

What Judges Say and Do in Deciding National Security Cases:
The Example of the State Secrets Privilege

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What Judges Say and Do in Deciding National Security Cases: The Example of the State Secrets Privilege

Jane is an American success story.¹ Born in the United States to immigrant parents from the Middle East, she and her parents embraced the American dream. She was a gifted student who received scholarships to attend the most selective schools and ultimately earned her doctorate degree in electrical engineering from MIT, followed by prestigious, government funded fellowships. Eventually, she was hired by a major government contractor to work on highly sensitive military contracts and received the necessary security clearances for that work.

Jane also has a much less accomplished younger brother, who over the years became politically active and disaffected. A few years ago, he severed ties with his family and is believed to be living outside the United States. Jane has attempted with limited success to communicate with him over the years.

One day, Jane is called to the office of her supervisor and told that her security clearance had been revoked and as a result, her employment terminated, effective immediately. Jane asks for an explanation, but is told that the Company is not in a position to provide the reasons for her termination other than her lack of the required security clearance. She assumes from what is said that the revocation of her security clearance and termination is government initiated and directed. She tries to fly home to be with her family and finds out that she is on the No Fly List and cannot fly on a commercial airline. She also learns over the next several weeks that she has been identified within the military contractor community as a security risk and becomes essentially unemployable.

¹ The facts of this hypothetical case are not taken from any past or pending case, but rather reflect aspects of cases in which the state secrets privilege has been asserted. *See, e.g., Molerio v. F.B.I.*, 749 F.2d 815 (D.C. Cir. 1984) (plaintiff, a top rated candidate for the FBI, was not hired for reasons protected under the state secrets privilege); *Doe v. C.I.A.*, 576 F.3d 95 (2d Cir. 2009) (state secrets privilege was asserted with respect to the reasons a CIA employee was “summarily separated” and “terminated immediately” from the CIA).

Jane can think of nothing in her own background or activities that would justify her treatment but assumes it has something to do with her brother. She therefore approaches the United States government about how she can prove that she is a loyal American and respond to any derogatory information it may have, all without any substantive response.

Finally, Jane files a lawsuit against the Company for wrongful discharge, defamation, and various economic torts. She serves interrogatories, document requests, and a Rule 30(b)(6) deposition notice in order to find out why she was terminated, what information the Company relied on to terminate her, and what information has been disseminated about her. The Company refuses to provide any information and seeks a protective order.

The United States intervenes and asserts the state secrets privilege with respect to any of the information or documents that Jane has requested in the lawsuit. It files a public, redacted declaration, and also an unredacted version, *ex parte* under seal, from a high ranking official of the CIA in charge of counterterrorism, stating that the requested information, if disclosed, would endanger national security as well as sources and methods pertaining to the gathering of sensitive intelligence and national security information. It also files a declaration from the Attorney General which says that she has personally reviewed the information and documents requested and agrees that its disclosure would endanger national security. The government wants the case dismissed immediately with no discovery and no further disclosure to Jane or the district court.

This paper explores how judges act when confronted with the issues raised in Jane's case and what considerations and objectives influence judges in the exercise of the considerable discretion they have in such a case.²

² Because the purpose of this paper is to analyze judicial conduct rather than the substance of legal holdings, it does not attempt to inventory the overall number of cases or judges holding any particular view, but rather surveys the range and typicality of those views. Similarly, the paper does not attempt to analyze in any significant way the many substantial and unsettled constitutional issues bound up with the state secrets privilege, except to the extent

Introduction

Since 1953, following the seminal case of *United States v. Reynolds*,³ courts have faced broad claims of executive authority in the name of national defense, including the state secrets privilege. Judges have responded in a variety of ways, from nearly complete deference to a demanding and searching inquiry. Particularly since 9/11, the debate over the proper role of the judiciary has been fueled, in part, by the assertion of such claims in an increasingly broad range of cases brought both by and against the government, either directly or against private actors involved with national defense.⁴ These cases go well beyond those pertaining strictly to military intelligence and extend to such matters as physical detentions, warrantless surveillance, restrictions on travel, FOIA requests, asset seizures, contract disputes, patent infringement claims, immigration and denaturalization proceedings, defamation claims, negligence and products liability claims, and employment discrimination claims.⁵

As a matter of procedure, the Executive Branch typically supports a state secrets claim with a sworn declaration from a high-ranking official, with varying degrees of supporting detail, identifying the categories into which the substance of the protected information falls, such as “covert operative or cooperating witness,” “sources and methods” or “sensitive ongoing investigation,” and claiming that if disclosed, the information would endanger national security.

The Executive Branch has recently given assurances that the privilege would be asserted

that they bear on judges’ approaches and dispositions in a particular case. For these reasons, the author has considered *dicta* as well as holdings, including those reversed or modified on appeal, and concurring and dissenting, as well as majority, appellate opinions.

³ 345 U.S. 1 (1953).

⁴ There were six published opinions concerning assertions of the state secrets privilege between 1954 and 1973, sixty-five published opinions between 1973 and 2001, and twenty-six between 2002 and June 2008. See Robert M. Chesney, *State Secrets and the Limits of National Security Litigation*, 75 GEO. WASH. L. REV. 1249, 1298 (2007) (Chart 1 - Published Opinions in State-Secrets Cases (1954-2006)); Michael H. Page, *Judging without the Facts: A Schematic for Reviewing State Secrets Privilege Claims*, 93 CORNELL L. REV. 1243, 1253, n.84 (2008).

⁵ See generally Laura K. Donohue, *The Shadow of State Secrets*, 159 U. PA. L. REV. 77 (2010) (providing inventory and summary of cases in which the state secrets privilege has been judicially considered); 8 J. WIGMORE, EVIDENCE §§ 2367–79 (J. McNaughton rev. 1961) (discussing the common law pertaining to the state secrets privilege); Chesney, *supra* (providing an overall history of the state secrets privilege).

sparingly and only after high level Department of Justice review,⁶ but the need for judicial oversight has been underscored by disclosures over the years that Executive Branch justifications based on national security may have been overstated or, in fact, baseless. For example, in the late 1990s, after declassification of the investigation report at issue in *Reynolds*, there has been substantial debate over whether the Executive Branch accurately represented to the judiciary the substance of that report.⁷ In May 2011, the Solicitor General of the United States “confessed error” in the *Korematsu* case on the grounds that by the time the case had reached the Supreme Court, “the solicitor general had learned of a key intelligence report that undermined the rationale behind the internment.”⁸

As discussed below, the United States Supreme Court has aggressively and repeatedly asserted the judiciary’s constitutional right and obligation to review assertions of the state secrets privilege. On the other hand, it counsels that judges should not quickly second guess the “predictive judgments” that are infused into those claims. Rather, the extent of a court’s inquiry into the factual basis for a state secrets claim should be governed by a litigant’s showing of “necessity” and “[w]here there is a strong showing of necessity, the claim should not be lightly accepted.” With that measure in mind, a judge should probe until “satisf[ied] . . . 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.”

⁶ See Memorandum from Attorney General to the Heads of Executive Departments and Agencies on Policies and Procedures Governing Invocation of the State Secrets Privilege, (Sept. 23, 2009), <http://www.justice.gov/opa/documents/state-secret-345privileges.pdf>.

⁷ See Louis Fisher, *In the Name of National Security: Unchecked Presidential Power and the Reynolds Case* (2006); see also *Herring v. United States*, 424 F.3d 384 (3d Cir. 2005) (rejecting the claim that the United States had committed “fraud on the court” through its characterization of the investigation report in *Reynolds*); *Mohamed v. Jeppensen Dataplan, Inc.*, 614 F.3d 1070 (9th Cir. 2010) (Hawkins, J., dissenting).

⁸ Neal Katyal, *Confession of Error: The Solicitor General’s Mistakes During the Japanese-American Internment Cases*, U.S. DEP’T OF JUSTICE (May 20, 2011), <http://www.justice.gov/opa/blog/confession-error-solicitor-generals-mistakes-during-japanese-american-internment-cases>.

Once a judge is “satisfied” that information is covered by the state secrets privilege, “even the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that military secrets are at stake;” and a judge must then decide whether the claims can be adjudicated. If the “subject matter” of the claim itself is a state secret, or the plaintiff or defendant is unable to prove its case or defenses without the privileged information or risking disclosure of privileged information, a judge should dismiss the claim.⁹

The Supreme Court’s formulation of the state secrets privilege requires a judge in all instances to consider the following core issues: (1) whether the privilege is properly invoked procedurally; (2) the level of inquiry into the basis for any privilege; and (3) the consequences to the litigation as a result of a recognized state secrets privilege. But *Reynolds* and subsequent Supreme Court cases leave open a wide range of issues. How does a judge decide whether there is a “reasonable danger” associated with a disclosure of information or whether military matters “should not be divulged,” under any circumstances or protective measures, even at the expense of a substantial meritorious claim? What would be an acceptable level of risk in order to allow for an adjudication of a claim? How direct or immediate, or conversely, how remote, speculative, or attenuated, must a risk be before it falls outside the bounds of a “reasonable” danger? To what extent and in what fashion may a litigant’s counsel participate in the process of evaluating the invocation of the privilege? How are a judge’s duty of inquiry and a litigant’s right of access to the courts to be reconciled or accommodated with the “absolute” nature of privileged information, no matter how marginally protected? Are there alternatives to outright dismissal that would adequately protect privileged information while allowing the use of non-privileged information, such as those procedures used in criminal cases under the Classified

⁹ *Reynolds*, 345 U.S. at 10-11.

