

The State Secrets Privilege: Preventing the Disclosure of Sensitive National Security Information During Civil Litigation

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Summary

The state secrets privilege is a judicially created evidentiary privilege that allows the federal government to resist court-ordered disclosure of information during litigation if there is a reasonable danger that such disclosure would harm the national security of the United States. Although the common law privilege has a long history, the Supreme Court first described the modern analytical framework of the state secrets privilege in the 1953 case of *United States v. Reynolds,* 345 U.S. 1 (1953). In *Reynolds*, the Court laid out a two-step procedure to be used when evaluating a claim of privilege to protect state secrets. First, there must be a formal claim of privilege, lodged by the head of the department that has control over the matter, after actual personal consideration by that officer. Second, a court must independently determine whether the circumstances are appropriate for the claim of privilege, and yet do so without forcing a disclosure of the very matter the privilege is designed to protect. If the privilege is appropriately invoked, it is absolute and the disclosure of the underlying information cannot be compelled by a court.

A valid invocation of the privilege does not necessarily require dismissal of the claim. In *Reynolds*, for instance, the Supreme Court did not dismiss the plaintiffs' claims, but rather remanded the case to determine whether the claims could proceed absent the privileged evidence. Yet, significant controversy has arisen with respect to the question of how a case should proceed in light of a successful claim of privilege. Courts have varied greatly in their willingness to either grant government motions to dismiss a claim in its entirety or allow a case to proceed "with no consequences save those resulting from the loss of evidence." Some courts have taken a more restrained view of the consequences of a valid privilege, holding that the privilege protects only specific pieces of privileged evidence. In contrast, other courts have taken a more expansive view, arguing that the privilege, with its constitutional underpinnings, often requires deference to executive branch assertions and ultimately, leaves a party with no other available remedy.

The state secrets privilege arises in a wide array of cases, generally where the government is a defendant or where the government has intervened in a case between private parties to prevent the disclosure of state secrets. Recently, the privilege has been characterized by a number of high-profile assertions—including invocation of the privilege to defend against claims arising from the government's "extraordinary rendition" practices, challenges to the terrorist surveillance program, and claims against various national security agencies for unlawful employment practices. The government has also intervened and invoked the privilege in a significant number of cases involving claims against government contractors. Most recently, in May of 2011, the Supreme Court held that the valid invocation of the state secrets privilege could render a defense contracting dispute nonjusticiable, leaving both the defense contractor and the Pentagon without any judicial remedies to enforce the contract.

This report is intended to present an overview of the protections afforded by the state secrets privilege; a discussion of some of the many unresolved issues associated with the privilege; and a selection of high-profile examples of how the privilege has been applied in practice.

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Introduction

The state secrets privilege, primarily a construct of the judiciary that has been derived from common law,[1] is an evidentiary privilege that allows the government to resist court-ordered disclosure of information[2] during civil litigation if there is a reasonable danger that such disclosure would harm the national security of the United States.[3] The privilege belongs to the government alone, and may be invoked only after personal consideration by the head of the department with control over the information.[4] The validity of the claim is then independently evaluated by the court after an inquiry that may require *in camera* review[5] of the information sought to be protected.[6] If the court determines that the information in question falls under the protection of the state secrets privilege, then the information will be considered unavailable, and the court must determine how or whether the litigation can proceed absent the protected evidence.[7]

In recent years, some have suggested that the privilege has been overused by the executive branch to prevent disclosure of its own questionable, embarrassing, or unlawful conduct—particularly with respect to the "war on terror."[8] In response, the Obama Administration has issued a new policy on the state secrets privilege in an attempt to "strengthen public confidence that the U.S. government will invoke the privilege in court only when genuine and significant harm to national defense or foreign relations is at stake and only to the extent necessary to safeguard those interests."[9] Under the policy established by Attorney General Eric Holder, any decision by an agency to invoke the privilege in litigation must first be reviewed by a State Secrets Review Committee and receive the personal approval of the Attorney General.[10] The new procedures specifically state that the Department of Justice will not defend an invocation of the state secrets privilege to conceal "violations of the law" or "administrative error"; avoid "embarrassment"; or

[1] *See* FED. R. EVID. 501.

[2] Although the courts have struggled to precisely define what constitutes a state secret, the U.S. Court of Appeals for the Ninth Circuit has held that the mere fact that a piece of evidence is classified is "insufficient to establish that the information is privileged." Mohamed v. Jeppesen Dataplan, Inc., 614 F.3d 1070, 1082 (9th Cir. 2010) ("Although classification may be an indication of the need for secrecy, treating it as conclusive would trivialize the court's role …").

[3] For a common law discussion of the privilege, *see* 8 Wigmore Evidence §§ 2367-2379 (J. McNaughton rev. 1961); for a more recent description, *see* EDWARD J. IMWINKELREID, THE NEW WIGMORE: A TREATISE ON EVIDENCE: *EVIDENTIARY PRIVILEGES*, ch. 8 (2002). It has also been argued that the privilege is derived "from the President's authority over national security, and thus is imbued with 'constitutional overtones.'" Amanda Frost, *The State Secrets Privilege And Separation Of Powers*, 75 FORDHAM L. REV. 1931, 1935 (Mar. 2007). *See also*, El-Masri v. U.S., 479 F.3d 296 (4th Cir. 2007)("The state secrets privilege … has a firm foundation in the Constitution, in addition to its basis in the common law of evidence.").

[4] U.S. v. Reynolds, 345 U.S. 1, 7 (1953)("The privilege belongs to the Government, and must be asserted by it …").

[5] "*In camera* review" involves a private review of the evidence by the presiding judge in his chambers.

[6] *See*, *Reynolds*, 345 U.S. at 8.

[7] *See*, Mohamed v. Jeppesen Dataplan, Inc., 614 F.3d 1070, 1082 (9th Cir. 2010).

[8] Editorial, Hiding Behind the "State Secrets Privilege," L.A. TIMES, May 18, 2011; Editorial, Securing Lawsuits, WASH. POST, May 11, 2009, at A16; Editorial, Unraveling Injustice, N.Y. TIMES, Feb. 5, 2009, at 30; Editorial, Revisit the State Secrets Privilege, PITTSBURGH POST-GAZETTE, Oct. 15, 2007, at B7.

[9] Memorandum for Heads of Executive Departments and Agencies, *Policies and Procedures Governing Invocation of the State Secrets Privilege*, Eric Holder, Attorney General, Sept. 23, 2009, *available at* http://legaltimes.typepad.com/files/ag-memo-re-state-secrets-dated-09-22-09.pdf.

[10] *Id*.

to "prevent or delay the release of information … *which would not reasonably be expected to cause significant harm to national security*."[11]

While the state secrets privilege arises in a wide array of cases, recently the privilege has been characterized by a number of high-profile assertions—including invocation of the privilege to defend against claims arising from the government's "extraordinary rendition" practices, challenges to the terrorist surveillance program, and claims against various national security agencies for unlawful employment practices. The government has also intervened and invoked the privilege in a significant number of cases involving claims against government contractors.

This report is intended to present an overview of the protections afforded by the state secrets privilege; a discussion of some of the many unresolved issues associated with the privilege; and, a selection of high-profile examples of how the privilege has been applied in practice.

