelously charged the plaintiff with espionage, suggesting that the plaintiff attempted to profit from his work on the Government’s secret program involving the use of animals for military and intelligence purposes.¹⁵⁵ When the plaintiff sought to call a witness that would testify that the plaintiff revealed only unclassified information about the program, the Government intervened, asserted the state secrets privilege, and moved to dismiss the case.¹⁵⁶ In support of its claim, the Government produced an affidavit from the Secretary of the Navy, which explained that “public disclosure of the classified information involved in this program could reasonably be expected to cause grave damage to the national security,” and that “it was ‘probable that classified information relating to the potential military uses of marine mammals [would] be called for, either directly or by a process of elimination,’ if the case proceeded to trial.”¹⁵⁷

The court upheld the privilege, and the district court’s dismissal, because “the very subject of this litigation [was] itself a state secret.”¹⁵⁸ It considered neither alternative, non-privileged evidence that the plaintiff might use to establish his claim nor the plaintiff’s interest in the case. And it considered

151. *Id.*

152. *Id.*

153. Judge Phillips and Judge Murnaghan, both of whom sat on the original panel, dissented in separate opinions. *Id.* at 281-82 (Phillips, J., dissenting); *id.* at 282-83 (Murnaghan, J., dissenting). Judges Winter and Ervin joined Judge Phillips’s dissent. *Id.* at 281-82 (Phillips, J., dissenting).

154. 776 F.2d 1236, 1244 (4th Cir. 1985).

155. *Id.* at 1237.

156. *Id.*

157. *Id.* at 1242-43.

158. *Id.* at 1243.

no method by which the district court might protect privileged evidence while allowing the case to proceed. In short, the court apparently deferred completely to the Secretary's claims regarding the inability to proceed without disclosing secret information.¹⁵⁹ The court concluded by aligning the case with *Farnsworth Cannon* and *Totten*, but cited no authority for this novel alignment. Instead, the court declared that "*Totten*, *Farnsworth Cannon* and this case all fall within that narrow category due to the centrality of the privileged material to the very question upon which a decision must be rendered."¹⁶⁰

In *Bareford v. General Dynamics Corp.*, plaintiffs sued a defense contractor, alleging that its defective weapons system caused deaths and injuries of sailors in a missile attack.¹⁶¹ The Federal Government intervened and alleged that the state secrets privilege protected evidence critical to the plaintiffs' case and that the very subject of the action was a state secret.¹⁶² The Government moved to dismiss the case on the pleadings.¹⁶³ After an in camera examination of the Navy's official investigation and a supporting affidavit by an admiral, the district court dismissed the case.¹⁶⁴

The Fifth Circuit affirmed the district court's dismissal, holding that the plaintiffs would be unable to prove their case without the protected information and that the very subject matter of the case was a state secret.¹⁶⁵ The court held that while the plaintiffs produced voluminous alternative, non-privileged evidence, it was insufficient to establish their

159. *Id.*

160. *Id.* at 1244.

161. 973 F.2d 1138, 1140 (5th Cir. 1992), *vacated in part*, No. 91-2432, 1992 U.S. App. LEXIS 25805 (5th Cir. Oct. 14, 1992). The *Bareford* court noted that *Zuckerbraun v. General Dynamics Corp.*, 935 F.2d 544 (2d Cir. 1991) involved the same basic facts. *Bareford*, 973 F.2d at 1142 (stating that the plaintiff's alternative evidence in *Bareford* is more than the "dockside rumor" in *Zuckerbraun*). The Second Circuit in *Zuckerbraun* used an approach very much like the Fifth Circuit's approach in *Bareford*, except that the Second Circuit was somewhat more cursory in its analysis, in part because the plaintiffs in *Zuckerbraun* did not come forward with alternative, non-privileged evidence to establish their claims. *See generally* *Zuckerbraun v. Gen. Dynamics Corp.*, 935 F.2d 544 (2d Cir. 1991).

162. *Bareford*, 973 F.2d at 1140, 1145.

163. *Id.*

164. *Id.*

165. *Id.* at 1145.

claim.¹⁶⁶ The court wrote,

Bareford has come forward with substantial evidence from which a judge or jury might find problems, or even wrongdoing, by General Dynamics in its production and testing of the Phalanx system. That alone will not establish a prima facie case. Its claim of manufacturing and design defects requires proof of what the Phalanx system was intended to do and the ways in which it fails to accomplish these goals. This question cannot be resolved without access to detailed data regarding “the design, manufacture, performance, functional characteristics, and testing of these systems.” . . . Such an analysis of the capabilities of an advanced Navy frigate’s defensive systems is the type of judicial disclosure of state secrets the doctrine blocks.¹⁶⁷

But even if the additional evidence might establish their claim, the court ruled that “any further attempt by the plaintiffs to establish a prima facie case would threaten disclosure of important state secrets.”¹⁶⁸ Moreover, even alternative, non-privileged evidence would require acknowledgment by the Government, thus revealing a state secret.¹⁶⁹ In other words, any litigation of the matter would reveal a state secret; or, stated differently, the very subject matter of the case was a state secret.¹⁷⁰ The court affirmed the district court’s dismissal and declined to permit the case to go forward.

The Fifth Circuit in *Bareford* gave only cursory consideration to the plaintiffs’ alternative, non-privileged evidence as an alternative basis for its claims. Moreover, it did not even consider the plaintiffs’ significant interests in

166. *Id.* at 1141.

167. *Id.* at 1142 (citation omitted).

168. *Id.* at 1143.

169. *Id.* at 1144.

170. *Id.* at 1143. The *Bareford* court wrote that “[t]he state secret doctrine justifies dismissal when privileged material is central ‘to the very question upon which a decision must be rendered.’” *Id.* (quoting *Fitzgerald v. Penthouse Int’l, Ltd.*, 776 F.2d 1236, 1244 (4th Cir. 1985)).

pursuing the case. Instead, the court disregarded the plaintiffs' interests because the Government properly invoked the privilege.¹⁷¹ Finally, the court ruled that the privilege completely barred further litigation, in part because the very subject matter of the action was a state secret.¹⁷²

In *Black v. United States*, the Eighth Circuit similarly dismissed a plaintiff's complaint on the pleadings based on the Government's assertion of the state secrets privilege.¹⁷³ In that case, the plaintiff, an electrical engineer who worked on military projects for various defense contractors, alleged that the Government engaged in a "campaign of harassment and psychological attacks" against him in violation of his constitutional rights and the Federal Tort Claims Act.¹⁷⁴ The Government asserted the state secrets privilege and moved to dismiss the case on the amended complaint.¹⁷⁵ The district reviewed in camera two supporting government declarations and granted the Government's motion, dismissing the case.¹⁷⁶

The Eighth Circuit upheld the dismissal, ruling that the plaintiff could not establish a prima facie case and that continued litigation would risk revealing the privileged

171. Compare *Bareford v. Gen. Dynamics, Corp.*, 973 F.2d 1138, 1144 (5th Cir. 1992), *vacated in part*, No. 91-2432, 1992 U.S. App. LEXIS 25805 (5th Cir. Oct. 14, 1992) ("Plaintiffs argue that dismissal of their case was an overly harsh remedy for the potential security risk posed by the trial of this case. Dismissal is a harsh sanction. But the results are harsh in either direction and the state secret doctrine finds the greater public good—ultimately the less harsh remedy—to be dismissal.") with *In re United States*, 872 F.2d 472, 477 (D.C. Cir. 1989) ("Dismissal of a suit, and the consequent denial of a forum without giving the plaintiff her day in court, however, is indeed draconian.").