Information Procedures Act, 18 U.S.C. App. III. §§ 1-16 (“CIPA”), including summaries, redactions, and the use of cleared counsel?¹⁰

As a practical matter, the Supreme Court’s pronouncements, and the conflicting values reflected in them, have essentially sanctioned an inquiry into assertions of the state secrets privilege as much or as little as a judge deems appropriate. It is therefore not surprising that, as the Supreme Court expected, the lower courts have dealt with these issues in a variety of ways. Some judges read *Reynolds* and other Supreme Court authority as restricting narrowly their ability to look behind the assertion of the privilege. They emphasize that while there can be no abdication of judicial oversight, a trial judge, in the first instance, should accord considerable deference to Executive Branch judgments and recommendations. They see courts “ill-equipped to become steeped in foreign intelligence matters” and the Executive Branch as occupying “a position superior to that of the courts in evaluating the consequences of a release of sensitive information.”¹¹ They emphasize the *Reynolds* principle that “even the most compelling necessity” cannot overcome the obligation to protect state secrets information.¹² They rely on statutory mandates to bolster claims of state secrets privilege,¹³ and have shown no disposition to find alternatives to dismissal when privileged subject matter is centrally involved in a claim.¹⁴

Other judges find in *Reynolds* not only wide discretion to probe into the factual basis for the privilege but also an obligation to engage in a more intrusive inquiry. These judges

¹⁰ For an overview of how judges have handled classified information in national security cases under CIPA and otherwise, see Robert Timothy Reagan, Fed. Judicial Ctr., National Security Case Studies: Specialty Case-Management Challenges (June 25, 2013), available at [http://www.fjc.gov/public/pdf.nsf/lookup/TS130625.pdf/\\$file/TS130625.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/TS130625.pdf/$file/TS130625.pdf).

¹¹ *Reynolds*, 345 U.S. at 10-11.

¹² See, e.g., *Ellsberg*, 709 F.2d at 57 (“No competing public or private interest can be advanced to compel disclosure.”); *In re United States*, 872 F.2d 472, 476 (noting that “the ‘balance has already been struck’ in favor of protecting secrets of state over the interests of a particular litigant.”); *Tilden v. Tenet*, 140 F. Supp. 2d 623, 626 (E.D. Va. 2000) (“[i]t is not for a court to second-guess the assertion of privilege”); see also *Halkin v. Helms*, 598 F.2d 1, 14 (D.C. Cir. 1978) (*Halkin I*); *Halkin v. Helms*, 690 F.2d 977, 990 (D.C. Cir. 1982) (*Halkin II*); *Jabara v. Kelley*, 75 F.R.D. 475, 484 (E.D. Mich. 1977).

¹³ See, e.g., *Tilden*, 140 F. Supp. 2d at 626 (E.D. Va. 2000), citing current 50 U.S.C. §§ 3025, 3057.

¹⁴ See, e.g., *El-Masri v. United States*, 437 F. Supp. 2d 530 (E.D. Va. 2006).

emphasize that the privilege is strictly limited to material necessary to prevent injury to national security.¹⁵ Absent a clear facial showing that the privilege necessarily applies, they see the need to review the underlying documents and whenever possible, disentangle privileged from non-privileged information in order to allow for the use of the latter, including non-privileged classified information in certain circumstances.¹⁶ They consider the competing interests at stake in assessing the effect to be given the privilege on the litigation and will look for alternatives to dismissal through procedures intended to preserve the adversarial process as much as possible.¹⁷

In short, judges have been able to find authority for almost any result; and the purpose of this paper is to examine how lower court judges have applied the principles and considerations laid down by the Supreme Court concerning the state secrets privilege. Towards that end, the paper assesses in Part I the jurisprudence that lower court judges have formulated based on those principles and considerations, as it appears in published opinions.¹⁸ In Part II, the paper considers how judges would actually exercise their broad discretion under that jurisprudence, as reflected in interviews with thirty-one federal district and circuit court judges who have been involved in varying degrees in national security-related cases, and state secrets cases in particular. Part II also considers whether the jurisprudence formulated by lower court judges provides any uniformity in approach or any real constraints on how judges go about dealing with state secrets claims. It also examines briefly whether any particular background or experiences appear to correlate with any particular focus or disposition on the part of the interviewed judges.

¹⁵ See, e.g., *Ellsberg v. Mitchell*, 709 F.2d 51, 57 (D.C. Cir. 1983).

¹⁶ *Id.*

¹⁷ See, e.g., *Horn v. Huddle*, 647 F. Supp. 2d 55, 59-60 (D.D.C. 2009).

¹⁸ “Published opinion,” as used here, refers to any decision accessible online or through the national reporter systems, rather than only those having precedential value under the rules of a particular Circuit. The paper has not based its analysis and discussion on other available sources reflecting judicial dispositions. See, e.g., Stephen Reinhardt, *The Judicial Role in National Security*, 86 BOSTON U. L. REV. 1309; T.S. Ellis, *National Security Trials: A Judge’s Perspective*, 90 VA. L. REV. 1607 (2013); Richard A. Posner, *Not a Suicide Pact: The Constitution in a Time of National Emergency*, New York: Oxford University Press, Inc. (2006).

Part I: Decided Cases¹⁹

A. The State Secrets Privilege from *Burr* through *Reynolds*.

The first recorded judicial consideration in an American court of what could be called the states secrets privilege appears to have occurred during the criminal trial of Aaron Burr on charges of treason and lesser offenses in 1807.²⁰ In that case, Chief Justice Marshall, presiding as a trial judge, considered Burr's request that a subpoena *duces tecum* be issued to President Jefferson for the original of a letter regarding Burr to the President from General Wilkinson, one of Burr's principle accusers. The government objected to the issuance of the subpoena on the grounds, among others, that the subpoenaed letter "might contain state secrets, which could not be divulged without endangering the national safety,"²¹ that the court did not have the "judicial competence" to subpoena the President, the "Chief Magistrate," and that public disclosure of the letter would disclose matters "which ought not to be disclosed."²² Marshall issued the subpoena over objections. Expressing sentiments that have animated all subsequent debates on executive privileges, Marshall recognized that the case presented "a delicate question" that balanced Burr's need for the information against whether "the disclosure be unpleasant to the executive."²³ But given Burr's need for the letter, Justice Marshall concluded that refusing to require production of

¹⁹ Approximately 750 federal cases have been found that reference state secrets or the state secrets privilege, approximately 150 of which have a substantive discussion useful to this paper. As reflected in the paper's case citations, despite the large number of cases in which judges have discussed the state secrets privilege, the range of attitudes and dispositions are reflected in a relatively small number of cases, and the paper concentrates its citations to those that have a particularly detailed or animated discussion.

²⁰ The more general "Executive privilege" appears to have been first alluded to in *Marbury v. Madison*, 5 U.S. (Cranch) 137, 144-45 (1803). At the trial in that case, the then Attorney General, who at the time of the events in question was acting Secretary of State, asserted that "he was not bound and ought not to answer [questions put to him], as to any facts which came officially to his knowledge while acting as secretary of state." Without ruling specifically on that claim, Chief Justice Marshall observed that the witness was obligated to disclose facts that he learned in his official capacity but that "if he thought that anything was communicated to him in confidence [by President Adams] he was not bound to disclose it."

²¹ *United States v. Burr*, 25 F. Cas. 30, 37 (C.C.D. Va. 1807).

²² *Id.*

²³ *Id.*

the letter “would tarnish the reputation of the court which had given its sanction to its being withheld.”²⁴

Seventy-one years later, in *Totten v. United States*, a civil breach of contract action, the Supreme Court as a judicial body first considered the state secrets privilege. In its short, four paragraph opinion, the Court laid down the principle, much recited in later cases, that “public policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential, and respecting which it will not allow the confidence to be violated.”²⁵ The stated rationale for the decision was not so much that the subject matter of the dispute (the espionage contract entered into with President Lincoln), if disclosed, would endanger national security (in fact, the nature and terms of the secret contract were fully disclosed),²⁶ but rather that the parties had, in effect, contractually agreed to keep secret the contract and the source of payment under the contract, such that it would be a breach of contract to allow one party to enforce the contract through the public tribunals.²⁷ As discussed below, subsequent Supreme Court cases have substantially recast the original holding of *Totten* into an expansive doctrine of non-justiciability based on subject matter rather than any implicit contractual agreement.²⁸

Following *Totten*, in fairly conclusory fashion and without extended analysis, a handful of lower courts considered what was in substance a state secrets privilege, typically described as

²⁴ *Id.*

²⁵ 92 U.S. 105, 107 (U.S. 1875).

²⁶ The contract at issue was one entered into with William A. Lloyd in July 1861 to spy on behalf of the United States and “report the facts to the president; for which services he was to be paid \$200 a month.” *Totten*, 92 U.S. at 106.

²⁷ *Id.* at 107 (“Much greater reason exists for the application of the principle [of non-disclosure applicable to other privileges] to cases of contract for secret services with the government, as the existence of a contract of that kind is itself a fact not to be disclosed”).

²⁸ See *Tenet v. Doe*, 544 U.S. 1 (2005).

a “military or national security privilege.”²⁹ Following *Totten*, and before *Reynolds*, the Supreme Court also touched upon basic separation of powers principles that have shaped its state secrets jurisprudence.³⁰ However, the Supreme Court did not again consider the state secrets privilege explicitly until 1953, in *Reynolds*, eighty-two years after *Totten*, in the midst of the Cold War.

In *Reynolds*, the plaintiffs, widows of civilian employees killed in the crash of a B-29 bomber that was “testing secret electric equipment,” brought an action against the Air Force under the Federal Tort Claims Act. They sought discovery of an Air Force investigative report on the accident and statements provided by surviving members of the airplane’s crew. The district court ordered the government to produce the documents for its review. The government refused; and the district court entered judgment against the government on the issue of liability essentially as a Rule 37 discovery sanction.³¹ The U.S. Court of Appeals for the Third Circuit affirmed.³² As seen by the Third Circuit, the critical fact was that the Federal Tort Claims Act waived sovereign immunity; and for that reason the public interest “must yield to what Congress evidently regarded as the greater public interest involved in seeing that justice is done to persons

²⁹ See, e.g., *Firth Sterling Steel Co. v. Bethlehem Steel Co.*, 199 F. 353 (E.D. Pa. 1912) (involving weapons blueprints); *Cresmer v. United States*, 9 F.R.D. 203 (E.D.N.Y. 1949) (holding that Navy Board of Investigation reports were discoverable since they did not contain military secrets). See also William V. Sanford, *Evidentiary Privileges Against the Production of Data Within the Control of Executive Departments*, 3 VAND. L. REV. 73 (1950) (cited by a number of cases, including the Supreme Court in *Reynolds*, in which the author references cases dealing with the privilege and offers an overall approach to the privilege); *United States v. Coplton*, 185 F.2d 629, 638 (2d Cir. 1950) (Hand, J.) (“[T]here may be evidence—‘state secrets’—to divulge which will imperil ‘national security’; and which the Government cannot, and should not, be required to divulge. *Salus rei publicae suprema lex*. The immunity from disclosure of the names or statements of informers is an instance of the same doctrine. This privilege will often impose a grievous hardship, for it may deprive parties to civil actions, or even to criminal prosecutions, of power to assert their rights or to defend themselves. That is a consequence of any evidentiary privilege. It is, however, one thing to allow the privileged person to suppress the evidence, and, *toto coelo*, another thing to allow him to fill a gap in his own evidence by recourse to what he suppresses.”).