United States v. Reynolds: The Seminal Case

Although previously established,[12] the Supreme Court first articulated the modern analytical framework of the state secrets privilege in the 1953 case of *United States v. Reynolds*.[13] That case involved multiple wrongful death claims brought by the widows of three civilians who died aboard a military aircraft that crashed while testing secret electronic equipment. The plaintiffs had sought discovery of the official post-incident report and survivors' statements that were in the possession of the U.S. Air Force. The Air Force opposed disclosure of those documents, as the aircraft and its occupants were engaged in a "highly secret mission of the Air Force" at the time of the crash.[14] The federal district court ordered the Air Force to produce the documents so that it could independently determine whether they contained privileged information. When the Air Force refused to provide the documents to the court, the district court ruled in favor of the plaintiffs on the issue of negligence; the court of appeals subsequently affirmed the district court's ruling.[15]

The Supreme Court reversed. In its opinion, the Court laid out a two-step procedure to be used when evaluating a claim of privilege to protect state secrets. First, "there must be a formal claim of privilege, lodged by the head of the department which has control over the matter, after actual personal consideration by that officer."[16] Second, "the court itself must determine whether the circumstances are appropriate for the claim of privilege, and yet do so without forcing a disclosure of the very thing the privilege is designed to protect."[17] Ultimately, the *Reynolds* Court

[11] *Id*. (emphasis in original).

[12] *See*, *Reynolds*, 345 U.S. at 6 (Describing the state secrets privilege as "well established in the law of evidence."). One of the earliest appearances of the privilege was in Aaron Burr's 1807 treason trial. *See*, Edmonds v. U.S., 323 F. Supp. 2d 65, 70-71 (D.D.C. 2004)(citing U.S. v. Burr, 25 F. Cas. 30 (C.C.D.Va 1807).

[13] 345 U.S. 1 (1953).

[14] *Id.* at 5. The Air Force did offer to make the surviving crew available for examination by the plaintiffs. *Id.*

[15] Reynolds v. U.S., 192 F.2d 987 (3rd Cir. 1951).

[16] Reynolds v. U.S., 345 U.S. 1, 8 (1953).

[17] *Id.* With respect to the facts at hand, the Court noted that the Secretary of the Air Force had filed a formal assertion of the privilege, and that there was a reasonable danger "that the accident investigation report would contain references to the secret electronic equipment which was the primary concern of the mission." *Id.* at 10. Furthermore, it was "apparent that these electronic devices must be kept secret if their full military advantage is to be exploited in the (continued...)

determined that the Air Force's invocation of the privilege was valid and that *in camera* review of the incident report was not necessary.[18] Importantly, the Court did not dismiss the claims, but rather remanded the case and directed the district court to provide the plaintiffs with the opportunity to pursue their case without the privileged evidence.[19]

Asserting the Privilege

The first requirement identified by the *Reynolds* Court, the assertion of the privilege, is a largely procedural hurdle to assure that the privilege is not "lightly invoked."[20] Nevertheless, this requirement is readily met through the written assertion of the privilege by the head of the department in control of the information in question after "personal consideration." Furthermore, the privilege belongs exclusively to the government and therefore cannot be validly asserted by a private party.[21] In cases in which the government is not a party, but the nature of the claim is such that litigation could potentially lead to the disclosure of secret evidence that would threaten national security, the government must itself intervene and assert the state secrets privilege.[22] It should be noted, however, that the government's failure to formally assert the privilege has previously been excused because strict adherence to the requirement would have had little or no benefit.[23] Finally, most courts have determined that the privilege may be raised at any time. For instance, the privilege may be raised prospectively at the pleading stage of the litigation, or during discovery in response to specific requests for information.[24]

(...continued)

national interests." *Id.* Thus, the Court upheld the government's assertion of the state secrets privilege and barred discovery of the requested documents by the plaintiffs.

[18] *Id*. at 11.

[19] *Id.* at 12. On remand to the district court, the parties "conducted limited discovery [and] settled their claims for approximately seventy-five percent of the original judgment." Herring v. United States, 2004 U.S. Dist. Lexis 18545 (E.D. Pa. 2004). The declassified accident report at issue in *Reynolds* was obtained in 2000 by the daughter of one of the original plaintiffs in the case. After discovering that the report did not contain a description of any "secret electronic equipment" a claim was brought seeking to set aside the settlement on the grounds that the Air Force had committed fraud on the court in asserting the privilege. A federal district court denied the claim, holding that a review of the declassified documents did not "suggest that the Air Force intended to deliberately misrepresent the truth or commit a fraud on the court." *Id*. at 14.

[20] *Reynolds,* 345 U.S. at 7.

[21] *Id*. ("The privilege belongs to the Government, and must be asserted by it; it can neither be claimed nor waived by a private party. ").

[22] In practice, it seems that government contractors have attempted to invoke the privilege on their own. *See*, Laura K. Donohue, *The Shadow of State Secrets*, 159 U. Pa. L. Rev. 77, 97 (2010).

[23] S*ee,* Clift v. U.S., 597 F.2d 826, 828-9 (2d Cir. 1979) (preventing discovery of documents in a patent infringement suit brought by the inventor of a cryptographic device against the government where the Director of the National Security Agency had submitted an affidavit stating that disclosing the contents of the documents would be a criminal violation, but had not formally asserted the state secrets privilege; the court reasoned that imposition of the formal requirement would have had little or no benefit in this circumstance).

[24] Mohamed v. Jeppesen Dataplan, Inc., 614 F.3d 1070, 1080 (9th Cir. 2010)("The privilege may be asserted at any time, even at the pleading stage.").

Evaluating the Validity of the Privilege

In contrast to the requirement that the government formally assert the privilege, the requirement that the court evaluate the validity of the government's claim often "presents real difficulty."[25] Accordingly, the government "bears the burden of satisfying a reviewing court that the *Reynolds* reasonable-danger standard is met."[26] For example, although the Supreme Court's holding in *Reynolds* recognized that it is the role of the judiciary to evaluate the validity of a claim of privilege, the Court declined to require that courts automatically compel inspection of the underlying information. As the Court noted, "too much judicial inquiry into the claim of privilege would force disclosure of the thing the privilege was meant to protect, while a complete abandonment of judicial control would lead to intolerable abuses."[27] Therefore, although the privilege requires some deference to the executive branch, an independent evaluation of the claim of privilege is necessary so as not to abdicate control over evidence "to the caprice of executive officers."[28] In light of this dilemma, the Court chose to chart a middle course, employing a "formula of compromise" to balance the competing interests of oversight by the judiciary, the plaintiffs' need for the evidence, and national security interests.[29] Under this scheme, the privilege should be found valid when a court is satisfied that there is a reasonable danger that disclosure "will expose military matters which, in the interest of national security, should not be divulged."[30]

The thoroughness of a court's review of the government's assertion of the state secrets privilege varies. Generally, the depth of the inquiry corresponds to an evaluation of the opposing party's need for the information and the government's need to prevent disclosure.[31] As part of this balancing, a court may go so far as to require the production of the evidence in question for *in camera* review. Under other circumstances, however, the nature of the evidence may be such that the court is satisfied that the evidence warrants protection based solely on the executive branch's assertions. No matter the depth of the inquiry, once a court is satisfied that the privilege is valid, it should not further "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."[32]

Whether a court may be satisfied without examining the underlying information will also be influenced by the amount of deference afforded to the government's representations regarding the evidence in question. In *Reynolds*, the Court noted that the necessity of the underlying information to the litigation will determine "how far the court should probe in satisfying itself that the occasion for invoking the privilege is appropriate."[33] In the case of *Reynolds*, the Court noted that the Air Force had offered to make the surviving crew members available for examination by the plaintiffs.[34] Because of this alternative avenue of information, the Court was satisfied that the privilege was valid based primarily upon representations made by the

[25] *Reynolds*, 345 U.S. at 8.

[26] El-Masri v. U.S., 479 F.3d 296, 305 (4th Cir. 2007).

[27] *Reynolds,* 345 U.S. at 8.

[28] *Id*. at 9-10.

[29] *Id.* at 9.

[30] *Id.* at 10.