The *Bareford* approach seems to conflate or to confuse the two steps in *Reynolds*. As we have seen, *Reynolds* first requires the court to use the plaintiff's interest to calibrate the depth of its probe into the Government's assertion of the privilege. Next, it requires the court to determine whether and how to proceed with the case in light of the assertion of privilege. The first step requires consideration of the plaintiff's interest, the second step does not. The court in *Bareford*, however, neglects the plaintiffs' interests, seemingly because it held that the Government appropriately invoked the privilege.

172. *Bareford*, 973 F.2d at 1144.

173. 62 F.3d 1115 (8th Cir. 1995).

174. *Id.* at 1116-17.

175. *Id.* at 1117.

176. *Id.*

information.¹⁷⁷ Like the Fifth Circuit in *Bareford*, and in sharp contrast to the D.C. Circuit in the similar case *In re Sealed Case*, the Eighth Circuit gave very little consideration to any alternative, non-privileged evidence that might support the plaintiff's claim. It gave no consideration to the plaintiff's interest in the case and ruled that the privilege completely barred further litigation of the matter, coming very close to holding that the very subject matter of the case was a state secret.¹⁷⁸

The Ninth Circuit similarly upheld the state secrets privilege in *Kasza v. Browner*, a case in which a plaintiff challenged Air Force compliance with the Resource Conservation and Recovery Act.¹⁷⁹ The Government asserted the state secrets privilege in response to plaintiff's discovery requests and moved for summary judgment on the ground that the plaintiff could not establish a prima facie case.¹⁸⁰ After reviewing supporting affidavits and documents in camera, the district court concluded that the plaintiff could not establish the claims and granted summary judgment.¹⁸¹

The Ninth Circuit affirmed for two independent reasons: (1) because the privilege prevented the plaintiff from establishing a prima facie case, and (2) because the very subject matter of the plaintiff's suit was a state secret.¹⁸² Like the Fourth Circuit in *Farnsworth Cannon and Fitzgerald*, the Ninth Circuit in *Kasza* provided very little analysis for this latter conclusion, although it did analyze other aspects of the Government's claim. It merely cited *Reynolds, Totten, Weston v. Lockheed Missiles & Space Co.*,¹⁸³ and *Farnsworth Cannon* in support of its conclusion that the very subject matter of the litigation was a state secret and required dismissal.¹⁸⁴ Because the Ninth Circuit affirmed summary judgment on this basis, it declined to consider how the plaintiff might proceed on other,

177. *Id.* at 1118.

178. *Id.* at 1119 ("The information covered by the privilege is at the core of Black's claims, and we are satisfied that the litigation cannot be tailored to accommodate the loss of the privileged information.")

179. 133 F.3d 1159, 1162 (9th Cir. 1998).

180. *Id.* at 1163.

181. *Id.*

182. *Id.* at 1170.

183. 881 F.2d 814 (9th Cir. 1989).

184. *Kasza*, 133 F.3d at 1165-67, 1170.

non-privileged, evidence.¹⁸⁵

In *Tenenbaum v. Simonini*, the Sixth Circuit upheld summary judgment against a plaintiff who alleged that various federal employees and the United States conducted a criminal espionage investigation against him solely because he was Jewish.¹⁸⁶ After reviewing the Government's supporting materials, the court ruled that the state secrets privilege applied and completely barred further litigation.¹⁸⁷ Moreover, the court ruled that the Government could not defend itself without revealing protected information.¹⁸⁸ Just like the Fifth Circuit in *Bareford* and the Eighth Circuit in *Black*, the Sixth Circuit here gave no consideration to alternative, non-privileged evidence; it gave no consideration to the plaintiffs' interest in the case; and it dismissed the case on summary judgment because its very subject matter was a state secret.¹⁸⁹

Finally, the Fourth Circuit in *Sterling v. Tenet* affirmed the district court's dismissal of a plaintiff's claim that the CIA discriminated against him because of his race.¹⁹⁰ Like the Ninth Circuit in *Kasza*, the Fourth Circuit held that the state secrets privilege prevented the plaintiff from establishing a prima facie case and that the very subject of the case was a state secret.¹⁹¹ As to the latter holding, the Fourth Circuit offered little analysis, simply resting its holding on *Fitzgerald*, *Farnsworth Cannon*, and *DTM Research, L.L.C v. AT&T Corp.*¹⁹²

These *Totten* cases are thus characterized by little to no consideration of the plaintiff's need for the information, great judicial deference to executive claims of state secrets, and scant consideration of whether or how a case might proceed in the

185. *Id.* at 1170.

186. 372 F.3d 776, 776 (6th Cir. 2004).

187. *Id.* at 777-78.

188. *Id.* at 777.

189. There appears to be no particular reason that the district court granted summary judgment, and not a motion to dismiss, in this case. We can, therefore, make no inferences about the court's treatment of the state secrets doctrine based on its upholding the district court on summary judgment and not on a motion to dismiss.

190. 416 F.3d 338, 341 (4th Cir. 2005).

191. *Id.* at 346-47, 348.

192. *Id.* at 347-48 (citing, *inter alia*, *DTM Research, L.L.C. v. AT&T Corp.*, 245 F.3d 327 (4th Cir. 2001)).

absence of privileged evidence. But most notably, these cases are characterized by complete dismissals because the very subject matter of the suits involved state secrets.

The dismissals in the *Totten* cases are significantly different than the dismissals in the *Reynolds* cases. In the *Reynolds* cases, the courts maintain at least the theoretical possibility that a plaintiff's case might move forward based on alternative, non-privileged evidence. The courts in those cases often remanded the case in order to determine whether sufficient non-privileged evidence existed to allow the case to proceed. This approach is consistent with the approach courts use for any evidentiary privilege and is in perfect harmony with *Reynolds* itself.

The courts in the *Totten* cases, however, thwarted the possibility of proceeding on alternative evidence by dismissing the entire case because its very subject matter was a state secret. As compared to the *Reynolds* cases, these cases scarcely considered the plaintiff's need for the evidence, granted extraordinary deference to the executive branch, and declined to seriously consider methods of allowing the cases to proceed. As discussed below, the Government's position on the state secrets privilege in the post-9/11 cases builds on these characteristics of the *Totten* cases.

III. The Post-9/11 Cases

In the wake of the 9/11 attacks, the Government's position on the state secrets privilege builds upon the characteristics of the *Totten* cases and attempts to give the privilege expanded and very troubling dimensions. Particularly, the Government has argued that the courts should accord the executive the utmost deference in its assertions of the state secrets privilege; that courts should neglect plaintiffs' interests; and that courts should not consider alternative, non-privileged evidence or judicial controls to permit the lawsuits to proceed without privileged material, even when information on the programs was widely available, often from the Government itself. For these reasons, and based on the *Totten* cases discussed above, the Government has argued that the courts should dismiss these cases, because their very subject matter involves a state secret.