³⁰ See *Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948) (“The President, both as Commander-in-Chief and as the Nation’s organ for foreign affairs, has available intelligence services whose reports neither are nor ought to be published to the world. It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret.”); see also *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

³¹ *Reynolds*, 345 U.S. at 5-6.

³² *United States v. Reynolds*, 192 F.2d 987 (3d Cir. 1951).

injured by governmental operations.”³³ In that regard, it concluded that “a claim of privilege against disclosing evidence relevant to the issues in a pending lawsuit 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 [district] judge for his examination.”³⁴ The Court of Appeals also warned that the existence of the wide-ranging privilege the government advanced facilitated the government’s keeping information secret for the sole purpose of avoiding its own embarrassment or liability.³⁵ Overall, it concluded that the district court judge had acted properly when it “directed that the documents in question be produced for his personal examination so that he might determine whether all or any part of the documents contain . . . matters of a confidential nature.”³⁶ It rejected the contention that the claim of privilege was exempt from judicial review, but noted that “such examination must obviously be *ex parte* and *in camera* if the privilege is not to be lost in its assertion.”³⁷

The Supreme Court reversed the Third Circuit’s affirmance of the district court, and in the process, settled certain issues and adopted for the first time a methodology for assessing the “well-established” evidentiary privilege “against revealing military secrets,”³⁸ albeit one with which “[j]udicial experience . . . has been limited.”³⁹ Like the Third Circuit, it rejected the contention that “the executive department heads have the power to withhold any document in their custody from judicial review if they deem it to be in the public interest,”⁴⁰ recognizing that in light of the competing interests and “[r]egardless of how it is articulated, some . . . formula of

³³ *Id.* at 994.

³⁴ *Id.* at 997.

³⁵ *Id.* at 995.

³⁶ *Id.* at 996.

³⁷ *Id.* at 997.

³⁸ *Reynolds*, 345 U.S. at 6-7.

³⁹ *Id.* at 7.

⁴⁰ *Id.* at 6.

compromise must be applied here.”⁴¹ It also rejected any notion that the state secrets privilege is to be assessed as it would within the context of a criminal case, since unlike a criminal case, “the Government is not the moving party and but it is a defendant only on terms to which it as consented.”⁴²

As to methodology, the *Reynolds* court first confirmed that as a matter of procedure the state secrets privilege must be asserted by the government, not a private party, acting through the head of the department having control over the subject matter, after personal consideration.⁴³ The Court also endorsed the view that the more substantial and plausible the government’s contentions concerning the danger to national security, the more judicial deference should be extended to the government’s assessments concerning the necessary scope of the claim.⁴⁴ However, the Court underscored the judiciary’s institutional role and that “[j]udicial control over the evidence in a case cannot be abdicated to the caprice of executive officers.”⁴⁵ For these reasons, the trial court must determine whether the circumstances are appropriate for the claim of privilege without forcing a disclosure of the information at issue.⁴⁶ In making that assessment, a trial court may not “automatically require a disclosure to the judge before the claim of privilege will be accepted in any case.”⁴⁷ Rather, the appropriate degree of inquiry will vary according to the needs of a litigant. “In each case, the showing of necessity [i.e., the importance of the documents or information to the plaintiff’s case] which is made will determine how far the court should probe and satisfying itself that the occasion for invoking the privilege is appropriate.”⁴⁸

⁴¹ *Id.* at 9.

⁴² *Id.* at 12.

⁴³ *Id.* at 7-8.

⁴⁴ *Id.* at 9.

⁴⁵ *Id.* at 9-10 (likening the state secrets privilege and the Fifth Amendment privilege in terms of the balance struck concerning the judge’s role in assessing the privilege).

⁴⁶ *Id.*

⁴⁷ *Id.* at 10.

⁴⁸ *Id.*

Where there is a strong showing of necessity, the claim of privilege should not be “lightly accepted.”⁴⁹ But the national security interest trumps any private interest once the state secrets privilege is recognized. “Even the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that military secrets are at stake.”⁵⁰ In the end, the Court laid down the fundamental, albeit amorphous, principle that should govern all judicial involvement: the district court must be “satisfied 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 interests of national security should not be divulged.”⁵¹ If the district court is satisfied that there is such a danger, it “should not jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence, even by the judge alone, in chambers.”⁵²

Ultimately, the Supreme Court concluded on the facts presented that an *in camera* examination of the investigative report was not necessary to determine that the privilege had been properly invoked.⁵³ It also concluded that the Air Force’s offer to furnish for deposition several surviving members of the crashed airplane’s crew was an acceptable “alternative” to disclosure of the investigation report, that the offer “should have been accepted” and that the offer made the plaintiffs’ need for the documents more “dubious” and presumably less necessary.⁵⁴ The Supreme Court did not dismiss the case, however, but remanded the case to the district court for further consideration and proceedings.⁵⁵ Justices Black, Frankfurter, and Jackson dissented “substantially for the reasons” stated in the Third Circuit’s opinion.⁵⁶

⁴⁹ *Id.* at 11.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.* (“[T]here was certainly a sufficient showing of privilege to cut off further demand for the document on the showing of necessity for its compulsion that had been made”).

⁵⁴ *Id.*

⁵⁵ The case was settled within months of its remand.

⁵⁶ *Id.*

B. The state secrets privilege since *Reynolds*.

Since *Reynolds*, the Supreme Court has issued numerous pronouncements concerning the state secrets privilege, as well as the principles underlying the privilege. For example, in *Department of the Navy v. Egan*, the Supreme Court recognized that “[p]redictive judgments” about the possible “compromise [of] some sensitive information” involve the determination of “what constitutes acceptable margin of error in assessing the potential risk” and thus “must be made by those with necessary experience in protecting classified information.”⁵⁷ In *United States v. Nixon*, the Court observed that courts should afford the “utmost deference” to executive assertions of the privilege for military diplomatic secrets, and judicial review of such a claim of privilege is necessarily narrow.⁵⁸ In *C.I.A. v. Sims*, the Court, recognizing “the harsh realities of the day,” concluded that Congress intended through legislation that the CIA have “sweeping powers to protect its ‘intelligence sources and methods’” and indeed, “all sources of intelligence that provide, or are engaged to provide, information the agency needs to perform its statutory duties with respect to foreign intelligence.”⁵⁹ It explained that intelligence gathering agencies are “familiar with ‘the whole picture,’ as judges are not” and “are worthy of great deference.” It viewed judges as “ill-suited to make the complex political, historical, and psychological judgments” about whether disclosures pose an unacceptable risk to an individual or more generally, the nation and observed that “[e]ven a small chance that some court will order disclosure of a source’s identity could well impair intelligence gathering and cause sources to ‘close up like a clam.’”⁶⁰ Moreover, “it is conceivable that the mere explanation of why information must be withheld can convey valuable information to a foreign intelligence agency .

⁵⁷ 484 U.S. 518, 528-29 (1958).

⁵⁸ 418 US 683, 710 (1974).

⁵⁹ 471 U.S. 159, 169-70, 174 (1985) (internal quotations omitted).

⁶⁰ *Id.* at 176.

. . . and it is the responsibility of [the executive branch], not that of the judiciary, to weigh the variety of complex and subtle factors in determining whether [to disclose sensitive information].”⁶¹

In *Weinberger v. Catholic Action of Hawaii/Peace Education Project*, the Court announced *Totten*’s “more sweeping holding”⁶² that subject matter other than secret espionage contracts could be “beyond judicial scrutiny” where “[d]ue to national security reasons” the United States could ““neither admit nor deny’ the fact that was central to the suit.”⁶³ In *Tenet v. Doe*, the Court stated explicitly that the *Totten* subject matter privilege was not simply a “contract rule,” which had been “reduced to an example of the state secrets privilege” discussed in *Reynolds*.⁶⁴ Nor did “the balancing of the state secrets evidentiary principle” discussed in *Reynolds* replace “the categorical *Totten* bar.”⁶⁵ Rather, the *Totten* privilege’s “unique and categorical nature” is intended to preclude judicial review in order to provide the “absolute protection” not afforded through the *Reynolds* privilege and “the frequent use of in camera proceedings.”⁶⁶ For these reasons, a case subject to the *Totten* bar should 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.”⁶⁷ Indeed, it would be “inconsistent” with the nature of the *Totten* privilege to “first allow discovery or other proceedings” before dismissal.⁶⁸ The Court observed in that regard that “[f]orcing the Government to litigate these claims would . . . make it vulnerable to “graymail . . . and requiring the Government to invoke the privilege on a

⁶¹ *Id.* at 180.

⁶² *Tenet v. Doe*, 544 U.S. 1, 9 (describing its ruling in *Weinberger*).

⁶³ 454 U.S. 139, 146 (1981).

⁶⁴ *Tenet v. Doe*, 544 U.S. 1.

⁶⁵ *Id.* at 9-10.

⁶⁶ *Id.* at 11; *see also In re Sealed Case*, 494 F.3d 139, 151 (D.C. Cir. 2007) (summarizing *Tenet v. Doe*).

⁶⁷ *Id.* at 9 (quoting *Reynolds*, 345 U.S. at 11 n.26) (internal quotation marks omitted).