[31] *Id*. at 11 ("Where there is a strong showing of necessity, the claim of privilege should not be lightly accepted …").

[32] *Id.*

[33] *Id.* at 11.

[34] *Id.* at 5.

government regarding the contents of the documents.[35] Conversely, less deference to the government's representations may be warranted where a private litigant has a strong need for the information.[36]

When possible, courts have attempted to "disentangle" privileged evidence from non-privileged evidence.[37] One way to protect privileged information without excluding non-privileged evidence is to redact sensitive portions of a document rather than barring the entire piece of evidence. However, some courts have questioned the prudence of using redaction to protect portions of documents that qualify for protection under the privilege out of a concern that pieces of "seemingly innocuous" information can create a "mosaic" through which protected information may be deduced.[38] The "mosaic theory" is based on the principle that federal judges are not properly equipped to determine which pieces of information, when taken together, could result in the disclosure "of the very thing the privilege is designed to protect."[39] Adherence to the mosaic theory, however, necessarily results in broad deference to the assertions of intelligence agencies.

The Consequences of the Privilege: Expansive or Limited?

If the privilege is appropriately invoked, it is absolute and the disclosure of the underlying information cannot be compelled by the court. Although a private litigant's need for the information may be relevant to the amount of deference afforded to the government, "even the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied" that the privilege is appropriate.[40] Still, a valid invocation of the privilege does not necessarily require dismissal of the claim.[41] In *Reynolds*, for instance, the Supreme Court did not dismiss the plaintiffs' claims, but rather remanded the case to determine whether the claims could proceed absent the privileged evidence. Yet, significant controversy has arisen with respect to the question of how a case should proceed in light of the successful claim of privilege. Courts have varied greatly in their willingness to either dismiss a claim in its entirety or allow a case to proceed "with no consequences save those resulting from the loss of evidence."[42] Some courts have taken a more restrained view of the consequences of a valid privilege, holding that the privilege protects only specific pieces of privileged evidence; while others have taken a more expansive view, arguing that the privilege, with its constitutional underpinnings, often requires deference to executive branch assertions and ultimate dismissal.[43] Whether the assertion of the

[35] *Id*. at 11.

[36] *See*, *e.g.*, Molerio v. FBI, 749 F.2d 815, 822 (D.C. Cir. 1984) (*in camera* examination of classified information was appropriate where it was central to litigation); Al-Haramain Islamic Found., Inc. v. Bush, 507 F.3d 1190, 1203-04 (9th Cir. 2007)("We reviewed the Sealed Document *in camera* because of [plaintiff's] admittedly substantial need for the document to establish its case.").

[37] Ellsberg v. Mitchell, 709 F.2d 51, 57 (D.C. Cir. 1983).

[38] Kasza v. Browner, 133 F.3d 1159, 1166 (9th Cir. 1998) ("[I]f seemingly innocuous information is part of a … mosaic, the state secrets privilege may be invoked to bar its disclosure and the court cannot order the government to disentangle this information from other information.").

[39] *Reynolds*, 345 U.S. at 8.

[40] *Id*. at 11.

[41] Mohamed v. Jeppesen Dataplan, Inc., 614 F.3d 1070, 1079 (9th Cir. 2010) ("Unlike the *Totten* bar, a valid claim of privilege under *Reynolds* does not automatically require dismissal of the case.").

[42] *Id*. at 1082.

[43] *Compare*, Ellsberg v. Mitchell, 708 F.2d 51 (D.C. Cir. 1983) (reversing a lower court dismissal under the privilege) *with* El-Masri v. U.S., 479 F.3d 296, 305 (4th Cir. 2007) (dismissing the claim in light of a valid assertion of the (continued...)

state secrets privilege is fatal to a particular suit, or merely excludes privileged evidence from further litigation, is a question that is highly dependent upon the specific facts of the case.

Pursuant to existing state secrets privilege jurisprudence, the valid invocation of the privilege generally may result in the outright dismissal of the case in three circumstances.[44] The first class of cases in which a claim is generally dismissed is those cases in which a plaintiff cannot establish a *prima facie* case without the protected evidence.[45] For example, in *Halkin v. Helms*, the U.S. Court of Appeals for the D.C. Circuit (D.C. Circuit) was confronted with a claim of privilege regarding the National Security Agency's alleged interception of international communications to and from persons who had been targeted by the Central Intelligence Agency (CIA).[46] After deciding that the claim of privilege was valid, the D.C. Circuit affirmed the protection of *that* information from discovery.[47] Although some non-privileged evidence that the plaintiffs were targeted by the CIA existed, the court dismissed the suit after deciding that without the privileged information, the plaintiffs would not be able to establish a *prima facie* case of unlawful electronic surveillance.

A case will also generally be dismissed where the privilege deprives a litigant of evidence necessary to establish a valid defense.[48] In *Molerio v. Federal Bureau of Investigation*, a job seeker alleged that the Federal Bureau of Investigation (FBI) had disqualified him based upon his father's political ties to socialist organizations in violation of the applicant's and his father's First Amendment rights.[49] In response, the FBI asserted that it had a lawful reason to disqualify the plaintiff, but claimed that its reason was protected by the state secrets privilege. After reviewing the FBI's claim *in camera*, the D.C. Circuit agreed that the evidence of a nondiscriminatory reason was protected and that its exclusion would deprive the FBI of an available defense. Therefore, the dismissal of that action was required once the privilege was determined to be valid.[50]

Subject Matter Dismissal and the *Totten* Bar in the Context of Extraordinary Rendition

Most courts recognize a controversial third category of cases that requires outright dismissal pursuant to the state secrets privilege. This class of cases includes those where the court determines that the "very subject matter of the case is a state secret," and as a result, "litigating the case to a judgment on the merits would present an unacceptable risk of disclosing state secrets."[51] Dismissals under this theory have led to significant confusion and debate, much of

(...continued)

privilege).

[44] Although not a dismissal under the state secrets privilege, the unavailability of an essential, yet privileged, piece of information may lead a court to dismiss a claim for lack of standing. *See, e.g.,* Al-Haramain Islamic Foundation v. Bush, 507 F.3d 1190 (9th Cir. 2007).

[45] *See, e.g.,* Kasza v. Browner, 133 F.3d 1159 (9th Cir. 1998).

[46] Halkin v. Helms, 690 F.2d 977 (D.C. Cir. 1982).

[47] The other evidence of CIA targeting was never claimed to be privileged by the government. *Id.* at 997.

[48] *See, e.g.,* Edmonds v. U.S., 323 F. Supp. 2d 65, 77-79 (D.D.C. July 6, 2004).

[49] Molerio v. FBI, 749 F. 2d at 824-825.

[50] *Id.* at 825.