But the Government in the post-9/11 cases has taken its claim one dangerous step further. Unlike previous cases, the Government in the post-9/11 cases has argued that the state secrets privilege is a constitutional doctrine—that it has roots in the President’s Article II powers. This unprecedented claim has garnered one important victory: the Fourth Circuit decision in *El-Masri v. United States*. As discussed below, this position represents a breathtaking expansion of the state secrets privilege. It means that the state secrets privilege, as a constitutional doctrine, trumps any consideration of a plaintiff’s interests or need for evidence and crowds out any meaningful role for courts. Taken along with its other positions, this extraordinary claim means that the Government could move for dismissal on the bare assertion that the very subject of a suit is a state secret, effectively evading any judicial oversight of the claim.

The Government’s position on the state secrets privilege in the post-9/11 cases is characterized by a neglect of any plaintiff’s interest or need for evidence, extraordinary deference to the Government, no consideration of whether or how cases might proceed without privileged evidence, and complete dismissal whenever the Government asserts that the very subject matter of a case is a state secret—all characteristics of the *Totten* cases. But the Government’s position is intensified in the post-9/11 cases, because of the Government’s extraordinary claim that the state secrets privilege is a constitutional doctrine.

This section examines some of the cases in two closely guarded and highly controversial programs in the post-9/11 era—the Terrorist Surveillance Program and the extraordinary rendition program.

A. *The Terrorist Surveillance Program*

The Government has moved to dismiss cases challenging the NSA’s Terrorist Surveillance Program (“TSP”) because the very subject matter of the suits involved a state secret. The TSP included data mining and warrantless interception of telephone and electronic communications where one party was located outside the United States and was identified by the

NSA as connected to a terrorist organization.¹⁹³ Plaintiffs challenged the TSP in several cases as a violation of their First and Fourth Amendment rights and the Foreign Intelligence Surveillance Act (“FISA”).¹⁹⁴

Building on the characteristics of the *Totten* cases, the Government moved to dismiss an early case, *American Civil Liberties Union v. National Security Agency*, on the grounds that the state secrets privilege protected information necessary for the plaintiffs to establish standing, that the plaintiffs’ claims could not be proven or defended without information protected by state secrets, and that the very subject matter of the lawsuit, the TSP, was a state secret.¹⁹⁵ The Government argued that the court’s review is highly deferential¹⁹⁶ and that the plaintiff’s interest plays no part in the court’s evaluation of the Government’s assertion.¹⁹⁷

The Government made nearly identical arguments in other cases challenging the TSP, including *Hepting v. AT&T Corp.*, a case against a private telecommunications company for its role in the TSP program,¹⁹⁸ and *Al-Haramain Islamic Foundation v. Bush*, a case against government officials.¹⁹⁹

193. *See generally* *Hepting v. AT&T Corp.*, 439 F. Supp. 2d 974, 986-87 (N.D. Cal. 2006) (collecting publicly available materials on the TSP and describing the program in greater detail).

194. Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1783.

195. 438 F. Supp. 2d 754, 758-59 (E.D. Mich. 2006), *rev’d*, 493 F.3d 644 (6th Cir. 2007).

196. Government’s Memorandum of Points and Authorities in Support of the United States’ Assertion of the Military and State Secrets Privilege; Defendants’ Motion to Dismiss or, in the Alternative, for Summary Judgment; and Defendants’ Motion to Stay Consideration of Plaintiffs’ Motion for Summary Judgment, *Am. Civil Liberties Union v. Nat’l Sec. Agency*, 438 F. Supp. 2d 754 (E.D. Mich. 2006) (No. 06-CV-10204) (“Aside from ensuring that the privilege has been properly invoked as a procedural matter, the sole determination for the court is whether, under the particular circumstances of the case, there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged.”) (citations and internal quotation marks omitted).

197. *Id.* (“Thus, in assessing whether to uphold a claim of privilege, the court does not balance the respective needs of the parties for the information.”).

198. 439 F. Supp. 2d at 978.

199. 451 F. Supp. 2d 1215, 1218-19 (D. Or. 2006), *rev’d*, 507 F.3d 1190 (9th Cir. 2007).

The courts in these cases largely rejected the Government's most sweeping claims, even as they sometimes ruled in the Government's favor. Thus, the Sixth Circuit in *American Civil Liberties Union v. National Security Agency* held that without protected evidence the plaintiffs could not establish that they were or would be targets of the TSP program.²⁰⁰ The court, therefore, ruled that the plaintiffs lacked standing.²⁰¹ Similarly, the Ninth Circuit ruled in *Al-Haramain Islamic Foundation, Inc. v. Bush*, that evidence necessary for the plaintiffs' standing was protected by the state secrets privilege.²⁰² The district court in *Hepting v. AT&T Corp.*, however, denied the Government's assertion of the state secrets privilege.²⁰³ The court ruled that public disclosures by the Government and defendant precluded the Government's claim that the very subject matter of the suit was a state secret.²⁰⁴ And, citing *Halkin II*, the court declined to decide the Government's other claims—that the Government's state secrets assertion would prevent the plaintiff from establishing a prima facie case or for AT&T to defend the claim—until the case proceeded to discovery.²⁰⁵

In these cases, the Government pushed the boundaries of the *Totten* cases, arguing that the courts should defer to the executive's assertion of state secrets, that the courts should neglect the plaintiffs' interests, and that the courts should dismiss cases based only on the complaints whenever the Government asserts the state secrets privilege. The courts largely rejected these sweeping claims, issuing rulings that looked more like the *Reynolds* cases.

The Government pushed harder—and achieved greater success—in the extraordinary rendition cases.

B. *The Extraordinary Rendition Program*

The Government has similarly moved to dismiss cases challenging its extraordinary rendition program based on the

200. 493 F.3d at 659-87.

201. *Id.* at 687.

202. 507 F.3d 1190, 1205 (9th Cir. 2007).

203. 439 F. Supp. 2d at 998-99.

204. *Id.* at 994.

205. *Id.* at 994-95 (citing *Halkin II*, 690 F.2d 977 (D.C. Cir. 1982)).

very subject matter of the suits. The Government's extraordinary rendition program involves the secret transportation and detention outside the United States of individuals suspected of involvement in terrorist activities. The Government conducted extraordinary renditions in order to allow interrogators to question these individuals using methods that were illegal under U.S. and international laws.²⁰⁶

In *El-Masri v. United States*, the Government moved to dismiss the plaintiff's complaint on the basis that the very subject matter of the suit was a state secret.²⁰⁷ The plaintiff in that case claimed that the Government and government officials violated international law and his constitutional rights in conducting the extraordinary rendition. The Government, employing arguments very similar to those in the TSP cases, argued that neither the plaintiff nor defendant could establish their positions without resorting to privileged information and that the very subject matter of the suit was a state secret.²⁰⁸

But the Government also added a significant new argument. The Government in *El-Masri* argued that the state secrets privilege enjoyed constitutional status²⁰⁹—that it was rooted in the President's Article II powers as the “sole organ of the federal government in the field of international relations.”²¹⁰ “It is the means by which the Executive Branch exercises its critical constitutional responsibility to protect secrets of state in the national interest.”²¹¹ The Government, of course, could cite no case directly on point, as no court had previously held that the state secrets privilege enjoyed constitutional status. Instead, the Government argued that the state secrets privilege was essential to its conduct of foreign

206. See generally Leila Nadya Sadat, *Enemy Combatants After Hamdan v. Rumsfeld: Extraordinary Rendition, Torture, and Other Nightmares from the War on Terror*, 75 GEO. WASH. L. REV. 1200 (2007).