⁶⁸ *Id.* at 7 n.4, 8, 11.

case-by-case basis risks the perception that it is either confirming or denying relationships with individual plaintiffs.”⁶⁹

The Court also made clear in *Tenet v. Doe* that *Totten*'s scope is limited by its core concern: “preventing the existence of the plaintiff’s relationship with the Government from being revealed.”⁷⁰ For that reason, the *Totten* bar would not apply where the relationship is acknowledged,⁷¹ but only where “success depends upon the existence of [a] secret espionage relationship with the government.”⁷² Justices Stevens and Ginsburg allowed that “[t]here may be situations in which the national interest would be well served by a rule that permitted similar commitments [as in *Totten*] made by less senior officers to be enforced in court, subject to procedures designed to protect sensitive information.”⁷³ In *General Dynamics Corp. v. United States*, the Court again stated that the “public policy” of non-justiciability imbedded in *Totten* is not limited to secret espionage cases,⁷⁴ and even limited, restrictive disclosures of sensitive information presents risks to national security.⁷⁵ Nevertheless, the Court counseled that a court’s “intervention” because of the privilege should not unfairly or disproportionately disable or empower one party over the other.⁷⁶

As discussed below, lower court judges have used these pronouncements to achieve a range of results. But in assessing assertions of the state secrets privilege, judges inevitably face three general, overarching issues: (1) the scope and nature of the privilege; (2) the appropriate

⁶⁹ *Id.* at 11 (defining “graymail” as “individual lawsuits brought to induce the CIA to settle a case (or prevent its filing) out of fear that any effort to litigate the action would reveal classified information that may undermine ongoing covert operations.”)

⁷⁰ *Id.* at 10.

⁷¹ *Id.*

⁷² *Id.* at 8.

⁷³ *Id.* at 11.

⁷⁴ 563 U.S. 478 (2011).

⁷⁵ *Id.* at 1904 (noting that disclosure of such information to a limited number of cleared lawyers nevertheless led to several unauthorized disclosures of military secrets).

⁷⁶ *Id.* at 1907.

level of inquiry sufficient to determine the merits of the privilege’s assertion; and (3) the consequences on the litigation that result from a valid assertion of the privilege, and when during the proceedings those consequences should be definitively imposed. In determining these issues, judges confront what some have characterized as “serious problems” arising out of (1) the government’s inability to demonstrate publicly the likelihood of harm without revealing the very information sought to be shielded; (2) the inherent dangers associated with the procedures used to allow disclosures of any kind for the purposes of assessing the privilege; and (3) the judiciary’s limited institutional expertise and competence to assess the probability that a particular disclosure will have an adverse effect on national security.⁷⁷ Appellate judges have also had to consider the standard by which to review trial court judgments concerning the state secrets privilege, with some open issues on that issue.⁷⁸

1. The nature and scope of the Privilege

The *Totten* and *Reynolds* privileges are distinct privileges, serving different functions.⁷⁹ The *Totten* privilege is generally viewed as a doctrine of non-justiciability, finding its reflection in the separation of powers and the need to provide “absolute protection” to certain subject matter.⁸⁰ The *Reynolds* privilege is an evidentiary privilege applicable to specific information. Nevertheless, judges have not always precisely distinguished between the two privileges when

⁷⁷ See *Ellsberg*, 709 F.2d at 58 n.31 (and cases cited therein).

⁷⁸ See *Sterling*, 416 F.3d at 342 (adopting *de novo* review for “legal determinations involving state secrets” including a decision to grant dismissal of the complaint on state secrets grounds); *El-Masri v. United States*, 479 F.3d 296, 302 (4th Cir. 2007) (same); *Jeppesen DataPlan*, 614 F. 3d 1070 (reviewing *ex parte, in camera* documents for the first time on appeal); *Halkin II*, 690 F.2d at 991 (abuse of discretion standard applied to a district court’s determination that sworn declarations are sufficient to establish reasonable danger that disclosure would cause injury); *Doe v. C.I.A.*, 567 F.3d 95, 100-01(2d Cir. 2009) (finding it unnecessary to determine whether abuse of discretion or *de novo* standard applies to the procedures used to consider the invocation of the state secrets privilege).

⁷⁹ *Tenet v. Doe*, 544 U.S. at 2.

⁸⁰ *Id.* at 11.

the core subject matter of the litigation is infused with state secrets.⁸¹ Judges also appear to accept, at least in principle and at least as to the *Reynolds* privilege, that the state secrets privilege, like other privileges, does not define the parties' "substantive rights."⁸²

Though never precisely clear as to its constitutional provenance, judges see the state secrets privilege performing "a function of constitutional significance"⁸³ and have extended to it both a status and a consequence far beyond other privileges.⁸⁴ Through the enactment of statutory exemptions from otherwise mandatory or permissible disclosures, Congress has effectively recognized the privilege for certain types of national security information that to a large extent coincides with the scope of these judicially created privileges.⁸⁵ Judges also accept

⁸¹ See *Zuckerbraun v. Gen. Dynamics Corp.*, 935 F.2d 544, 547 (2d Cir. 1991) (citing both *Reynolds* and *Totten* as authority for its dismissal of the case because "[t]he very subject matter of this action is . . . a state secret"); See also *El-Masri v. United States*, 479 F.3d 296 (4th Cir. 2007); cf. *Jeppensen DataPlan*, 614 F.3d 1070 (rejecting the "conflation" of the *Reynolds* and the *Totten* privilege in *El-Masri*).

⁸² *In re Sealed Case*, 494 F.3d 139, 143 (D.C. Cir. 2007) ("The federal rules are premised on a distinction between substantive claims and the evidence used to prove the claims. Although evidentiary matters are governed by the rules, they cannot modify litigants' substantive rights as to either constitutional or statutory matters. Thus, so long as the state secrets privilege operates as a rule of evidence, and not as a means to modify [plaintiff's] substantive constitutional rights, we hold that it may be invoked by the United States in a *Bivens* action") (internal citations omitted).

⁸³ *El Masri*, 479 F.3d at 303.

⁸⁴ See *Reynolds*, 345 U.S. at 6 (the state secrets privilege's "constitutional overtones" were "unnecessary to pass upon, there being a narrower [statutory] ground for decision."); *United States v. Nixon*, 418 U.S. 683, 710-11 (unlike other, qualified executive privileges, the state secrets privilege concerns "areas of Art[icle] II duties [in which] the courts have traditionally shown the utmost deference to Presidential responsibilities" and to the extent that it "relates to the effective discharge of a President's powers, it is constitutionally based."); *Halkin I*, 598 F.2d at 7 (the state secrets privilege "head[s] the list" of evidentiary privileges); *El-Masri*, 437 F. Supp. 2d at 535 ("while the state secrets privilege is commonly referred to as a 'evidentiary' in nature, it is in fact a privilege of the highest dignity and significance[]" and is ". . . derived from the President's constitutional authority over the conduct of this country's diplomatic and military affairs and therefore belongs exclusively to the Executive Branch."), *aff'd* 479 F.3d 296, 304 (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"); *Nat'l Lawyers Guild v. Attorney Gen.*, 96 F.R.D. 390, 396 n.10 (S.D.N.Y. 1982) ("The governmental privileges other than that for state secrets are qualified rather than absolute. They may be overcome by a litigant's showing of necessity . . . [that] outweigh[s] the governmental interest favoring secrecy") (internal citations omitted). *But see Gen. Dynamics Corp.*, 563 U.S. at 5 (observing that the state secrets privilege's "[w]ell-established pedigree" is in the law of evidence) (citing *Reynolds*).

⁸⁵ See The Freedom of Information Act, Exemption 1, 5 U.S.C. § 552(b)(1) (enabling an agency to refrain from disclosing information that is "specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and . . . [is] in fact properly classified pursuant to such Executive order."); The Invention Secrecy Act, 35 U.S.C. §§ 181-88 (providing for information in patent applications to be kept secret when secrecy is deemed to be in the national interest and prevents the inventor from securing his patent until the secrecy order is lifted, subject to an inventor's right to compensation for the United States' use of a device that could not be patented as a result of the Act); The National Security Act of 1947,

that the state secrets privilege is not limited to statutory claims, such as the FTCA claim considered in *Reynolds*, but extends as well to constitutional tort claims, as in a *Bivens* action.⁸⁶

In assessing the nature and scope of the privilege, judges acknowledge, as the *Reynolds* Court explicitly noted, that the “compromise” reflected in the state secrets privilege impacts the constitutional values imbedded in a transparent, adversarial process.⁸⁷ From that perspective, some judges see the privilege potentially operating to undermine the public’s perception of the judiciary’s legitimacy and independence.⁸⁸ Nevertheless, judges generally reject Due Process clause and First Amendment challenges based on claims that a civil litigant has the same due

currently codified at 50 U.S.C. §§ 3021 *et seq.*, (mandating that the director of National Intelligence “shall protect intelligence sources and methods from unauthorized disclosure”); and the Central intelligence Agency Act of 1949, also codified at 50 U.S.C. §§ 3021 *et seq.* See also Executive Order on National Security Information, No. 12356, 47 FR 14874, issued on April 2, 1982, becoming effective on August 1, 1982 (pertaining to FOIA Exemption 1); *Halpern v. United States*, 258 F.2d 36 (2d Cir. 1958) (a court is authorized to conduct *in camera* trial proceedings under the Invention Secrecy Act).

⁸⁶ See, e.g., *In re Sealed Case*, 494 F.3d at 143-44 (“The distinction . . . between constitutional claims and those based on statutory grounds means that *Reynolds*’ holding on statutory grounds does not control. Nonetheless, it hardly follows that the privilege evaporates in the presence of an alleged constitutional violation . . . Although the rules of evidence must yield when they offend the constitutional trial rights of litigants, [plaintiff] identifies no trial rights that is being abridged. In [plaintiff]’s view, it is the constitutional nature of his underlying claim that entitles him to escape the binds of the federal rules. We can find no support for this position, which would essentially allow any constitutional claim to repress any rule that withholds evidence for reasons other than relevance”) (internal citations and quotations omitted).

⁸⁷ See e.g., *Heine v. Raus*, 399 F.2d 785, 791 (4th Cir. 1968) (“Disclosures in camera are inconsistent with the normal rights of a plaintiff of inquiry and cross-examination”); *Doe v. C.I.A.*, 576 F. 3d 95, 107 (2d Cir. 2009) (“[t]he [district] court, pursuant to *Reynolds*, dispensed with two fundamental protections for litigants, courts, and the public. First, the district court and the parties lost the benefit of an adversarial process, which may have informed and sharpened the judicial inquiry in which would have assured each litigant a fair chance to explain, complain, and otherwise be heard . . . Second, they lost the value of open proceedings and judgments based on public evidence”).