[51] Mohamed v. Jeppesen Dataplan, Inc., 614 F.3d 1070, 1083 (9th Cir. 2010).

which derives from the proper characterization of an 1876 Supreme Court case entitled *Totten v. United States*.[52]

Totten involved a breach of contract claim brought against the government by the estate of a former Union Civil War spy for compensation owed for secret wartime espionage services.[53] The Court dismissed the claim noting that "as a general principle [] public policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential."[54] Thus, under *Totten*, controversies over secret espionage contracts may not be reviewed by federal courts.[55] The "*Totten* bar" was later affirmed in *Tenet v. Doe,* a Supreme Court case involving a contract claim against the CIA brought by Cold War era spies.[56] Prior to that decision, the exact relevance of the *Totten* rule in light of the Court's intervening decision in *Reynolds* was unclear. In *Tenet*, the Court held that "*Totten* precludes judicial review in cases such as respondents' where success depends upon the existence of their secret espionage relationship with the government."[57] In reaching its decision, and by limiting *Totten* to its facts, the Supreme Court arguably affirmed the distinction between the *Totten* bar and the *Reynolds* privilege—holding that the *Totten* rule had not been "reduced to an example of the state secrets privilege," and that "*Reynolds* therefore cannot be plausibly read to have replaced the categorical *Totten* bar with the balancing of the state secrets evidentiary privilege in the distinct class of cases that depend upon clandestine spy relationships."[58] Therefore, disputes over contracts for espionage appear to remain a special category of cases over which the courts have no jurisdiction, and therefore must be "dismissed on the pleadings without ever reaching the question of evidence."[59]

The relationship between the *Totten* bar and the *Reynolds* privilege may be interpreted in a number of different ways. Some courts have attempted to maintain a strict differentiation between *Totten* and *Reynolds*—limiting the severe consequences of the *Totten* bar to only those cases which involve proving the existence of a clandestine spy relationship with the federal government.[60] Other courts have arguably "conflated" the two doctrines.[61] Still others distinguish

[52] 92 U.S. 105 (1876).

[53] *Id.*

[54] *Id.* at 107.

[55] The *Totten* bar has been labeled a "rule of non-justiciability, akin to a political question." *See, e.g*., Al-Haramain Islamic Found. Inc. v. Bush, 507 F.3d 1190, 1197 (9th Cir. 2007).

[56] 544 U.S. 1 (2005).

[57] *Id*. at 8.

[58] *Id*. "The 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." *Id.* at 11.

[59] *Id*. at 8. Specifically, under *Totten*, the government need not invoke the state secrets privilege. *Id.* at 11 ("[R]equiring the Government to invoke the privilege on a case-by-case basis risks the perception that it is either confirming or denying relationships with individual plaintiffs.").

[60] *See, e.g.* Mohamed v. Jeppesen Dataplan, Inc., 579 F.3d 943 (9th Cir. 2009) (reversed by Mohamed v. Jeppesen Dataplan, Inc., 614 F.3d 1070, 1087 (9th Cir. 2010)) ; Terkel v. AT&T Corp., 441 F. Supp. 2d 899 (N.D. Ill. 2006); ACLU v. NSA, 438 F. Supp. 2d 754 (E.D. Mich. 2006).

[61] El-Masri v. U.S., 479 F.3d 296 (4th Cir. 2007). *See*, Mohamed v. Jeppesen Dataplan, Inc., 614 F.3d 1070, 1087 (9th Cir. 2010) ("[W]e have previously disapproved of *El-Masri* for conflating the *Totten* bar's 'very subject matter' inquiry with the *Reynolds* privilege."); Al-Haramain Islamic Found. Inc. v. Bush, 507 F.3d 1190 (9th Cir. 2007)("In other words [the *El-Masri*] court merged the concept of "subject matter" with the notion of proof of prima facie case."). *See also*, Carrie Newton Lyons, *The State Secrets Privilege: Expanding Its Scope Through Government Misuse*, 11 Lewis & Clark L. Rev. 99 (2007) (noting that courts have expanded the *Reynolds* privilege "into the realm of *Totten*, despite the distinct nature of the *Totten* privilege …").

between *Totten* and *Reynolds*, while interpreting *Totten* to have broader application beyond spy contracts, resulting in a "continuum of analysis" that requires dismissal under the privilege where "the case cannot be litigated without presenting either a certainty or an unacceptable risk of revealing state secrets."[62]

Recent cases from the U.S. Court of Appeals for the Fourth Circuit (Fourth Circuit) and the U.S. Court of Appeals for the Ninth Circuit can be viewed as exemplifying the varied conclusions federal courts have reached in ostensibly similar cases. Both cases involved civil claims against various government officials and private transportation companies associated with the government's extraordinary rendition program. "Extraordinary rendition" has been described as a program administered by the CIA "to gather intelligence by apprehending foreign nationals suspected of involvement in terrorist activities and transferring them in secret to foreign countries for detention and interrogation."[63] *El-Masri v. United States* involved a claim by Khaled El-Masri against the CIA and a number of private transportation companies, alleging that the defendants unlawfully detained and interrogated him in violation of the U.S. Constitution and international law. El-Masri, a German citizen, alleged he had been detained in Macedonia; turned over to the CIA; flown to Afghanistan, where he was held in a CIA facility; and then flown to Albania, where he was released.[64] During his ordeal, El-Masri also alleged he was "beaten, drugged, bound, and blindfolded during transport; confined in a small, unsanitary cell; interrogated several times, and consistently prevented from communicating with anyone outside the detention facility."[65]

Mohamed v. Jeppesen Dataplan involved a claim by five plaintiffs against a subsidiary of Boeing for violations of the Alien Tort Statute stemming from the company's role in providing transportation services for the extraordinary rendition program.[66] The plaintiffs alleged that Jeppesen Dataplan Inc. "provided flight planning and logistical support services to the aircraft and crew on all of the flights transporting the five plaintiffs among their various locations of detention and torture."[67] In both *El- Masri* and *Jeppesen*, the government asserted the state secrets privilege and argued that the suits should be dismissed because the issues involved in the lawsuits could not be litigated without risking disclosure of privileged information.[68]

In *El-Masri*, the Fourth Circuit, citing both *Totten* and *Reynolds*, asserted that "the Supreme Court has recognized that some matters are so pervaded by state secrets as to be incapable of judicial resolution once the privilege has been invoked."[69] Although the court recognized that *Totten* has "come to primarily represent a somewhat narrower principal—a categorical bar on actions to enforce secret contracts for espionage," the court concluded more broadly that *Totten* rested on the general proposition that "a cause cannot be maintained if its trial would inevitably lead to the

[62] Mohamed v. Jeppesen Dataplan Inc., 614 F.3d 1070, 1087 (9th Cir. 2010).

[63] *Id*. at 1073. *See also,* CRS Report RL32890, *Renditions: Constraints Imposed by Laws on Torture*, by Michael John Garcia.

[64] El-Masri v. U.S., 479 F.3d 296 (4th Cir. 2007).

[65] *Id*. at 300.

[66] Mohamed v. Jeppesen Dataplan Inc., 579 F.3d 943 (9th Cir. 2009).

[67] *Id*. at 951.

[68] El-Masri v. U.S., 479 F.3d at 301. In *Jeppesen*, the federal government was not initially a defendant, but intervened in the case to assert the privilege and simultaneously moved to dismiss. *Mohamed v. Jeppesen Dataplan*, 539 F. Supp. 2d 1128, 1132-1133 (N.D. Cal. 2008).