207. *El-Masri v. Tenet*, 437 F. Supp. 2d 530, 535 (E.D. Va. 2006), *aff'd sub. nom.*, *El-Masri v. United States*, 479 F.3d 296 (4th Cir. 2007).

208. *Id.*

209. Brief of the Appellee at 8, *El-Masri v. United States*, 479 F.3d 296 (4th Cir. 2007) (No. 06-1667). The Government argued that “the Supreme Court has explained that the state secrets privilege is rooted in, and is an aspect of, the powers granted to the President by Article II of the Constitution.” *Id.* (citing *United States v. Nixon*, 418 U.S. 683, 710 (1974)).

210. *Id.* (quoting *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936)).

211. *Id.*

affairs, over which, it argued, it had plenary authority.²¹²

According to the Government, this constitutional basis for the state secrets privilege meant that it could assert the privilege unilaterally, with no judicial review.²¹³ The Government wrote, “[t]he law is clear that the decision to invoke the state secrets privilege constitutes the exercise of duties uniquely confided by the Constitution to the Executive Branch in order to safeguard the nation and to conduct the foreign relations of the United States.”²¹⁴ Moreover, the Government argued that the constitutional basis for the privilege overshadowed any interest the plaintiff may have in the litigation, reducing the plaintiff’s interest to a nullity.²¹⁵ In short, according to the Government, this constitutional basis for the state secrets privilege crowded out the judiciary’s role in policing the privilege and the plaintiff’s interest in the litigation. The new claim thus offered firmer footing for extreme judicial deference and minimal concern for plaintiffs’ interests—characteristics of the *Totten* cases—and expanded those principles into categorical constitutional rules. According to the Government, the President’s power to assert the state secrets privilege, grounded in Article II, meant that the President could assert the privilege without review of the judiciary and without consideration of plaintiffs’ interests.²¹⁶

Taken together with the Government’s argument that the

212. *Id.* at 8-20.

213. *Id.* at 5; *see also id.* at 14 (“Thus, the state secrets privilege has a constitutional foundation, is interposed as a matter of policy by the Executive Branch in order to further important foreign policy and national security concerns, is absolute when properly invoked, and can be asserted at any point in litigation when the privilege is needed in order to protect state secrets from disclosure, either purposeful or inadvertent.”); *id.* at 16 (“Because the decision to assert the privilege for secrets of state involves a policy determination on a matter constitutionally committed to the Executive Branch, the scope of the inquiry undertaken by the Judicial Branch when the claim is interposed is very limited.”).

214. *Id.* at 5.

215. *Id.* at 10-11 (“Because of its constitutional underpinning, ‘the privilege to protect state secrets must head the list’ of the various governmental privileges recognized in our courts. . . . Thus, in evaluating a claim of state secrets privilege, the presiding court does not balance the interests of the United States in protecting its secrets against the interests of the litigant in gaining access to the information, for ‘[t]hat balance has already been struck.’”) (citations omitted).

216. *Id.* at 8-9.

state secrets privilege required dismissal anytime the very subject matter of the suit involved state secrets, the Government's constitutional claim meant that it could shut down any lawsuit merely by asserting that its very subject matter was a state secret.²¹⁷

The Fourth Circuit adopted the Government's positions.²¹⁸ In an opinion laden with separation-of-powers considerations, most tilting toward judicial deference in the face of the executive's assertion of the state secrets privilege, the court upheld the district court's dismissal.²¹⁹ The court ruled that the state secrets privilege prevented both the plaintiff and the defendants from establishing their positions,²²⁰ and that the very subject matter of the case was a state secret.²²¹ In comparison to the *Reynolds* cases and the *Totten* cases described above, the court exhibited great deference to the Government and barely considered the plaintiff's interests.²²²

217. See, e.g., *Mohamed v. Jeppesen Dataplan, Inc. (Mohamed II)*, 563 F.3d 992, 1003 (9th Cir.), *amended and superseded by* 579 F.3d 949 (9th Cir. 2009), *petition for reh'g en banc granted by* 586 F.3d 1108 ("According to the Government's theory, the Judiciary should effectively cordon off all secret government actions from judicial scrutiny, immunizing the CIA and its partners from the demands and limits of the law.").

218. *El-Masri v. United States*, 479 F.3d 296 (4th Cir. 2007). The Government nearly won a second important case on this point. As this Article was being edited, the *en banc* Second Circuit discussed the state secrets privilege in both constitutional and evidentiary terms in an extraordinary rendition case. *Arar v. Ashcroft*, 585 F.3d 559, 574-75, 581 n.14 (2d Cir. 2009). The court seemed torn between a state secrets privilege rooted in separation-of-powers concerns and a state secrets privilege as a common law evidentiary privilege. *Id.* at 581 n.14 ("[T]he state secrets privilege is often performed witness-by-witness; question-by-question; page-by-page; paragraph-by-paragraph—and can take years. . . . In any event, the state secrets doctrine has roots in separation of powers principles, and is not itself devoid of constitutional implications.") (citing *Dep't of Navy v. Egan*, 484 U.S. 518, 527 (1988); *El-Masri v. United States*, 479 F.3d 296, 303 (4th Cir. 2007)). But the court expressly declined to rule on the state secrets privilege, *Arar*, 585 F.3d at 567, and the plaintiff did not press the issue in his petition for writ of certiorari to the Supreme Court. *Petition for Writ of Certiorari at i, Arar v. Ashcroft*, 2010 WL 500089 (Feb. 1, 2010) (No. 09-923).

219. *El-Masri*, 479 F.3d at 313.

220. *Id.* at 308-10.

221. *Id.* at 310-11.

222. *Id.* at 308-10. Judicial deference in *El-Masri* is perhaps best illustrated by the court's acceptance of the Government's claim that even the vast amount of non-privileged public information on the extraordinary rendition program, some of it produced by the Government itself, provided an

Most significantly, the court affirmed the Government's position that the state secrets privilege enjoys constitutional status:

Although the state secrets privilege was developed at common law, it performs a function of constitutional significance, because it allows the executive branch to protect information whose secrecy is necessary to its military and foreign-affairs responsibilities. . . . Significantly, the Executive's constitutional authority is at its broadest in the realm of military and foreign affairs. The Court accordingly has indicated that the judiciary's role as a check on presidential action in foreign affairs is limited. . . . Moreover, both the Supreme Court and this Court have recognized that the Executive's constitutional mandate encompasses the authority to protect national security information. . . . The state secrets privilege that the United States has interposed in this civil proceeding thus has a firm foundation in the Constitution, in addition to its basis in the common law of evidence.²²³

Armed with the *El-Masri* case, the Government made substantially the same arguments in a Ninth Circuit case. In *Mohamed v. Jeppesen*, the plaintiffs again challenged the Government's extraordinary rendition program.²²⁴ Citing and quoting *El-Masri* liberally throughout its motion to dismiss and appellate brief, the Government argued that the state secrets

insufficient basis upon which the plaintiff could prove his case. *See id.*

223. *Id.* at 303-04 (citations omitted).