⁸⁸ See, e.g., *Doe v. C.I.A.*, 576 F. 3d 95, 107 (2d Cir. 2009) citing *United States v. Aref*, 533 F. 3d 72 at 107-08. (2d Cir. 2008) (“transparency is pivotal to public perception of the judiciary’s legitimacy and independence. The political branches of government claim legitimacy by election, judges by reason. Any step that withdraws an element of the judicial process from public view makes the ensuing decision look more like fiat and requires rigorous justification . . . This is especially so when a judicial decision accedes to requests of the co-ordinate branch, lest ignorance of the basis for the decision will cause the public to doubt that complete independence of the courts of justice [which] is peculiarly essential in a limited Constitution); *Richmond Newspapers Inc. v. Va.*, 448 U.S 555 (1980) (“without publicity, all other checks are insufficient: in comparison of publicity, all other checks are of small account . . . Whatever other institutions might present themselves in the character of checks, would be found to operate rather as cloaks and checks; as cloaks in reality, as checks only in appearance.” (quoting 1 J. Bentham, RATIONALE OF JUDICIAL EVIDENCE 524 (1927))).

process rights as a criminal defendant to present all available evidence⁸⁹ or that the state secrets privilege violates a plaintiff's constitutional right of access to the courts, counsel, or information needed to respond to an assertion of the privilege.⁹⁰ In short, regardless of how a judge views competing constitutional values, in the end, national security considerations takes precedence over any other consideration.⁹¹

Judges have also taken a narrow view as far as what public disclosures are sufficient to remove the veil of secrecy over certain information.⁹² Likewise, judges have shown little

⁸⁹ See, e.g., *McDonnell Douglas Corp. v. United States*, 323 F.3d 1006, 1023 (Fed. Cir. 2003) (observing that equating the rights of civil and criminal defendants “essentially conflate[s] rules governing criminal and civil proceedings, elevating the civil contract dispute into the constitutional territory of a criminal prosecution” and citing *Reynolds*' pronouncement that “such rationale has no application in a civil forum where the government is not the moving party, but is a defendant only on terms to which it has consented.” 345 U.S. at 12).

⁹⁰ See *Doe v. C.I.A.*, 576 F.3d 95, 100 (2d Cir. 2009) (rejecting that plaintiff had a “right to submit classified material to the Court in connection with the Government's claim of the state secrets privilege” and a decision on the state secrets privilege was “ripe” despite the absence of counter submissions by the plaintiffs).

⁹¹ See *Heine*, 399 F.2d at 791 (“[I]f the two interests [*in camera* disclosure and a litigant's rights] cannot be reconciled, the interest of the individual litigant must give way to the government's privilege against disclosure of its secrets of state.”); *Bareford v. Gen. Dynamics Corp.*, 973 F.2d 1138, 1144 (5th Cir. 1992) (“the results are harsh in either direction and the state secret [*sic*] doctrine finds the greater public good—ultimately the less harsh remedy—to be dismissal”); *El-Masri*, 479 F.3d at 313 (observing that dismissal in a state secrets cases occurs because plaintiff's personal interest in pursuing his civil claim is subordinated to the collective interest in national security); see also *Restis v. Am. Coalition Against Nuclear Iran, Inc.*, No. 13 Civ. 5032, 2015 WL 1344479 (S.D.N.Y. Mar. 23, 2015) (where, for all its stated concerns over the adversarial process, the Court concluded that the *ex parte, in camera* proceedings occurred for “good and sufficient reason: to ensure that legitimate state secrets were not lost in the process . . .” and that the plaintiffs' rights of access to the courts were not compromised by the district court's refusal to require that the CIA facilitate their use of information covered by an assertion of the state secrets privilege); *El-Masri*, 437 F. Supp. 2d at 539-41 (“while dismissal of the complaint deprives El-Masri of an American judicial forum for vindicating his claims, well-established and controlling legal principles require that in the present circumstances, El-Masri's private interests must give way to the national interest in preserving state secrets [and] . . . [i]n times of war, our country, chiefly through the Executive Branch, must often take exceptional steps to thwart the enemy. Of course, reasonable and patriotic Americans are still free to disagree about the propriety and efficacy of those exceptional steps. But what this decision holds is that these steps are not proper grist for the judicial mill where, as here, state secrets are at the center of the suit and the privileges validly invoked”); *Spock v. United States*, 464 F. Supp. 510, 518-20 (S.D.N.Y. 1978) (national security interests take precedence but premature to deny plaintiff access to the courts at the pleadings stage in light of the limited state secrets issue presented).

⁹² See, e.g., *Mohamed v. Jeppensen Dataplan, Inc.*, 614 F.3d 1070, 1074 (en banc) (concluding that information concerning plaintiff's torture claims were covered by the state secrets privilege even though plaintiff contended that “virtually every aspect of [plaintiff's] rendition, including his torture . . . had been publicly acknowledged by the Swedish government” where the plaintiff sought asylum); *El-Masri v. United States*, 479 F.3d 296, 301-02, 308-09 (4th Cir. 2007) (state secrets were unaffected by public disclosures concerning the existence of the extraordinary rendition program, the existence of facilities for that purpose, the “modus operandi” developed for the purposes of renditions, the “decision-making process” pertaining to that program and the role played by other governments); *Hepting v. AT&T Corp.*, 439 F. Supp. 2d 974, 990 (in determining whether a factual statement is “secret” for the purposes of the state secrets privilege, “the court should look only at publicly reported information that possesses

disposition to find exemptions, preemptions or waivers with respect to the privilege⁹³ because of public or inadvertent disclosures,⁹⁴ inter or intra-branch or agency disclosures,⁹⁵ inconsistent government positions,⁹⁶ general official acknowledgements of privileged subject matter,⁹⁷ illegal, unconstitutional or criminal wrongdoing;⁹⁸ or federal legislation.⁹⁹ However, some judges have found preemption and waiver implicit in certain federal legislative schemes.¹⁰⁰

substantial indicia of reliability and whose verification or substantiation possesses the potential to endanger national security. That entails assessing the value of the information to an individual or group bent on threatening the security of the country, as well as the secrecy of the information.”).

⁹³ See generally *Maxwell*, 143 F.R.D. at 597 (waiver for the purposes of the state secrets privilege must at least meet the requirements for waiver under the Freedom of Information Act, including that (1) the information requested must be as specific as the information previously released; (2) the information requested must match information previously disclosed; and (3) the information requested must already have been made public through an official and documented disclosure).

⁹⁴ See, e.g., *Al Haramain Islamic Foundation, Inc. v. Bush*, 507 F.3d 1190, 1202-03 (9th Cir. 2008) (inadvertent disclosure to the plaintiffs did not make state secrets public information); *Alfred A. Knopf, Inc. v. Colby*, 509 F.2d 1362, 1370 (4th Cir. 2009) (“It is one thing for a reporter or authors to speculate or guess that a thing may be so or even, quoting undisclosed sources, to say that it is so; it is quite another thing for one in a position to know of it officially to say that it is so.”); *United States v. Marchetti*, 466 F.2d 1309, 1318 (4th Cir. 1972) (“Rumor and speculation are not the equivalent of prior disclosure.”).

⁹⁵ See, e.g., *Halkin I*, 598 F.2d at 9 (“[T]he government is not estopped from concluding in one case that disclosure is permissible while in another case it is not.”); *Halkin II*, 690 F.2d at 994 (no waiver through books by former CIA officials screened and approved by the CIA); *N.S.N. Int’l Ind. v. E.I. DuPont de Nemours*, 140 F.R.D. 275, 280 (S.D.N.Y. 1991) (no waiver where counsel for private company given prior access to privileged documents). *But see Jabara v. Kelley*, 75 F.R.D. 475, 492-93 (E.D. Mich. 1977) (declining to recognize the privilege where claimed privileged information had been revealed to the United States Senate Select Committee on Intelligence).

⁹⁶ See, e.g., *Hepting v. AT&T Corp.*, 439 F. Supp. 2d 974, 990, 996 (N.D. Ca. 2006) (concluding that “the government has opened the door for judicial inquiry by publicly confirming and denying material information about its monitoring of [claimed privileged] communication content”).

⁹⁷ See, e.g., *El-Masri*, 437 F. Supp. 2d at 537-38 (“Plaintiff’s argument that government officials’ public affirmation of [privileged subject matter] undercuts the claim of privilege misses the critical distinction between a general admission that [the subject matter] exists, and the admission or denial of the specific facts at issue in this case. A general admission provides no details as to the means and methods employed in these renditions, or the persons, companies or governments involved.”).

⁹⁸ See *Founding Church of Scientology v. N.S.A.*, 610 F.2d 824, 829 n.49 (D.C. Cir. 1979) (distinguishing under FOIA information whose disclosure “simply . . . might uncloak an illegal operation” and information whose disclosure “would reveal” state secrets”); *Silets v. Dep’t of Justice*, 945 F.2d 227, 231 (7th Cir. 1991) (en banc) (privilege would be effectively eliminated under FOIA if allegations of criminal conduct were sufficient to overcome the privilege); *El-Masri*, 479 F.3d at 312 (rejecting theory that judiciary is obligated to “jettison” the state secrets privilege in order to exercise “a roving writ to ferret out and strike down executive excess”); *Frost v. Perry*, 919 F. Supp. 1459, 1466 (D. Nev. 1996) (allegations of criminal violations of Resource Conservation and Recovery Act insufficient to overcome privilege); *Maxwell* 143 F.R.D. at 598, *aff’d Maxwell v. First Nat’l Bank of Md.*, No. 92-2392, 1993 WL 264547 (4th Cir. 1993) (privilege assertable to protect state secrets even if it also allows concealment of alleged illegal conduct).

⁹⁹ See *Frost v. Perry*, 161 F.R.D. 434, 438-40 (D. Nev. 1995) (Resource Conservation and Recovery Act does not preempt or supersede the state secrets privilege since it does not “speak directly” to whether the privilege applies to the required statutory disclosures) *aff’d sub nom Kasza v. Browner*, 133 F.3d 1159, (9th Cir. 1998); see also *Hepting v. AT&T*, No. C-06-672, 2006 WL 1581965, *3 (N.D. Ca. 2006) (premature to grant access to privileged information under statutory authorization).