[69] *El-Masri*, 479 F.3d at 306.

disclosure of privileged information."[70] In the court's opinion, any attempt by El-Masri to prove or disprove the allegations in the complaint would necessarily involve disclosing the internal organization and procedures of the CIA, as well as secret contracts with the transportation companies. The circuit court thus determined that because the "central facts … that form the subject matter of El-Masri's claim [] remain state secrets," the court was required to dismiss the suit upon the successful invocation of the privilege by the government.[71] The Supreme Court declined to review the *El-Masri* decision.[72]

It is also important to note that in reaching its decision, the Fourth Circuit emphasized the notion that the state secrets privilege performs a "function of constitutional significance."[73] Prior to the *El-Masri* case, the privilege had traditionally been characterized as a common law evidentiary privilege, rather than a constitutionally based doctrine. The Fourth Circuit opinion, however, contained express language asserting that the state secrets privilege "has a firm foundation in the Constitution."[74]

In contrast, in *Mohamed v. Jeppesen Dataplan*, a Ninth Circuit panel initially held that the state secrets privilege only excluded privileged evidence from discovery or admission at trial, and did not require the dismissal of the complaint at the pleadings stage.[75] While the court recognized that the exclusion of privileged evidence from discovery might ultimately be fatal to the litigation if it prevented the plaintiffs from establishing a *prima facie* case or denied the defendant a valid defense, the *Jeppesen* court held that dismissal of a suit on the pleadings based on the "very subject matter" of the privileged information was not warranted, except in the narrow case of contracts for espionage barred under *Totten*.[76]

In characterizing *Totten* and *Reynolds*, the Ninth Circuit noted that "two parallel strands of the state secrets doctrine have emerged from its relatively thin history."[77] The opinion clearly distinguished between the *Reynolds* privilege and the *Totten* bar, recognizing that dismissal under the *Reynolds* privilege was only proper when the privileged evidence prevented the plaintiff from establishing a *prima facie* case, or the defendant from establishing a valid defense.[78] "Neither does any Ninth Circuit or Supreme Court case law," concluded the court, "indicate that the 'very subject matter' of any other kind of law suit is a state secret, apart from the limited factual context of *Totten* itself."[79] Limiting *Totten* to its facts, the Ninth Circuit panel refused to countenance any expansion of "*Totten's* uncompromising dismissal rule beyond secret agreements with the government."[80]

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[70] *Id*.

[71] *Id*. at 311.

[72] 552 U.S. 947 (2007).

[73] *Id*. at 303.

[74] *Id*. at 304.

[75] Mohamed v. Jeppesen Dataplan, Inc., 579 F.3d 943 (9th Cir. 2009).

[76] *Id.* at 954.

[77] *Id*. at 952.

[78] *Id*. at 958 ("Thus, within the *Reynolds* framework, dismissal is justified if and only if specific privileged evidence is itself indispensable to establishing either the truth of the plaintiff's allegations or a valid defense that would otherwise be available to the defendant.").

[79] *Id*. at 954.

[80] *Id*.

Upon *en banc* review, however, the panel decision was overturned by a vote of 6-5.[81] While criticizing the Fourth Circuit's decision in *El-Masri* as an "erroneous conflation" of the *Totten* bar's "very subject matter" inquiry with the *Reynolds* privilege, and expressly criticizing *Totten* as an ambiguous "judge-made doctrine with extremely harsh consequences," the court determined that dismissal was nonetheless required under *Reynolds*, and not *Totten*, as there was "no feasible way to litigate Jeppesen's alleged liability without creating an unjustifiable risk of divulging state secrets."[82]

In recognizing this third category of cases requiring dismissal under *Reynolds*, the Ninth Circuit noted that there exists a point in which "the *Reynolds* privilege converges with the *Totten* bar," to form a "continuum of analysis."[83] According to the court, included in the circumstances under which *Reynolds* merges with *Totten* is any case in which litigation would potentially result in an "unacceptable risk of disclosing state secrets."[84] Plaintiff's petition for certiorari is currently pending before the Supreme Court.[85]

Much confusion remains with respect to the amount of deference owed to the executive branch once the state secrets privilege is invoked, as well as in determining the proper consequences of a valid assertion of the privilege. Specifically, courts and commentators continue to disagree as to the relationship between the *Totten* bar and the *Reynolds* privilege and the resulting question of whether a successful assertion of the privilege requires dismissal of a given claim, or simply the exclusion of privileged evidence—allowing the party to proceed with his claim through the submission of other available evidence.

The Supreme Court's Most Recent View

The 2010-2011 term saw the Supreme Court hear its first state secrets privilege case since the 2005 case of *Tenet v. Doe*. In *General Dynamics Corporation v. United States*, the federal government validly asserted the privilege to prevent the disclosure of sensitive stealth technology in a defense contract dispute with a government contractor.[86] However, in addition to asserting the privilege, the government also sought the return of progress payments made to the contractor.[87] The complex factual scenario is discussed in greater length *infra*, however it is important to note that the case focused on the consequences of a valid privilege in situations where the privilege acts to inhibit a party's ability to defend against the government's breach of contract claim. Although the case was more a contract remedy case than a state secrets privilege case,[88] the opinion contained potentially important language with respect to the evidentiary foundation of the privilege and the scope of the *Totten* rule.

[81] Mohamed v. Jeppesen Dataplan, Inc., 614 F.3d 1070, 1087 (9th Cir. 2010).

[82] *Id*. at 1084, 1087.

[83] *Id*. at 1083, 1089.

[84] *Id*. at 1079.

[85] Petition for a Writ of Certiorari, No. 10-1078 (U.S. filed Dec. 7, 2010).

[86] General Dynamics Corporation v. U.S., 563 U.S. __ (2011) (consolidated with Boeing v. U.S., No. 09-1302).

[87] *Id*. at 1-5 (slip op.).

[88] The Court felt the case focused on "our common-law authority to fashion contractual remedies in Government-contracting disputes." *Id*. at 7.

The *General Dynamics* opinion contained language suggesting a reaffirmation of the Court's view that the *Reynolds* privilege is based in the law of evidence rather than in the Constitution.[89] The Court expressly stated that "*Reynolds* was about the admission of evidence. It decided a purely evidentiary dispute by applying evidentiary rules."[90] The Court also clearly established that the legal theory of nonjusticiability behind *Totten* and *Tenet* did not solely apply to cases involving secret espionage contracts. In citing the two espionage contract cases, rather than *Reynolds,* as the applicable authority in the case, the Court stated: "We think a similar situation obtains here, and that the same consequence should follow."[91] In extending *Totten* into this new context and in refusing to find an enforceable contract, the Court held that "where liability depends upon the validity of a plausible ... defense, and when full litigation of that defense 'would inevitably lead to the disclosure of' state secrets, neither party can obtain judicial relief."[92] The Court also cited *Totten* in noting that "[b]oth parties—the government no less than petitioners—must have assumed the risk that state secrets would prevent the adjudication of claims of inadequate performance."[93]

Other Examples of the State Secrets Privilege in Practice

The United States has invoked the state secrets privilege in a wide array of cases, many of which have resulted in the outright dismissal of the plaintiffs' claims. This section of the report provides a brief overview of a selection of recent, high-profile uses of the privilege.

Terrorist Surveillance Program

The state secrets privilege has played a large role in litigation arising from the Terrorist Surveillance Program (TSP). The TSP was a Bush Administration program that authorized the National Security Agency (NSA) to intercept various communications involving U.S. persons within the United States without first obtaining warrants under the Foreign Intelligence Surveillance Act (FISA).[94] FISA provides a statutory framework for government agencies to seek an order from the specialized Foreign Intelligence Surveillance Court that authorizes the collection of foreign intelligence information via electronic surveillance.[95] After the program was revealed in 2005, dozens of claims were filed challenging its legality. Most of these claims were filed against private telecommunications companies that had assisted the NSA by providing the agency with telephone communication records, while others were filed against the NSA itself and individual government officials.[96] Given the sensitive nature of NSA's surveillance activities, the

[89] *Id*. at 5 ("[T]he state-secrets privilege, we said, had a 'Well established' pedigree 'in the law of evidence.'")(citing *Reynolds*).

[90] *Id*. at 6.

[91] *Id*. at 7.

[92] *Id*. at 7-8.

[93] Id. at 12.

[94] *See*, CRS Report R40980, *Government Collection of Private Information: Background and Issues Related to the USA PATRIOT Act Reauthorization*, by Edward C. Liu and Charles Doyle.

[95] 50 U.S.C. §§ 1801-1808.