224. *Mohamed v. Jeppesen Dataplan, Inc. (Mohamed I)*, 539 F. Supp. 2d 1128 (N.D. Cal. 2008), *rev'd*, 563 F.3d 992 (9th Cir. 2009), *amended and superseded by* 579 F.3d 949 (9th Cir. 2009), *petition for reh'g en banc granted by* 586 F.3d 1108. These arguments were not unique to the Bush administration. The Government's attorney affirmed at oral argument, after President Obama took office, that the new administration vetted and approved these same arguments. Audio file: Oral argument in *Mohamed v. Jeppesen Dataplan, Inc.*, 563 F.3d 992 (9th Cir. 2009), *available at* http://www.ca9.uscourts.gov/media/view_subpage.php?pk_id=0000002777.

privilege was based on the President's Article II powers,²²⁵ the courts should review the Government's assertion with great deference,²²⁶ the plaintiff's interest is immaterial,²²⁷ and the court should dismiss the case because the very subject matter of the action involved a state secret.²²⁸

The district court dismissed the case because the very subject matter of the action was a state secret,²²⁹ but a three-judge panel of the Ninth Circuit reversed.²³⁰ The panel disentangled the *Totten* bar and the *Reynolds* privilege and ruled that neither could be so stretched as to support the Government's position in the case.²³¹ The panel also reaffirmed that the *Reynolds* privilege was an evidentiary privilege, not a constitutional doctrine,²³² and that any separation-of-powers considerations cut in favor of, not against, judicial review of the Government's assertion of the state secrets privilege.²³³ The panel affirmed that the courts have an active role in evaluating the executive's assertion of the privilege,²³⁴ and that the

225. Notice of Motion and Motion to Dismiss or, in the Alternative, for Summary Judgment by the United States of America at 6, Mohamed I, 539 F. Supp. 2d 1128 (N.D. Cal. 2008) (No. 07-02798); Redacted, Unclassified Brief for Intervenor-Appellee the United States at 12, Mohamed II, 563 F.3d 992 (9th Cir. 2009) (No. 08-15693).

226. Notice of Motion and Motion to Dismiss or, in the Alternative, for Summary Judgment by the United States of America at 7-9, Mohamed I, 539 F. Supp. 2d 1128 (N.D. Cal. 2008) (No. 07-02798); Redacted, Unclassified Brief for Intervenor-Appellee the United States at 12-13, Mohamed II, 563 F.3d 992 (9th Cir. 2009) (No. 08-15693).

227. Notice of Motion and Motion to Dismiss or, in the Alternative, for Summary Judgment by the United States of America at 6-7, Mohamed I, 539 F. Supp. 2d 1128 (N.D. Cal. 2008) (No. 07-02798); Redacted, Unclassified Brief for Intervenor-Appellee the United States at 13, Mohamed II, 563 F.3d 992 (9th Cir. 2009) (No. 08-15693).

228. Notice of Motion and Motion to Dismiss or, in the Alternative, for Summary Judgment by the United States of America at 9-11, Mohamed I, 539 F. Supp. 2d 1128 (N.D. Cal. 2008) (No. 07-02798); Redacted, Unclassified Brief for Intervenor-Appellee the United States at 15-24, Mohamed II, 563 F.3d 992 (9th Cir. 2009) (No. 08-15693).

229. *Mohamed I*, 539 F. Supp. 2d at 1134-36.

230. *Mohamed II*, 563 F.3d at 1009.

231. *Id.* at 1000-06.

232. *Id.* at 1004-06.

233. *Id.* at 1004 (“[W]hatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake.” (citations omitted)).

234. *Id.*

plaintiff's need for the information is a key determinant in the scope of the court's inquiry.²³⁵ On remand, the panel ordered that the Government assert the state secrets privilege only with respect to particular secret evidence, and not with respect to the entire case.²³⁶ The panel also ordered the district court to determine whether the plaintiff's case could proceed without privileged evidence.²³⁷ Thus under the panel ruling, and consistent with the *Reynolds* cases above, the plaintiff's case could potentially proceed on alternative, non-privileged material and information about the extraordinary rendition program.

The Government sought en banc review of the panel decision, repackaging the arguments it relied upon below.²³⁸ The Government may have backed off its claim that the state secrets privilege is a constitutional doctrine, however, merely alluding to the President's responsibility to protect national security and not specifically invoking Article II.²³⁹ As of this writing, the case is pending before the full Ninth Circuit.

Thus the Government's position in the cases regarding these two central post-9/11 clandestine programs is characterized by a neglect of any plaintiff interest or need for evidence, extraordinary deference to the Government, no consideration of whether or how cases might proceed without privileged evidence, and complete dismissal whenever the Government asserts that the very subject of a case is a state secret. And while these are also characteristics of the *Totten* cases, the Government has intensified them in the post-9/11 cases in part by claiming that the state secrets privilege is a constitutional doctrine.

The next section explores more how these characteristics expand the characteristics in the *Totten* cases, why that expansion is significant, and why it is wrong.

235. *Id.* at 1003.

236. *Id.* at 1009.

237. *Id.*

238. Petition for Rehearing or Rehearing En Banc, Mohamed II, 563 F.3d 992 (9th Cir. 2009) (No. 08-15693).

239. *Id.* at 10-11. Based on oral arguments before the en banc Ninth Circuit, the more sweeping version of the state secrets privilege is apparently still in play at the Ninth Circuit. See Audio file: Oral argument in Mohamed v. Jeppesen Dataplan, Inc., available at http://www.ca9.uscourts.gov/media/view_subpage.php?pk_id=0000004702.

IV. The Post-9/11 State Secrets Privilege and its Problems

The Government's new and expanded position on the state secrets privilege in the post-9/11 cases lacks a solid basis in law and creates several significant constitutional problems. This section explores four defining characteristics of the Government's new position and explains how they lack support or create problems. First it explains why the Government's position that the state secrets privilege is a constitutional doctrine lacks a basis in law. Next, it explains why the Government's position encouraging more deferential judicial scrutiny of its claims lacks a basis in law. Third, it considers some of the problems with the Government's position that the courts should ignore plaintiffs' interests. And finally, it explores some of the problems with the Government's position that courts must dismiss cases where the very subject matter is a state secret.

This section demonstrates why the Government's extraordinary new position on the state secrets privilege is unsound, and why any effort to rein in the Government's use of the state secrets privilege must account for each of these four characteristics.

A. *State Secrets as a Constitutional Doctrine*

As we have seen, the Government has argued in the post-9/11 cases that the state secrets privilege is rooted in the Constitution. This argument is not only novel, it is baseless. Neither the origins of the state secrets privilege nor the cases upon which the Government relies support its claim.

Nothing in either *Totten* or *Reynolds* suggests that the state secrets privilege has roots in the President's Article II powers.²⁴⁰ As we have seen, the *Totten* bar derived from the practical policy considerations based on the nature of secret contracts with the Government, and the *Reynolds* privilege

240. See Brief of Professors of Constitutional Law, Federal Jurisdiction, and Foreign Relations Law as Amici Curiae in Support of Mohamed and Urging Reversal at 3, *Mohamed II*, 563 F.3d 992 (9th Cir. 2009) (No. 08-15693) (arguing that the state secrets privilege is an evidentiary privilege, not a constitutional doctrine).

evolved as a common law evidentiary privilege. The Government's novel claim in *El-Masri* that "the state secrets privilege is rooted in, and is an aspect of, the powers granted to the President by Article II of the Constitution,"²⁴¹ and the Fourth Circuit's adoption of that position,²⁴² simply has no basis in law.