(a) The *Totten* privilege

Supreme Court pronouncements notwithstanding, there has been a range of judicial views concerning the nature, scope, and application of the *Totten* subject matter privilege. There appears to be general agreement, however, that the privilege, where it in fact applies, constitutes or closely approximates a rule of non-justiciability that issues out the Constitution's separation of powers.¹⁰¹

As to its scope, some judges have resisted applying the *Totten* privilege to fact situations beyond those closely approximating the facts of that case - a secret contract of espionage.¹⁰² Some judges have applied the *Totten* privilege broadly based on the principle that it applies where a party's "success depends on the existence of a secret espionage relationship with the government."¹⁰³ For example, judges often dismiss employment discrimination claims against the CIA based on the *Totten* privilege where necessary but protected evidence, such as the identity of covert operatives or assignments, would need to be disclosed.¹⁰⁴ Other judges have essentially expanded *Totten*'s categorical bar to any subject matter "so pervaded by state secrets as to be incapable of judicial resolution once the privilege has been invoked."¹⁰⁵ On the other

¹⁰⁰ *Hepting v. AT & T*, 439 F. Supp. 2d at 984 (state secrets privilege pre-empted under FISA); *Halpern v. United States*, 258 F.2d 37 (2d Cir. 1958) (Invention Secrecy Act "must be viewed as waiving the [state secrets] privilege").

¹⁰¹ See *Fn 181 infra*; Part I.B.3.iii *infra* at 50.

¹⁰² See *In re Sealed Case*, 494 F. 3d 139 (D.C. Cir. 2007); *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1093 (9th Cir. 2010) (Hawkins, J. dissenting) (the *Totten* privilege does not apply to claims based on an illegal "rendition" program).

¹⁰³ See *El-Masri v. Tenet*, 437 F. Supp. 2d 530, 540 (2006) (alterations omitted) (citing *Tenet v. Doe*, 544 U.S. 1 (2005)) (finding it dispositive that the plaintiff himself was not a party to any secret espionage agreements or relationships).

¹⁰⁴ See, e.g., *Sterling v. Tenet*, 416 F.3d 338, 341 (4th Cir. 2005); *Abilt v. C.I.A.*, No. 1:14-cv-1031, 2015 WL 566712 (E.D. Va. Feb. 10, 2015). But see *Tenet v. Doe*, 544 U.S. 1, 10 (2006) ("But there is an obvious difference, for purposes of *Totten*, between a suit brought by an acknowledged (though covert) employee of the CIA and one filed by an alleged former spy. Only in the latter scenario is *Totten*'s core concern implicated: preventing the existence of the plaintiff's relationship with the Government from being revealed.").

¹⁰⁵ See, e.g., *El-Masri*, 479 F.3d 296, 306 (4th Cir. 2007); see also *id.* at 308 (extending *Totten*'s categorical bar to any case where privileged information "will be so central to the subject matter of the litigation that any attempt to proceed will threaten disclosure of privileged matters"); *Al-Haramain*, 507 F.3d at 1197 (The *Totten* bar "has evolved into the principle that where the very subject matter of a lawsuit is a matter of state secret, the action must be dismissed without reaching the question of evidence."); *Fitzgerald v Penthouse*, 776 F.2d 1236 (4th Cir. 1985)

hand, some judges have resisted relying on the *Totten* privilege, even where it could clearly apply, in favor of a more particularized consideration of the claimed privileged information under the more flexible *Reynolds* privilege,¹⁰⁶ although an application of the *Reynolds* privilege within this context essentially conflates the *Totten* and *Reynolds* privileges.¹⁰⁷

(b) The *Reynolds* privilege

While the *Reynolds* privilege, as all evidentiary privileges, is to be “narrowly construed,”¹⁰⁸ judges have nevertheless applied it expansively to not only the kind of “military secrets” considered in *Reynolds*, but also to any information whose disclosure would endanger “national security,” broadly defined based on *Reynolds*,¹⁰⁹ including clandestine intelligence operations and sensitive aspects of foreign affairs.¹¹⁰ Some judges have equated the scope of

(*Totten* subject matter exclusion applies beyond direct contractual privity cases where “sensitive military secrets will be so central to the subject matter of the litigation that any attempt to proceed will threaten disclosure of the privileged matters”); *Jeppesen DataPlan*, 614 F.3d at 1093 (Bea, J., concurring) (the *Totten* privilege applies to claims based on an illegal “rendition” program); *Restis v. Am. Coalition Against Nuclear Iran, Inc.*, No. 13 Civ. 5032, 2015 WL 1344479 (S.D.N.Y. Mar. 23, 2015).

¹⁰⁶ See *Jeppesen DataPlan*, 614 F.3d at 1084 (relying on the *Reynolds* privilege because of the “extremely harsh consequences” of the arguably applicable *Totten* privilege and “because conducting a more detailed analysis will tend to improve the accuracy, transparency and legitimacy of the proceedings.”); *Al-Haramain*, 507 F.3d at 1201 (disapproving of *El-Masri*’s conflating the *Totten* subject matter bar and the *Reynolds* privilege with respect to subject matter that prevents the use of non-privileged information); see also *Monarch Assurance P.L.C. v. United States*, 244 F.3d 1356 (Fed. Cir. 2001) (refusing to dismiss under *Totten* a claim based on an alleged secret agreement between the CIA and a foreign insurance company concerning the funding of a clandestine CIA operation); *Horn v. Huddle*, 647 F. Supp. 2d 55, 57 n.2 (noting that CIPA-like procedures could be used to facilitate litigation even though the subject matter was privileged under *Totten*).

¹⁰⁷ See, e.g., *Jeppesen Dataplan*, 614 F.3d at 1087 n.12; *Zuckerbraun v. Gen. Dynamics Corp.*, 935 F.2d 544, 547-48 (2d Cir. 1991) (dismissal required under *Reynolds* and *Totten* because “the very subject matter . . . is privileged”); *Weston v. Lockheed Missiles & Space Co.*, 881 F.2d 814, 816 (9th Cir. 1989) (“the state secrets privilege alone can be the basis for dismissal of an entire case”); *Fitzgerald v. Penthouse Int’l, Ltd.*, 776 F.2d 1236, 1241-42 (4th Cir. 1985).

¹⁰⁸ *Jabara v. Kelley*, 75 F.R.D. 475, 480 (E.D. Mich. 1977).

¹⁰⁹ *Reynolds*, 345 U.S. at 10 (protected state secrets include “matters which, in the interest of national security, should not be divulged”), cited in *Kinoy v. Mitchell*, 67 F.R.D. 1, 8, (S.D.N.Y. 1975); *Jabara*, 75 F.R.D. at 483 n.25; *Frost v. Perry*, 919 F. Supp 1459, 1464 (D. Nev. 1996).

¹¹⁰ See, e.g., *In re Sealed Case*, 494 F.3d 139, 146, 152 (D.C. Cir. 2007) (state secrets extend to “covert operatives, organizational structure and functions . . . intelligence-gathering sources, methods, and capabilities . . . locations of facilities . . . [and] the organization of classified employees”); *Zuckerbraun*, 935 F.2d 544, 547 (2d Cir. 1991) (missile defense systems); *Farnsworth Cannon, Inc. v. Grimes*, 635 F.2d 268 (4th Cir. 1980) (en banc) (military contracts and military employees’ job responsibilities); *Fitzgibbon v. C.I.A.*, 911 F.2d 755, 762 (D.C. Cir. 1990) (extending the Supreme Court’s pronouncements in *Sims* to intelligence methods); *Halkin v. Helms*, 598 F.2d 1,7 (D.C. Cir. 1978) (*Halkin I*) (NSA intercepted communications of Vietnam protesters); *Halkin v. Helms*, 690 F.2d

“state secrets” to that of “national defense,” as used in The Espionage Act of 1917, 40 Stat. 217, and The Defense Secrets Act of 1911, 36 Stat. 1040,¹¹¹ described by the Supreme Court as “a generic concept of broad connotations, referring to the military and naval establishments and the related activities of national preparedness.”¹¹²

Judges have also effectively expanded the scope of the state secrets privilege, and the deference to be extended to the Executive Branch, through the use of the so-called “mosaic theory,” under which seemingly innocuous or unimportant pieces of information become protected because they are part of an overall “mosaic” from which “sophisticated analysts” could derive privileged information.¹¹³ Judges have refused, however, to equate all classified information with information protected under the state secrets privilege.¹¹⁴ Conversely, judges appear willing under appropriate circumstances to extend the privilege to information that is not

977, 993 (D.C. Cir. 1982) (*Halkin II*) (instances of foreign assistance in surveillance and identity of CIA operatives); *Ellsberg v. Mitchell*, 709 F.2d 51, 56-57 (D.C. Cir. 1983) (“impairment of the nation’s defense capabilities, disclosure of intelligence-gathering methods or capabilities, and disruption of diplomatic relations with foreign governments”); *Bareford v. Gen. Dynamics Corp.*, 973 F.2d 1138, 1144 (5th Cir. 1992) (the operation and defects of classified weapons systems); *Fitzgerald v. Penthouse Int’l, Ltd.*, 776 F.2d at 1242 (4th Cir. 1985) (experiments with potential weapons systems); *El-Masri*, 479 F.3d 296, 303 (4th Cir. 2007) (“foreign affairs”); *Heine v. Raus*, 305 F. Supp. 816 (D. Md. 1969) (CIA instructions concerning the identity of a presumed Soviet agent); *Pack v. Beyer*, 157 F.R.D. 226, 231-32 (D.N.J. 1994) (“the public interest” and the placement of prisoner plaintiffs in a “Maximum Control Unit”); *Republic of China v. Nat’l Union Fire Ins. Co.*, 142 F. Supp. 551, 553 (D. Md. 1956) (conversations between British and American officials concerning sovereign immunity of China); *Black v. United States*, 900 F. Supp. 1129, 1134 (D. Minn. 1994) (the identities of government agents, the nature and purpose of their contacts with individuals under investigation and the location of contacts); *Frost v. Perry*, 919 F. Supp. 1459 (D. Nev. 1996) (environmental information at a classified military facility). *But see Jabara*, 75 F.R.D. at 492 (holding that the state secrets privilege does not extend to “arrangements” through which the FBI requested and obtained information from a federal agency or the “general” manner in which the FBI used such information).