[96] *Compare*, Hepting v. AT&T Corp., 439 F. Supp. 2d 974 (N.D. Ca. 2006), *with* Al-Haramain Islamic Foundation, Inc. (continued...)

federal government intervened in a majority of these cases, invoked the state secrets privilege, and asked that the cases be dismissed. These early assertions of the privilege saw little success. For example, in *Hepting* v. *AT&T Corp*., the district court denied the government's motion to dismiss under the state secrets privilege.[97] The court reasoned that the *Totten* bar was inapplicable under the facts of the case and that the "very subject matter" of the case was "hardly a secret."[98] The court noted that because of the broad public disclosures by AT&T and the government relating to the TSP, it could not be concluded "that merely maintaining this action creates a 'reasonable danger' of harming national security."[99] The court would not "defer to a blanket assertion of secrecy."[100]

In 2008, however, Congress passed the FISA Amendments Act (FAA),[101] which granted the telecommunications companies retroactive immunity for assistance provided to NSA under the TSP.[102] Accordingly, federal courts have dismissed most of the TSP-related claims filed against telecommunications companies pursuant to the protections provided in the FAA.

Challenges to the TSP program filed against the NSA or government officials, however, were not impeded by the immunity granted to telecommunications companies under the FAA. Perhaps the preeminent existing challenge to the TSP is *Al-Haramain Islamic Foundation v. Bush*.[103] *Al-Haramain* involves a claim by a Muslim charity—designated as a terrorist organization by the United Nations—alleging that the NSA had unlawfully intercepted communications through the TSP and provided those records to the Office of Foreign Assets Control (OFAC), which subsequently froze Al-Haramain's assets in violation of statutory, constitutional and international law.[104] Whereas other plaintiffs had struggled to obtain standing to challenge the TSP,[105] OFAC had inadvertently provided Al-Haramain with a secret document that allegedly proved that the foundation had been subject to NSA surveillance.[106] In response to the complaint, the government asserted the state secrets privilege both narrowly, with respect to the top secret document, and generally, arguing that the case must be dismissed as the "very subject matter" of the proceeding was a state secret.[107]

On an interlocutory appeal, the Ninth Circuit rejected the government's motion to dismiss the case on the grounds that the subject matter of the claim was a state secret, but accepted the government's assertion of the privilege with respect to the top secret document inadvertently

(...continued)

v. Bush, 451 F. Supp. 2d 1215 (D. Or. 2006).

[97] 439 F. Supp. 2d 974 (N.D. Ca. 2006).

[98] *Id*. at 994.

[99] *Id*.

[100] *Id*. at 995.

[101] P.L. 110-261 (110th Cong.) (2008).

[102] Under the FAA, a claim may not be maintained against a party for "providing assistance to an element of the intelligence community, and shall promptly be dismissed" if the Attorney General certifies that the defendant provided assistance in connection with the TSP and was given written assurances that the program was authorized by the President and determined to be lawful or that the alleged assistance was not in fact provided. 50 U.S.C. § 1885a.

[103] 507 F.3d 1190 (9th Cir. 2007).

[104] *Id*. at 1193-1195.

[105] *See, e.g.,* ACLU v. NSA, 93 F.3d 644 (6th Cir. 2007)(dismissing plaintiffs challenge to the TSP for lack of standing).

[106] Al-Haramain Islamic Foundation Inc. v. Bush, 507 F.3d 1190, 1193 (9th Cir. 2007).

[107] *Id*. at 1195.

disclosed to Al- Haramain.[108] The court held that enough was known about the TSP, including confirmation of the program by a number of government officials, that "the subject matter of Al-Haramain's lawsuit can be discussed … without disturbing the dark waters of privileged information."[109] Thus dismissal under the state secrets privilege at such an "early stage" was not warranted.[110] However, after *in camera* review of the top secret document, the court concluded that "disclosure of information concerning the [secret document] … would undermine the government's intelligence capabilities and compromise national security," therefore the document itself was protected by the privilege and unavailable to the plaintiffs.[111]

While the court in *Al-Haramain* did not dismiss the case under the state secrets privilege, it did determine that without the top secret document, the plaintiffs could not show the "concrete and particularized" injury necessary to establish standing.[112] In short, without the secret document, Al-Haramain could not prove that it had actually been a subject of TSP surveillance. The court therefore dismissed the claim for lack of standing, but left open the important question of whether certain FISA provisions superseded and preempted the state secrets privilege.

FISA, Preemption, and the TSP

In addition to providing the framework for the authorized collection of foreign intelligence information via electronic surveillance, FISA also provides a civil remedy for an "aggrieved person ... who has been subjected to an electronic surveillance or about whom information obtained by electronic surveillance of such person has been disclosed or used" in violation of federal law.[113] When evaluating the legality of a FISA order, the statute states that the court:

> shall, notwithstanding any other law, if the Attorney General files an affidavit under oath that disclosure or an adversary hearing would harm the national security of the United States, review *in camera* and *ex parte* the application, order, and such other materials relating to the surveillance as may be necessary to determine whether the surveillance of the aggrieved person was lawfully authorized and conducted. In making this determination, the court may disclose to the aggrieved person, under appropriate security procedures and protective orders, portions of the application, order, or other materials relating to the surveillance only where such disclosure is necessary to make an accurate determination of the legality of the surveillance.[114]

The Ninth Circuit noted that FISA, "unlike the common law state secrets privilege, provides a detailed regime to determine whether surveillance 'was lawfully authorized and conducted.'"[115] Were FISA to preempt the state secrets privilege, Al-Haramain would likely be able to proceed with its claim, as the necessary portions of the secret document would no longer be considered

[108] *Id*. at 1193 ("[W]e agree with the district court that the state secrets privilege does not bar the very subject matter of this action. After *in camera* review and consideration of the government's documentation of its national security claim, we also agree that the Sealed Document is protected by the state secrets privilege.").

[109] *Id*. at 1198.

[110] *Id*.

[111] *Id*. at 1204.

[112] *Id*. at 1205.

[113] 50 U.S.C. § 1810.

[114] 50 U.S.C. § 1806(f).

[115] *Al-Haramain*, 507 F.3d at 1205.

unavailable. Noting that the preemption question was "central to Al-Haramain's ability to proceed with the lawsuit," the court remanded the case to the district court to determine whether FISA preempts the state secrets privilege.[116]

On remand, the Federal District Court for the Northern District of California held that the FISA procedures, which the court read as requiring judicial examination of the actual underlying information, superseded the judicially created state secrets privilege as it is described in *Reynolds*,[117] but only if the plaintiffs could demonstrate that they had standing as "aggrieved persons" under FISA.[118] Therefore, before FISA's preemption of the privilege would be triggered, the plaintiffs would first need to prove, without reference to the privileged secret document, that they were "aggrieved persons." In January of 2009, the district court found that the plaintiffs had successfully met that burden through non-privileged evidence and could thus proceed with discovery under FISA, which took precedence over the state secrets privilege.[119] After a period of significant resistance by the government in which "defendants denied plaintiffs counsel access to any classified filings in the litigation," on March 31, 2010, the court granted summary judgment to the plaintiffs—based on available non-classified evidence—finding that the federal government had violated the statutory requirements of FISA and engaged in the unlawful surveillance of the plaintiffs.[120]

Government Contractors

The United States commonly intervenes in civil claims brought against government contractors, especially military contractors, in order to protect state secrets.[121] For example, the federal government intervened and asserted the privilege in a 2008 tort case against Raytheon brought by the estate of a deceased U.S. Navy lieutenant.

In *White v. Raytheon*, the wife of Navy combat pilot Nathan White alleged that a malfunction in Raytheon's Patriot Air & Missile Defense System was responsible for the death of her husband, who had been killed when a wayward Patriot missile struck his F/A-18 fighter plane.[122] During discovery, the United States intervened to assert the privilege through a declaration filed by the Secretary of the Army. The declaration asserted that any disclosure of "technical information regarding the design, performance, functional characteristics, and vulnerabilities, of the PATRIOT Missile system" along with any disclosure of the "rules of engagement authorized for, and military operational orders applicable" to the missile system would jeopardize national security.[123] The Secretary also provided the court with a classified supplemental declaration that further elaborated on the impact of the disclosure of information specific to the case.[124] After *in camera*

[116] *Id*. at 1206.