The Government's claim and the Fourth Circuit's ruling in *El-Masri* were based upon the President's Article II powers "in the field of foreign relations" and the presumed role that the state secrets privilege played in furthering those powers.²⁴³ But no court had previously linked the state secrets privilege to presidential powers "in the field of foreign relations" (or, for that matter, any other Article II powers) in this way. Perhaps the closest the courts have come to this link is in *United States v. Nixon*,²⁴⁴ the case relied upon by both the Government and the Fourth Circuit. That case, however, merely discussed *Reynolds* and the *Reynolds* privilege in passing dicta, and notably, state secrets was not at issue.²⁴⁵ The link in that case between the presidential powers and the state secrets doctrine was only a spatial one: the Court merely discussed the President's powers and the *Reynolds* case in back-to-back paragraphs.²⁴⁶ The *Nixon* Court made no explicit link, much less the link that the Government and Fourth Circuit made, between the two.

In *El-Masri*, the Fourth Circuit also relied upon *Reynolds* in concluding that the state secrets privilege is rooted in the Constitution.²⁴⁷ The Fourth Circuit wrote that "*Reynolds* itself suggested that the state secrets doctrine allowed the Court to avoid the constitutional conflict that might have arisen had the judiciary demanded that the Executive disclose highly sensitive

241. Brief of the Appellee 8, *El-Masri v. United States*, 479 F.3d 296 (4th Cir. 2007) (No. 06-1667) (citing *United States v. Nixon*, 418 U.S. 683, 710 (1974)).

242. *El-Masri*, 479 F.3d at 303-04.

243. Brief of the Appellee 8, *El-Masri v. United States*, 479 F.3d 296 (4th Cir. 2007) (No. 06-1667) (quoting *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936)).

244. 418 U.S. 683 (1974).

245. *Id.* at 710-11.

246. *Id.*

247. *El-Masri*, 479 F.3d at 303.

military secrets.”²⁴⁸ But *Reynolds* had nothing to do with state secrets as a constitutional doctrine. As the *Reynolds* Court clearly noted, it did not rule on this question.²⁴⁹ Instead, the passage that the Fourth Circuit relied upon from *Reynolds* summarized the *Government’s claim* in that case.²⁵⁰ The *Reynolds* Court avoided ruling on *this claim*,²⁵¹ not on the “constitutional conflict that might have arisen.”²⁵² And it avoided this claim merely because it found a narrower ground for its decision.²⁵³ The Fourth Circuit’s use of *Reynolds*—that the Court’s failure to address the government’s claim amounts to an endorsement of that claim—simply distorts that case.²⁵⁴

Finally, the Government relied upon *United States v. Marchetti* to support its argument that the privilege has a constitutional basis.²⁵⁵ But even by the Government’s own reckoning, that case only holds that intelligence *gathering* is within the President’s Article II powers.²⁵⁶ It says nothing about *withholding* state secrets as derived from Article II powers.

Thus the Government’s claim about the constitutional basis of the state secrets privilege, which it continues to press, lacks a basis in law. Far worse, the Government has used this claim to argue further that the constitutional basis of the state secrets privilege crowds out any meaningful judicial review of the Government’s assertion of the privilege and any consideration of plaintiffs’ interests.²⁵⁷ The Government’s

248. *Id.*

249. *United States v. Reynolds*, 345 U.S. 1, 6 (1953).

250. *Id.*

251. *Id.*

252. *See id.*

253. *Id.*

254. *Id.*

255. Brief of the Appellee at 9, *El-Masri v. United States*, 479 F.3d 296 (4th Cir. 2007) (No. 06-1667) (quoting *United States v. Marchetti*, 466 F.2d 1309, 1315 (4th Cir. 1972)).

256. *Id.* (“Gathering intelligence information and the other activities of the [CIA], including clandestine affairs against other nations, are all within the President’s constitutional responsibility for the security of the Nation as the Chief Executive and as Commander in Chief of our Armed forces.” (quoting *United States v. Marchetti*, 466 F.2d 1309, 1315 (4th Cir. 1972)).

257. Brief of the Appellee at 5, *El-Masri v. United States*, 479 F.3d 296 (4th Cir. 2007) (No. 06-1667); *see also id.* at 14 (“Thus, the state secrets privilege has a constitutional foundation, is interposed as a matter of policy by the Executive Branch in order to further important foreign policy and

position, then, unbalances the carefully weighed separation of powers in our Constitution by virtually eliminating the judiciary from consideration of these cases.²⁵⁸ Moreover, as discussed below, it runs up against plaintiffs' constitutional interests in access to the courts.

B. *State Secrets as Curtailing Judicial Review*

In the post-9/11 cases, the Government has argued for unprecedented judicial deference. The Government's position hit a high point in *El-Masri*, when it argued that the constitutional basis for the state secrets privilege virtually eliminated any role for the courts.

But as we have seen, *Reynolds* contemplated a meaningful role for the judiciary in examining the Government's assertions of the state secrets privilege, while also balancing the need for secrecy:

Judicial control over the evidence in a case cannot be abdicated to the caprice of executive officers. Yet we will not go so far as to say that the court may automatically require a complete disclosure to the judge before the claim of privilege will be accepted in any case. It may be possible to satisfy the court, from all the circumstances of the case, that there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged. When this is the case, the occasion for the privilege is appropriate, and the court should

national security concerns, is absolute when properly invoked, and can be asserted at any point in litigation when the privilege is needed in order to protect state secrets from disclosure, either purposeful or inadvertent."); *id.* at 16 ("Because the decision to assert the privilege for secrets of state involves a policy determination on a matter constitutionally committed to the Executive Branch, the scope of the inquiry undertaken by the Judicial Branch when the claim is interposed is very limited.").

258. See generally Amanda Frost, *The State Secret Privilege and Separation of Powers*, 75 *FORDHAM L. REV.* 1931 (2007) (examining in greater detail the state secrets privilege's implications for separation-of-powers principles).

not jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence, even by the judge alone, in chambers.²⁵⁹

Under *Reynolds*, the court determines whether the Government's claim meets the technical requirements of the privilege. If the Government properly invoked the privilege, then the court evaluates the depth of its own probe into the assertion, based on the plaintiff's need for the underlying information. At this step, courts have reviewed in camera the requisite affidavits and the underlying evidence and materials sought to be excluded. The courts have even required a public defense of the claim of privilege. The depth of the probe depends on the plaintiff's need for the evidence. Finally, the court determines whether and how the case will proceed without the privileged evidence.

This is a far cry from the extreme judicial deference that the Government proposes in the post-9/11 cases, especially when the Government argues against virtually any role for the courts, because the privilege is rooted in Article II principles.²⁶⁰

C. *State Secrets as Negating Plaintiffs' Interests*

The Government and some courts have moved toward eliminating consideration of a plaintiff's need, or of any plaintiff interest in the litigation, as part of the state secrets calculus. They argue and hold that the state secrets privilege is absolute and that a plaintiff's interest has no role in applying the privilege—there is no balancing test for the state secrets privilege. This argument, however, is belied by *Reynolds* itself, and it runs up against plaintiffs' constitutional interests in pursuing their claims.

Under *Reynolds*, a plaintiff's need for the underlying evidence plays an important role in the court's evaluation of an assertion of the state secrets privilege; it alone determines how closely the court should scrutinize the Government's claim. "In each case, the showing of necessity which is made will

259. *United States v. Reynolds*, 345 U.S. 1, 10 (1953).