¹¹¹ See *Kinoy v. Mitchell*, 67 F.R.D. 1, 8 (S.D.N.Y. 1975); *Jabara*, 75 F.R.D. at 483 n.25; *Frost*, 919 F. Supp. 1459, at 1464.

¹¹² *Gorin v. United States*, 312 U.S. 19, 28 (1941).

¹¹³ See *Halkin I*, 598 F.2d at 8-9; *Ellsberg*, 709 F.2d at 58 n.31; *El-Masri*, 479 F.3d at 305; *Black*, 62 F.3d at 1119 n.5; *In re United States*, 872 F.2d at 475; *Kasza*, 133 F.3d at 1166; *Herring v. U.S.*, 424 F.3d 384, 391 n.3 (deference is required because of “the near impossibility of determining with any level of certainty what seemingly insignificant pieces of information would have been of keen interest to a Soviet spy 50 years ago”); *Knight v. C.I.A.*, 872 F.2d 660, 663 (5th Cir. 1989) (“even the most apparently innocuous [information] can yield valuable intelligence”); *C.I.A. v. Simms*, 471 U.S. 159, 178 (1985) (“bits and pieces of data may aid in piecing together bits of other information even when the individual piece is not of obvious importance in itself”) (internal citations omitted); see also David E. Pozen, *The Mosaic Theory, National Security, and the Freedom of Information Act*, 115 YALE L.J. 628 (2005).

¹¹⁴ *Jeppesen Dataplan*, 614 F.3d at 1070.

classified.¹¹⁵ Judges also recognize that the privilege also does not technically extend to information pertaining to “domestic security.”¹¹⁶ But the boundaries between domestic and foreign intelligence sources and methods often blur; and the protections afforded under the state secrets privilege are often considered together with more qualified law enforcement privileges applicable to domestic security, often without precise differentiation.¹¹⁷

2. The level of inquiry into the basis for the Privilege

When confronted with an assertion of the state secrets privilege, judges often first consider whether it may be side-stepped altogether, either because the information at issue is immaterial or inadmissible under the rules of evidence¹¹⁸ or because the case may be dismissed on such grounds as non-justiciability, the political question doctrine, governmental immunity or standing.¹¹⁹

Should an assessment of the privilege be necessary, a judge will usually first assess whether the government has satisfied the *Reynolds* requirement that an appropriate person has asserted the privilege after personally concluding that an invocation of the privilege is

¹¹⁵ See *Halkin II*, 690 F.2d at 996 n.69; *Frost*, 161 F.R.D. at 438-40; *Maxwell*, 143 F.R.D. at 596 n.6, *aff'd* No. 92-2392, 1993 WL 264547 (4th Cir. 1993); see also *Mohamed v Holder*, 1:11-cv-50, Doc. No. 104-1 (E.D. Va.) (government claimed state secrets privilege as to the unclassified Watchlist Guidance pertaining to the No Fly List).

¹¹⁶ See, e.g., *Jabara*, 75 F.R.D. at 493-94; *Kinoy*, 67 F.R.D. at 14.

¹¹⁷ See, e.g., *Northrop Corp. v. McDonnell Douglas Corp.*, 751 F.2d. at 405 n.11; *Yang v. Reno*, 157 F.R.D. at 632; *Jabara*, 75 F.R.D. at 480; *United States v. Felt*, 491 F. Supp. 179 (D.D.C. 1979) (dealing with the liaison relationships between the United States and foreign countries as they pertain to the foreign activities of a domestic terrorist organization).

¹¹⁸ See, e.g., *Gilmore v. Palestinian Interim Self-Gov't Auth.*, 8 F. Supp. 3d 1 (D.D.C. 2014) (any possibly privileged documents were inadmissible under the rules of evidence); *Mohamed v. Holder*, 995 F. Supp. 2d 520 (E.D. Va. 2014) (any privileged documents immaterial to procedural due process challenges to No Fly List).

¹¹⁹ See, e.g., *Gilmore*, 8 F. Supp. 3d 1 (finding inadmissible any possibly privileged documents); *Wilson v. Libby*, 498 F. Supp. 2d 74 (D.D.C. 2007) (finding no cognizable *Bivens* remedy); *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1 (D.D.C. 2010) (finding no jurisdiction based on lack of standing and the political question doctrine); *Al-Aulaqi v. Panetta*, 35 F. Supp. 3d 56 (D.D.C. 2014) (finding no jurisdiction based on lack of standing, non-justiciability, political question, and the lack of cognizable *Bivens* or other remedy); *Doe v. Rumsfeld*, 683 F.3d 390 (D.C. Cir. 2012) (finding no *Bivens* remedy in a case involving the military, national security, or intelligence); *United States v. Stanley*, 483 U.S. 669 (1987) (finding no *Bivens* remedy for damages arising out of military service).

appropriate.¹²⁰ Some judges see this procedural requirement bound up with the political accountability that justifies an appropriate degree of judicial deference to Executive Branch judgments. For that reason, they have applied rigorously the *Reynolds* requirement that “the decision to object [to disclosure] should be taken by the minister who is the *political* head of the department, and that he should have seen and considered the contents of the documents and himself have formed the view that on grounds of public interest they ought not to be produced” (emphasis added).¹²¹

Nevertheless, as a general proposition, judges have not aggressively challenged whether the appropriate senior officer of the responsible agency has “personally” reviewed and considered the assertion of the privilege.¹²² Judges do expect, at a minimum, an explicit representation that an appropriate declarant has done so¹²³ and also a reasonable degree of specificity with respect to the identity of the materials and information reviewed and the reasons

¹²⁰ One unresolved issue is whether a foreign government can assert the privilege in a civil context, a topic beyond the scope of this paper. See *Compagnie Française d'Assurance Pour le Commerce Extérieur v. Phillips Petroleum Co.*, 105 F.R.D. 16, 25-26 (S.D.N.Y. 1984) (rejecting assertion of the state secrets privilege by a French-owned plaintiff company as outside the privilege's scope); *In re Grand Jury Subpoena dated August 9, 2000*, 218 F. Supp. 2d 544, 560 (S.D.N.Y. 2002) (assuming without deciding the privilege is available on behalf of a foreign country but not as to communications between employees of a private corporation and the foreign government); *Gilmore*, 8 F. Supp. 3d at 7-8 (recognizing assertion of state secrets privilege on behalf of the Palestinian Authority). It would appear that the state secrets privilege is not properly asserted by a state or state agency. See *Chisler v. Johnston*, 796 F. Supp. 2d 632, 639 (W.D. Pa. 2011), citing *El-Masri*, 479 F.3d at 304 (“[T]he state secrets privilege must be asserted by the United States”).

¹²¹ *Reynolds*, 345 U.S. at 8 n.20 (1953); see also *Yang v. Reno*, 157 F.R.D. at 633 (M.D. Pa. 1994) (concluding based on *Reynolds* that the Executive Secretary of the National Security Agency was not an appropriate person to invoke the state secrets privilege).

¹²² See, e.g., *Ellsberg v. Mitchell*, 709 F.2d 51, 64 (D.C. Cir. 1983) (noting that “the government’s public statement need be no more (and no less) specific than is practicable under the circumstances”); *Edmonds v. Dep’t of Justice*, 323 F. Supp. 2d 65, 76 (D.D.C. 2004) (finding that the affidavits of the Attorney General and others were sufficient even though they did not state that the Attorney General actually reviewed the documents at issue); *Northrop Corp.*, 751 F. 2d at 400 (finding that review by the Secretary of Defense was sufficient because “he had reviewed a representative sample of the documents as well as affidavits of staff members who had received all the documents”); *Molerio v. F.B.I.*, 749 F.2d 815, 821 (D.C. Cir. 1984) (holding that personal examination is not required when the object of discovery in the lawsuit was to establish a state secret).

¹²³ See *McDonnell Douglas*, 751 F.2d at 405; *Yang v. Reno*, 157 F.R.D. at 634 (finding insufficient declarant’s statement that he is “familiar with the types of issues and information that could arise” with respect to claimed privileged information or that he “understands” that the information had been the subject of high level Executive Branch discussions concerning policy matters).

for withholding those materials.¹²⁴ Judges have occasionally rejected the privilege for a lack of specificity in this regard,¹²⁵ although judges often provide ample opportunities to cure any such deficiencies.¹²⁶ Judges also appear to recognize the organizational reality that a filed declaration reflects to a certain necessary extent a collective agency effort and judgment and that “in actuality the personal consideration requirement is often thwarted.”¹²⁷ For essentially the same reasons, judges have allowed subordinate officials to supplement agency head declarations with information that explains in further detail the reasons for the invocation of the privilege.¹²⁸

Judges also evaluate compliance with the “personal consideration” requirement based on the nature of the litigation. For example, when the central focus of the litigation involves privileged “subject matter,” some judges view the “personal consideration” requirement to extend only to the “subject matter,” not each piece of protected information within that subject matter.¹²⁹ On the other hand, where the privilege involves only specific pieces of information relevant to litigation, judges appear to expect a more individualized document assessment and have sometimes required explicitly that the responsible agency official personally review and

¹²⁴ See *Salisbury v. United States*, 690 F.2d 966, 971-72 (D.C. Cir. 1982); *Nat'l Lawyers Guild v. Attorney Gen.*, 96 F.R.D. 390, 397 (S.D.N.Y. 1982).

¹²⁵ See *Kinoy v. Mitchell*, 67 F.R.D. 1, 9-10 (S.D.N.Y. 1975).

¹²⁶ See *Clift v. United States*, 597 F.2d 826, 827, n.1 (2d Cir. 1979); *Hyundai Merchant Marine v. United States*, 1991 WL 190563 (S.D.N.Y. 1991); *United States ex rel. Schwartz v. TRW, Inc.*, 211 F.R.D. 388, 393-94 (C.D. Cal. 2002).

¹²⁷ *Nat'l Lawyers Guild*, 96 F.R.D. at 396 n.11.