[117] *See*, *In re NSA Telecomms Records Litig.*, 564 F. Supp. 2d at 1119.

[118] *Id.* at 1137. *See also* 50 U.S.C. § 1801(k) (defining "aggrieved persons" under FISA).

[119] *In re NSA Telecomms. Records Litig.*, 595 F. Supp. 2d 1077, 1086 (N.D. Cal. 2009).

[120] *In re NSA Telecomms. Records Litig.*, 700 F. Supp. 2d 1182 (N.D. Cal. 2010).

[121] *See, e.g.,* McDonnell Douglas Corp. v. U.S., 567 F.3d 1340 (Fed. Cir. 2009); Crater Corp. v. Lucent Technologies, 423 F.3d 1260 (Fed. Cir. 2005); DTM Research, L.L.C. v. AT&T Corp., 245 F.3d 327 (4th Cir. 2001). The government's intervention in previously discussed extraordinary rendition and electronic surveillance cases could also be considered government contractor cases.

[122] 2008 U.S. Dist. LEXIS 102200 (D.Ma. 2008).

[123] *Id*. at 4

[124] *Id*. at 17.

review of the supplemental declaration, the district court judge held that though the plaintiff could potentially make out a *prima facie* case absent the privileged information, "I see no practical means by which Raytheon could be permitted to mount a fair defense without revealing state secrets."[125] The court thus concluded that it had "no alternative but to order the case dismissed."[126]

The Supreme Court heard oral arguments on January 18, 2011, in a separate government contractor case involving the invocation of the state secrets privilege by the federal government. The complex case pertains to the consequences of a valid claim of privilege in cases where the assertion of the privilege acts to inhibit a party's ability to defend against an action of the federal government. The combined cases of *General Dynamics v. U.S* and *Boeing v. U.S* involve a contract entered into in 1988 to design and build a new stealth capable, carrier-based A-12 Avenger.[127] By 1990, however, the contractors had fallen behind in the project by missing required deadlines, which resulted in the Navy terminating the contract in 1991.[128] As a result of the default termination, the Navy demanded that the contractors return $1.35 billion in progress payments.[129] Although the Navy terminated the contract, it is important to note that it was the contractors who initiated the present litigation with a suit under the Contract Disputes Act.[130] Filed with the U.S. Court of Federal Claims, the contractors' suit argued that a lack of cooperation and support from the Pentagon had caused the project delays—resulting in a termination of convenience, rather than a termination for default.[131] The contractors asked the court to deny the government's demand for the return of the $1.35 billion in progress payments and award the contractors certain damages. The Navy maintained that the contract was terminated due to default by the contractors.

One of the contractors' chief arguments was that by not providing the companies access to its existing stealth technology, as it had allegedly promised,[132] the Navy had breached its duty to "disclose critical information to a contractor that is necessary to prevent the contractor from unknowingly pursuing a ruinous course of action."[133] By withholding its "superior knowledge" of stealth technology, the contractors asserted, it was the Navy that had caused the default. In support of this "superior knowledge" argument, the contractors sought to obtain evidence relating to that technology. The federal government responded by invoking the state secrets privilege, arguing that "the government could not have an implied duty to reveal classified information pertinent to the A-12 program that would threaten national security."[134] Both the Court of Federal Claims and the U.S. Court of Appeals for the Federal Circuit accepted the claim of privilege and barred evidence of the Navy's stealth technology from the litigation.[135] Without the privileged

[125] *Id*.

[126] *Id*.

[127] General Dynamics Corp. v. U.S., (U.S. filed April 23, 2010).

[128] *See*, McDonnell Douglas Corp. v. U.S., 567 F.3d 1340 (Fed. Cir. 2009).

[129] McDonnell Douglas Corp. v. U.S., 323 F.3d 1006, 1011 (Fed. Cir. 2003).

[130] 41 U.S.C. § 609(a).

[131] See, McDonnell Douglas Corp. v. U.S., 35 Fed. Cl. 358 (1996). Whether the contract was terminated for "default" or "convenience" governs the recovery available to the government, including the return of the progress payments at issue in this case.

[132] Petition for Certiorari, Nos. 091298 and 09-1302 (U.S. filed April 23, 2010) at 2.

[133] McDonnell Douglas Corp. v. U.S., 323 F.3d 1006 (Fed Cir. 2003).

[134] McDonnell Douglas Corp. v. U.S., 182 F.3d 1319 (Fed. Cir. 1999).

[135] McDonnell Douglas Corp. v. U.S., 323 F.3d 1006, 1020-1024 (Fed. Cir. 2003).

evidence, the contractors' "superior knowledge" defense was rejected. Ultimately, after a series of decisions by the Court of Federal Claims and the Federal Circuit, the Federal Circuit determined that the federal government had properly terminated the contract for default.[136] The government subsequently asked for the return of the $1.35 billion in progress payments plus appropriate interest.[137]

The Supreme Court vacated and remanded the Federal Circuit's decision.[138] The Court had granted a *writ of certiorari* to consider the question of "whether the government can maintain its claim against a party when it invokes the state secrets privilege to completely deny that party a defense to a claim."[139] Thus, in holding that neither the government's claim nor the contractors' defense could be "judicially determined" in light of the valid assertion of the privilege, the Court's opinion focused solely on the consequence of the invocation of the privilege in the context of this case, rather than an examination of whether the invocation of the privilege was proper.[140] In crafting a remedy, the Court looked to *Totten* and *Tenet* in determining that the parties must be left "where they stood when they knocked on the courthouse door."[141] As the Court had previously done in refusing to enforce espionage contracts, "rather than tempt fate, we leave the parties ... where we found them the day they filed suit."[142] Thus the government could not claim the $1.35 billion in progress payments, nor could the contractor pursue its claim for damages under the theory that "superior knowledge" was withheld.[143] The Court also included language in an attempt to limit the future application of the opinion in the state secrets context, declaring: "Our decision today clarifies the consequences of [the privilege's] use only where it precludes a valid defense in Government-contracting disputes, and only where both sides have enough evidence to survive summary judgment but too many of the relevant facts remain obscured by the state-secrets privilege to enable a reliable judgment."[144]

Employment Cases

The state secrets privilege also arises in employment-related claims against national security agencies.[145] The federal government has generally argued that these cases threaten to disclose "intelligence-gathering methods or capabilities, and disruption of diplomatic relations with foreign governments."[146] *Sterling v. Tenet*, for example, involved a racial discrimination claim brought against the Director of the CIA.[147] Under the facts of the case, Jeffrey Sterling, a CIA Operations Officer, alleged that he was subject to unlawful discriminatory practices during his

[136] *See*, McDonnell Douglas Corp. v. U.S., 567 F.3d 1340 (Fed. Cir. 2009).

[137] Petitioners report that the government is demanding $2.9 billion. *Petition for Certiorari,* at 11.

[138] General Dynamics Corp. v. U.S., 563 U.S. __ 2011.

[139] General Dynamics Corp. v. U.S., 131 S. Ct. 62 (2010).

[140] General Dynamics, 563 U.S. __ at 12.

[141] *Id*. at 9.

[142] *Id*. at 7.

[143] Id. at 10-12. The court admitted that "[n]either side will be entirely happy with the resolution we reach today.") *Id*. at 10.

[144] *Id*. at 13-14.