260. *Frost*, *supra* note 258, at 1955-56.

determine how far the court should probe in satisfying itself that the occasion for invoking the privilege is appropriate.”²⁶¹

As described more fully above, courts have found that a plaintiff’s need ranges from desperate—where the sought-after evidence was necessary to establish standing or a prima facie case—to insignificant—where alternative, non-privileged evidence and information permitted a case to move forward. Courts have adjusted their scrutiny of the Government’s state secrets assertion accordingly, balancing the Government’s interest in secrecy against the plaintiff’s interest in judicial redress.

The Government’s arguments against considering a plaintiff’s interests confuse or conflate the two critical steps in the *Reynolds* framework. In the first step, determining how to scrutinize the assertion of the Government’s claim, the court’s calibration turns *only* on the plaintiff’s need.²⁶² But in the second step, once the court has probed the Government’s claim and determined that the privilege applies, the plaintiff’s need becomes irrelevant and “even the most compelling necessity cannot overcome the claim of privilege.”²⁶³

The Government has argued, and some courts have held, that a plaintiff’s need is not relevant and that the state secrets privilege involves no balancing of interests.²⁶⁴ This argument confuses the irrelevancy of a plaintiff’s interest in the second step and of a plaintiff’s need overall. It results in a position that takes a plaintiff’s need out of the state secrets calculus—a result inconsistent with *Reynolds* itself.

D. *Dismissal Where the Very Subject Matter is a State Secret*

Finally, the Government has argued consistently in the

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

262. *Id.*

263. *Id.*

264. *See, e.g.*, *El-Masri v. United States*, 479 F.3d 296, 305-06 (4th Cir. 2007) (“The degree to which such a reviewing court should probe depends in part on the importance of the assertedly privileged information to the position of the party seeking it. . . . Moreover, no attempt is made to balance the need for secrecy of the privileged information against a party’s need for the information’s disclosure”) (citations omitted). In an opinion stated somewhat confusingly, the court apparently declined to consider, or to review, the district court’s consideration of the plaintiff’s need.

post-9/11 cases that courts should dismiss the cases because their very subject matter are state secrets. The Government supports this claim largely on the basis of the *Totten* cases. To be clear, this claim is substantially stronger than the claim that a case should be dismissed because the plaintiff cannot establish standing or a *prima facie* case, or because the defendant cannot defend the case, as a result of privileged evidence. The latter claim, affirmed by the *Reynolds* cases, is an evidentiary claim. It protects evidence, not information, and allows the plaintiff to establish his or her case with alternative, non-privileged evidence. If no such evidence exists, then, as with any other evidentiary privilege, the claim may be dismissed.

But the former claim—the Government’s claim in the post-9/11 cases—is an absolute ban on litigation dealing with certain issues or programs, even if non-privileged evidence exists to establish a claim. This claim operates more like the justiciability doctrine than an evidentiary privilege and, by the Government’s reckoning, allows the Government to dodge suits with very little judicial oversight. Indeed, this claim is problematic for three reasons: it lacks a solid basis in law, it confuses evidence and information, and it undermines a plaintiff’s fundamental right to access the courts.

1. The Paucity of Legal Support

The Government’s argument in the post-9/11 cases—that the case must be dismissed because the very subject matter of the lawsuit is a state secret—has no support in the law of state secrets. The cases that created the privilege cannot carry the weight of this extraordinary claim, and the more recent cases most often cited in support of this claim are themselves built upon empty analysis.

First and most clearly, the claim has no basis in *Reynolds* or *Totten*. As we have seen, *Reynolds* is an evidentiary privilege. Properly invoked, the *Reynolds* privilege permits a party to establish facts based on alternative, non-privileged evidence. *Reynolds* itself mentioned alternative, non-privileged evidence upon which the plaintiffs might have developed their

case.²⁶⁵ *Reynolds* authorizes dismissal only when a plaintiff cannot establish a case without privileged evidence. Neither its holding nor its reasoning supports dismissal when the very subject matter of the litigation is a state secret.²⁶⁶

Totten also does not support the claim of privilege. As we have seen, *Totten* provides a narrow ban on litigating secret spy contracts with the Government. It is based on unique policy considerations that apply only in such cases, and not more generally to any secret or clandestine government programs.²⁶⁷ As discussed in more detail above, the Supreme Court reaffirmed this understanding of *Totten* in *Tenet v. Doe* in 2005.

Reynolds and *Totten* together cannot provide a basis for dismissing a case because the very subject matter of the case is a state secret. As we have seen, the Supreme Court unanimously held in *Tenet v. Doe* that the *Reynolds* evidentiary privilege and the *Totten* bar are two distinct principles, even if they share some common ground.²⁶⁸ If neither alone supports the claim that a case may be dismissed because its very subject matter is a state secret—and if, as explained above, they represent two very different principles that cannot be aggregated—then even together they cannot support such a claim.

Moreover, the recent cases are themselves built upon empty analysis and, when read closely, provide no solid support for this claim. For example, the Government frequently cited *Kasza* in support of its argument. While the Ninth Circuit in *Kasza* dismissed the entire case because its very subject matter was a state secret,²⁶⁹ the cases it cited—*Reynolds*, *Totten*, *Farnsworth Cannon*, and *Weston v. Lockheed Missiles & Space Co.*—do not support this holding. *Reynolds* and *Totten* do not support it for the reasons discussed above. *Farnsworth Cannon* was an en banc summary affirmance of the district

265. 345 U.S. 1, 6 (1953).

266. See *Kasza v. Browner*, 133 F.3d 1159, 1001 (9th Cir. 1998) (discussing why *Reynolds* does not support dismissal because the very subject matter of the suit is a state secret).

267. *Id.* (discussing why *Totten* does not support dismissal because the very subject matter of the suit is a state secret).

268. *Tenet v. Doe*, 544 U.S. 1, 8-9 (2005).

269. *Kasza*, 133 F.3d at 1170.

court's unpublished dismissal on the pleadings, without citation to a single case or authority, and with rather ambiguous language about the precise basis of its ruling.²⁷⁰ The court in *Weston* did not even rule on this issue.²⁷¹ It merely stated in dicta that "the state secrets privilege alone can be the basis for dismissal of an entire case."²⁷² This is ambiguous support, at best, for *Kasza's* holding. It is hardly the stuff of sound legal doctrine. And just in case there were any questions about *Kasza's* ruling, the Ninth Circuit recently disavowed it in *Mohamed v. Jeppesen Dataplan, Inc.*²⁷³ and ruled that this theory cannot provide the basis for complete dismissal.²⁷⁴

Other cases regularly cited in support of this claim are similarly weak and merely create something like a case-law house of cards. For example, the court in *Fitzgerald v. Penthouse International, Ltd.* upheld a dismissal because the very subject matter of the case was a state secret.²⁷⁵ But it only relied upon *Totten* and *Farnsworth Cannon* in support of this conclusion.²⁷⁶ Similarly, the court in *Zuckerbraun v. General Dynamics Corp.* merely cited *Reynolds* and *Totten* in support of its conclusion that dismissal was required because the very subject matter of the case was a state secret.²⁷⁷ The court in *Bowles v. United States* merely cited *Fitzgerald*,²⁷⁸ and the court in *Bareford v. General Dynamics Corp.* cited *Farnsworth Cannon* and *Bowles*.²⁷⁹ The court in *DTM*

270. *Farnsworth Cannon, Inc. v. Grimes*, 635 F.2d 268, 281 (4th Cir. 1980) (en banc) (per curiam) ("[A]ny 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.").

271. *Weston v. Lockheed Missiles & Space Co.*, 881 F.2d 814, 816 (9th Cir. 1989).

272. *Id.*

273. 563 F.3d 992, 1002 n.5 (9th Cir.), *amended and superseded by* 579 F.3d 949 (9th Cir. 2009), *petition for reh'g en banc granted by* 586 F.3d 1108.

274. *Id.* at 1003.

275. 776 F.2d 1236, 1243 (4th Cir. 1985).

276. *Id.* at 1241-42.

277. *Zuckerbraun v. Gen. Dynamics Corp.*, 935 F.2d 544, 547-48 (2d Cir. 1991).

278. *Bowles v. United States*, 950 F.2d 154, 156 (4th Cir. 1991).

279. *Bareford v. Gen. Dynamics Corp.*, 973 F.2d 1138, 1143 (5th Cir. 1992), *vacated in part*, No. 91-2432, 1992 U.S. App. LEXIS 25805 (5th Cir. Oct. 14, 1992).

Research, L.L.C. v. AT&T Corp. cited only *Fitzgerald*,²⁸⁰ and the court in *Sterling v. Tenet* cited *Fitzgerald*, *Farnsworth Cannon*, and *DTM Research*.²⁸¹ Other cases, including *El-Masri*, recycle these cases, occasionally adding some of the *Reynolds* cases in support of the claim that the state secrets privilege may require complete dismissal of a case.²⁸² Of course the *Reynolds* cases provide no support for the claim that courts must dismiss cases in which the very subject matter is a state secret. They hold only that courts must dismiss cases in which evidence necessary to establish standing or a prima facie case is protected. Thus the case support for this claim is quite tenuous, ultimately turning on recycled citations to cases that themselves lack a foundation in the law.

2. The Confusion Between Evidence and Information

The sweeping claim here—that courts must dismiss cases in which the very subject matter is a state secret—confuses evidence and information by applying an evidentiary privilege to sources well beyond any disputed evidence but that nevertheless supply the information in the evidence. This curtails a plaintiff's ability to establish a claim through alternative, non-privileged material and expands the *Totten* ban or the *Reynolds* privilege (or both) well beyond the scope of those rulings.

Courts that have upheld dismissals on this basis have banned all evidence, privileged or not, so long as the information in that evidence might relate to a state secret. *Mohamed v. Jeppesen Dataplan, Inc.* illustrates the strangeness of this position.²⁸³ In that case, the Government

280. *DTM Research, L.L.C. v. AT&T Corp.*, 245 F.3d 327, 334 (4th Cir. 2001).

281. *Sterling v. Tenet*, 416 F.3d 338, 347-48 (4th Cir. 2005).

282. *See, e.g.*, *El-Masri v. United States*, 479 F.3d 296, 306-07 (4th Cir. 2007). *El-Masri* also cites *Tenet v. Doe* in support of this claim. The Court wrote that *Doe* “approvingly quoted *Reynolds*’s discussion of *Totten* as a matter in which dismissal on the pleadings was appropriate because the very subject matter of the action was a state secret.” *Id.* at 306. But as discussed above, nothing in *Doe* suggests that the *Totten* bar, or any like version of the state secrets privilege, applies outside the narrow facts of that case.

283. 563 F.3d 992 (9th Cir. 2009), *amended and superseded by* 579 F.3d 949 (9th Cir. 2009), *petition for reh’g en banc granted by* 586 F.3d 1108.

argued that the court should dismiss the case because the very subject matter involved a state secret. But by the time the case reached the Ninth Circuit, the very subject matter of the case, the Government's extraordinary rendition program, was well known by the public and even acknowledged by the Government and government officials in widely publicized and non-privileged sources.²⁸⁴ Yet the Government's position would have prevented the plaintiff from establishing his claim based on these alternative, non-privileged sources. Bizarrely, the Government's position would have even prevented the plaintiff from telling his own story in pleadings, discovery, or court. The Government's assertion of the evidentiary privilege, then, would have cut off not only all privileged evidence, but all "secret" information about the extraordinary rendition program.

This position, adopted in *El-Masri*,²⁸⁵ represents an extraordinary expansion of both the *Reynolds* privilege and the *Totten* ban. As a claim of evidentiary privilege under *Reynolds*, it means that for the state secrets privilege—alone among evidentiary privileges—the information, not the evidence, would be paramount. As a result, the *Reynolds* privilege would stretch beyond all recognition and morph into a rule of justiciability. Alternatively, as a claim under *Totten*, it means that any government program, not just government spy contracts, might be a state secret. This would stretch the logic of *Totten* and subject any government action to a claim of state secrets. Either way—as a claim under the *Reynolds* privilege or as a claim under the *Totten* ban—this position would create an absolute privilege with no definable boundaries. Taken with the Government's other extraordinary positions, it means that anytime the Government claims that the very subject matter of a suit involves a state secret, the case must be dismissed.

3. The Failure to Consider the Plaintiff's Interests

Finally, this position runs up against a plaintiff's constitutional interests in access to the courts. Plaintiffs have

284. See generally Sadat, *supra* note 206.

285. *El-Masri*, 479 F.3d at 303.

a fundamental right, rooted in due process and equal protection principles, against government interference with access to the courts. The Supreme Court most recently affirmed this well-established right in *Tennessee v. Lane*.²⁸⁶ The Court in that case upheld Congress's authority under Section 5 of the Fourteenth Amendment to require state and local governments to accommodate persons with disabilities by providing access to the courts.²⁸⁷ The Court ruled that Congress could so regulate state and local governments under Section 5, because the underlying right, access to the courts, was fundamental.²⁸⁸

Just as the plaintiff in *Lane* had a fundamental right to access the court, so too do the plaintiffs in cases potentially involving state secrets. The Government's position in the post-9/11 cases, however, threatens to curtail this interest, cutting it off entirely without any meaningful judicial review.

V. Conclusion

The Government's position, and at least one circuit court's ruling, on the state secrets privilege in the cases challenging the Government's clandestine post-9/11 programs represents a dramatic expansion of the privilege. This expansion has four characteristics. First, the Government now claims that the state secrets privilege has a constitutional pedigree. Next, the Government argues for great judicial deference when examining assertions of the state secrets privilege. Third, the Government has argued for complete dismissal, on the pleadings, when the very subject matter of a case involves state secrets. And finally, the Government argues that a plaintiff's interest should not play a role in evaluating state secrets claims.

The last three characteristics simply continue a trend in

286. 541 U.S. 509 (2004).

287. *Id.* at 533-34.

288. *Id.* at 532-33 ("The Due Process Clause also requires the States to afford certain civil litigants a 'meaningful opportunity to be heard' by removing obstacles to their full participation in judicial proceedings.") (citing *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971); *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996)). International law recognizes a similar right, the right to an effective remedy. Brief for Redress and the International Commission of Jurists as Amici Curiae in Support of the Plaintiffs-Appellants, *Mohamed II*, 563 F.3d 992 (9th Cir. 2009).

one line of cases on the state secrets privilege. But the Government's new claim that the state secrets privilege is a constitutional doctrine amplifies those characteristics. This means that the Government now presses a position that courts should completely dismiss any action, with little or no judicial review, when the Government asserts that the very subject of the case involves a state secret.

Efforts to reform the privilege must take account of these characteristics. Current proposed legislation falls far short. Congress must go much further to address these characteristics if it truly seeks to control the effects of the Government's sweeping state secrets assertions.