[145] *See, e.g*., Jane Doe v. CIA, 576 F.3d 95 (2nd Cir. 2009); Edmonds v. DOJ, 323 F. Supp. 2d 65 (D.D.C. 2004).

[146] Sterling v. Tenet, 416 F.3d 338, 346 (4th Cir. 2005).

[147] *Id*.

employment at the CIA in violation of Title VII of the Civil Rights Act.[148] In response, the CIA invoked the state secrets privilege and asked the district court to dismiss the case, relying on an affidavit submitted by CIA Director George Tenet, alleging that litigating the factual issues of the claim would "compromise CIA sources and methods, threaten the safety of intelligence sources, and adversely affect foreign relations."[149] The district court granted the CIA's motion to dismiss, concluding that the state secrets privilege "barred the evidence that would be necessary to state a *prima facie* claim."[150]

On appeal, the Fourth Circuit upheld the dismissal. The court asserted that Sterling could not prove employment discrimination "without exposing at least some classified details of the covert employment that gives context to his claims."[151] In dismissing the claim, the Fourth Circuit, as it did in *El-Masri*, took a broad view of the consequences of a claim in which the "very subject matter" is itself a state secret, holding that "dismissal follows inevitably when the sum and substance of the case involves state secrets."[152]

Targeted Killing

Another recent invocation of the state secrets privilege has come in the context of the United States alleged policy on targeted killings. In *Al-Aulaqi v. Obama*, the father of a U.S.-born Yemeni cleric and Specially Designated Global Terrorist,[153] brought a claim against the federal government challenging his son's alleged inclusion on a supposed CIA target kill list. The plaintiff argued that inclusion on the CIA list meant his son was subject to a "standing order" that permits the CIA or [Joint Special Operations Command] to kill him without regard to whether lethal force was lawful under the circumstances in violation of the Fourth and Fifth Amendments of the U.S. Constitution.[154] The federal government responded by arguing that the plaintiff lacked standing to bring the claim on behalf of his son; that the claim was barred by the political question doctrine; and, in the alternative, that the claim should be dismissed under the state secrets privilege on the grounds that evidence protected by the privilege "would be necessary to litigate each of plaintiff's claims."[155]

In support of the government's claim of privilege, the Director of National Intelligence, the Director of the Central Intelligence Agency, and the Secretary of Defense submitted declarations asserting that disclosure of certain evidence connected to the case could cause "exceptionally grave damage to the national security of the United States."[156] Specifically, the government

[148] *Id*. at 341.

[149] *Id*. at 346.

[150] *Id*. at 342.

[151] *Id*. at 346. "Proof of these allegations would require inquiry into state secrets such as the operational objectives and long-term missions of different agents, the relative job performance of these agents, details of how such performance is measured, and the organizational structure of CIA intelligence gathering." *Id*. at 347.

[152] *Id*. at 347. Sterling is currently facing a criminal prosecution for alleged disclosure of national defense information. *See*, Former CIA Officer Arrested for Alleged Unauthorized Disclosure of National Defense Information and Obstruction of Justice, Jan. 6, 2011. *Available at* http://www.justice.gov/opa/pr/2011/January/11-crm-015.html.

[153] 727 F. Supp. 2d 1 (D.D.C. 2010). The government alleges that Al-Aulaqi has significant ties to terrorist groups. *Id*. at 10.

[154] *Id*. at 11.

[155] *Id*. at 53.

[156] *See*, Declaration in Support Formal Claim of State Secrets Privilege, James R. Clapper, Director of National (continued...)

asserted that the litigation could lead to the disclosure of "information needed to address whether or not, or under what circumstances, the United States may target a particular foreign terrorist organization and its senior leadership" and "criteria governing the use of lethal force."[157] In addition to the public declarations, the government also provided the court with supplemental confidential declarations for *in camera* review.

The district court ultimately dismissed the case for lack of standing and nonjusticiability under the political question doctrine without reaching the state secrets privilege claim.[158] However, the court seemed to imply that dismissal would have been warranted under the privilege. In dicta, the court noted that "given the nature of the state secrets assessment here based on careful judicial review of classified submissions to which neither plaintiff nor his counsel have access, there is little that plaintiff can offer with respect to this issue."[159]

Terrorist Screening Database

The state secrets privilege has also arisen in claims associated with the Terrorist Screening Database (TSDB). For example, a federal district court rejected the government's claim of privilege in a 2008 case entitled *Rahman v. Chertoff*. [160] *Rahman* involved a claim by a class of plaintiffs for wrongful detention stemming from repeated encounters with law enforcement while crossing the border. In an effort to prove that they were "misidentified" or "overclassified," the plaintiffs sought to obtain evidence proving their existence in the TSDB.[161] Citing national security concerns, the federal government asserted the privilege with respect to any information "tending to confirm or deny whether the plaintiffs are now or ever have been listed in the TSDB."[162] In support of the claim, the government argued that if an individual who was engaged in terrorist activity had knowledge of whether he was included on the TSDB that person may "alter the nature or extent of his terrorism-related activity, or take new precautions against surveillance ... change his appearance or acquire false identification to avoid detection ... [or] even go into hiding."[163]

The federal district court rejected the government claim of privilege and ordered that the information related to the TSDB be disclosed to plaintiffs pursuant to a protective order.[164] In reaching its decision, the court determined that the plaintiffs had made a strong showing of necessity to obtain the information and that defendants had "failed to establish that, under all the circumstances of this case, disclosure of that information would create a reasonable danger of

(...continued)

Intelligence, Al-Aulaqi v. Obama, No. 10-cv-1469 (D.D.C. 2010).

[157] *Al-Aulaqi*, 727 F. Supp. 2d at 53.

[158] *Id*. at 54.

[159] *Id*.

[160] Rahman v. Chertoff, 2008 U.S. Dist. LEXIS 32356 (N.D. Ill. 2008).

[161] *Id*. at 4.

[162] *Id*. at 17.

[163] *Id*. at 23. The government also argued that disclosure of the requested information could "reveal sources and methods" of gathering intelligence. *Id*. at 24.

[164] *Id*. at 33-34. The government had also asserted the privilege with respect o the disclosure of the contents of FBI investigative files, and agency policy and procedure documents. The court determined that the much of the FBI files were protected but that the court would require *in camera* review to separate protected information from responsive, non-protected information. The court held that the policy and procedure documents were fully protected. *Id*. at 42-47.

jeopardizing national security."[165] The court noted that the government had raised only "general concerns" and refused to accept the government's assertion that that knowledge of ones TSDB status would allow one to alter their activity so as to avoid surveillance. The court concluded that where a plaintiff has "been stopped at border entries on numerous occasions ... there is little force to the argument that revealing their TSDB status will alert [the plaintiff] for the first time that they have been under government scrutiny. [W]e expect that plaintiffs who have been repeatedly stopped when entering the border have been alerted to the fact that they are or may be of interest to the FBI or other governmental investigative authorities."[166]

Conclusion

The federal courts continue to wrestle with the precise contours of the state secrets privilege. Although the privilege has been invoked in a significant number of cases in a range of areas of the law, a variety of important questions have yet to be resolved in an authoritative manner. Unsettled issues include whether the state secrets privilege is more accurately defined as a common law evidentiary privilege or a constitutional doctrine; the degree of deference to be accorded to the executive branch during a court's independent evaluation of an assertion of the privilege; the circumstances under which a valid claim of privilege must result in outright dismissal as opposed to allowing the claim to proceed absent the privileged evidence; and, finally, the scope of *Totten* and the nature of the relationship between the *Reynolds* privilege and the *Totten* bar.

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[165] *Id*. at 34.

[166] *Id*. at 26 (internal quotation marks omitted).