¹²⁸ See *Kasza v. Browner*, 133 F.3d at 1169 (use of subordinate official to explain “how a claim of privilege plays out in practice is consistent with *Reynolds*’[] insistence that the decision to object be made at the highest level . . . [T]he Secretary, once she has properly invoked the claim of privilege and adequately identified categories of privileged information, cannot reasonably be expected personally to explain why each item of information arguably responsive to the discovery request affects the national interest.”) (internal citations omitted); *In re United States*, 872 F.2d at 474 (approving use of classified declaration of assistant director of FBI’s Intelligence Division); *Molerio*, 749 F.2d at 821 (suggesting that Agency head’s designee could determine whether state secrets were implicated in discovery requests).

¹²⁹ See, e.g., *Molerio*, 749 F.2d at 821 (personal examination not required when the object of discovery in the lawsuit was to establish a state secret); *Bareford v. Gen. Dynamics Corp.*, 973 F.2d at 1142 (agency head only needs to personally review the “type of evidence” necessary to support claim that privileged information is requested).

vouch for each document at issue.¹³⁰ Judges also appear to agree, however, that in determining whether to assert a state secrets privilege, the responsible government official has no obligation to “balance” or weigh the competing interests.¹³¹ In any event, judges have made clear the high degree of candor expected in connection with government representations, with substantial consequences likely for any attempts to obstruct, mislead or misdirect the court.¹³² But even in these cases, judges evidence a strong commitment to protecting potentially privileged information, despite government misconduct.¹³³

Once a judge determines that the privilege has been properly asserted by the appropriate official, a judge must then, in every instance, consider whether the level of inquiry will extend beyond the un-redacted *ex parte, in camera* declarations filed as a matter of course by high ranking agency officials and the Attorney General. Judges have unquestioningly assumed their inherent authority to require the *ex parte* submission of the underlying documents, as well as other information not typically considered in assessing other privileges, or to conduct *ex parte* evidentiary and other hearings.¹³⁴ Judges have evidenced, however, widely divergent dispositions concerning whether to go beyond the government’s initial submissions.

¹³⁰ See, e.g., *Nat’l Lawyers Guild*, 96 F.R.D. at 403 (concluding that a sampling technique was not sufficient and that the Attorney General must review personally each item for which he asserts the state secrets privilege); *but see Halkin II*, 690 F.2d at 992-93 (finding CIA Director’s affidavit “necessarily unspecific” and not too vague when read against the backdrop of widespread public disclosures).

¹³¹ See *Halkin II*, 690 F.2d at 994 n.65; *Nat’l Lawyers Guild*, 96 F.R.D. at 400.

¹³² See, e.g., *Horn v. Huddle*, 647 F. Supp. 2d 55, 58 (D.D.C. 2009).

¹³³ *Id.* (giving the government “yet another opportunity to convince the Court that its redactions were proper and that they have been limited to only privileged information”); see also *Al-Aulaqi v Panetta*, 35 F. Supp. 3d at 81 (granting the government’s motion to dismiss despite the United States’ “truculent opposition” that made the case “unnecessarily difficult” and required the court “to cobble together enough judicially-noticeable facts from various records”); *Islamic Shura Council of S. Cal. v. F.B.I.*, 779 F. Supp. 2d 1114, 1125-26 (C.D. Cal. 2011) (protecting documents and information pertaining to national security even after government conceded it had filed false declarations concerning the number of such documents that existed).

¹³⁴ See, e.g., *El-Masri v. United States*, 479 F.3d at 305 (“in some situations, a court may conduct an *in camera* examination of the actual information sought to be protected, in order to ascertain that the criteria set forth in *Reynolds* are fulfilled”); *Ellsberg v. Mitchell*, 709 F.2d at 58 (“[w]hen assessing claims of a state secrets privilege, a trial judge properly may rely on affidavits and other secondary sources more often than he might when evaluating assertions of other evidentiary privileges”); *Kasza v. Browner*, 133 F.3d at 1169 (“[e]laborating the basis for the

Appellate judges, relying principally on *Reynolds*, have emphasized that a judge may conclude from the declarations alone that the privilege clearly applies; and a trial court should not review documents *in camera* unless a judge cannot determine from the submitted declarations that the “dangers asserted by the government are substantial and real.”¹³⁵ For that reason, and relying on *Reynolds*’ cautionary directives, judges most often conclude that no further inquiry is required when the subject matter disclosed in the complaint falls squarely within certain broad protected categories, such as covert military or intelligence operations,¹³⁶ the identity of covert operatives or relationships,¹³⁷ advanced weapons systems,¹³⁸ or secrecy agreements.¹³⁹ However, even when it appears that the privilege applies to some information, judges have nonetheless examined the underlying documents where the breadth of the privilege is not clear from the nature of subject matter, as described in the government’s declarations.¹⁴⁰ In fact, some judges consider *in camera* inspection mandatory before a case is dismissed.¹⁴¹

claim of privilege through *in camera* submissions is unexceptionable”); *but see* Fed. R. Evid. 104(a) (in deciding preliminary questions, “the court is not bound by evidence rules, except those on privilege”).

¹³⁵ *See, e.g., Sterling v. Tenet*, 416 F.3d 338, 343-45 (4th Cir. 2005) (“Once the judge is satisfied that there is a ‘reasonable danger’ of state secrets being exposed . . . any further disclosure is the sort of ‘fishing expedition’ the court has declined to countenance. Courts are not required to play with fire . . .”) (citing *Reynolds*, 345 U.S. at 10); *El-Masri*, 479 F.3d at 305 (citing cases).

¹³⁶ *See, e.g., El-Masri v. Tenet*, 437 F. Supp. 2d 530 (E.D. Va. 2006); *El-Masri v. United States*, 479 F.3d 296; *Abilt v. C.I.A.*, No. 1:14-cv-01031, 2015 WL 566712 (E.D. Va. Feb. 10, 2015).

¹³⁷ *Maxwell v. First Nat’l Bank of Md.*, 143 F.R.D. 590 (D. Md. 1992); *Sterling v. Tenet*, 416 F.3d 339.

¹³⁸ *See, e.g., Zuckerbraun v. Gen. Dynamics Corp.*, 935 F.2d at 547 (“As a reviewing court we conclude that it is self-evident that disclosure of secret data and tactics concerning the weapons systems of the most technically advanced and heavily relied upon of our nation’s warships may reasonably be viewed as inimical to national security. The privilege was thus properly invoked.”); *Fitzgerald v. Penthouse Int’l, Ltd.*, 776 F.2d 1236 (defamation claim based on accusations of espionage and secret weapons program involving dolphins); *Farnsworth Cannon, Inc. v. Grimes*, 635 F.2d 268 (4th Cir. 1980) (contract interference dispute involving former defense contractor and the United States Navy).

¹³⁹ *Sterling v. Tenet*, 416 F.3d 338 (4th Cir. 2005).

¹⁴⁰ *Ellsberg*, 709 F.2d at 58-59.

¹⁴¹ *Id.* at 59 n.37 (“[w]hen a litigant must lose if the claim is upheld and the government’s assertions are dubious in view of the nature of the information requested and the circumstances surrounding the case, careful *in camera* examination of the material is not only appropriate . . . but obligatory”) (internal citations omitted); *Hepting v. AT&T Corp.*, 2006 WL 1581965 (N.D. Cal. 2006) (“Because the government contends that the primary reason for rejecting Plaintiffs’ arguments are set forth in the Government’s *in camera, ex parte* materials . . . the court would be remiss not to consider those classified documents in determining whether this action is barred by the privilege”) (internal quotations omitted); *see also Mohamed v. Jeppensen DataPlan*, 614 F.3d 1070 (9th Cir. 2010) (judges sitting *en banc* reviewed *in camera, ex parte* the documents at issue, even though the district court had not); *but see*

In determining whether to review the underlying documents *in camera*, judges appear to consider first and foremost, consistent with *Reynolds*, the plaintiff's need for the information in question, with a greater need justifying a deeper inquiry.¹⁴² But other considerations are also typically involved, including (1) the amount of deference appropriate to the privilege claim, considered in light of its plausibility,¹⁴³ the detail, consistency and accuracy of the government's representations,¹⁴⁴ the age of the information at issue,¹⁴⁵ and the nature of the government conduct relative to its recognized powers;¹⁴⁶ (2) whether *in camera* inspection is necessary to

El-Masri v. Tenet, 437 F. Supp. 2d 530 (ED Va. 2006), *aff'd sub nom* 479 F.3d 296 (4th Cir. 2007) (district court dismissed and Fourth Circuit affirmed without *ex parte* review of the documents).

¹⁴² See, e.g., *Reynolds*, 345 U.S. at 11 (“[t]here is nothing to suggest that the electronic equipment, in this case, had any causal connection with the accident. Therefore, it should be possible for respondents to adduce the essential facts as to causation without resort to material touching upon military secrets . . . [plaintiffs] were given a reasonable opportunity to do just that, when [the government] formally offered to make the surviving crew members available for examination. We think that offer should have been accepted”); *Ellsberg v. Mitchell*, 709 F.2d at 59 n.37, 38; *In re Sealed Case*, 494 F.3d at 144; see also *Horn v. Huddle*, 647 F. Supp. 2d at 57 (noting the relevance of information that was available publicly).

¹⁴³ *Ellsberg*, 709 F.2d at 59 (“the more plausible and substantial the government’s allegations of danger to national security, in the context of all the circumstances surrounding the case, the more deferential should be the judge’s inquiry into the foundations and scope of the claim”); *Knight v. United States C.I.A.*, 872 F.2d 660, 664 (5th Cir. 1989) (absent evidence of bad faith, it is “beyond the purview of courts” to challenge a determination by the director of central intelligence that a classified document could reveal intelligence sources and methods); *El-Masri v. Tenet*, 437 F. Supp. 2d at 536-37 (“the judiciary must accept the executive branch’s assertion of the privilege whenever its independent inquiry discloses a “reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged.”) (citing *Reynolds*, 345 U.S. at 10) (emphasis in original).

¹⁴⁴ See, e.g., *Horn v. Huddle*, 636 F. Supp. 2d at 17; *Horn v. Huddle*, 647 F. Supp. 2d at 58 n.3 (noting that the court (a) “did not give a high degree of deference to the government because the government has already committed fraud on this Court and the Court of Appeals regarding what information is covered by the state secrets privilege in this case,” (b) “the fraud . . . diminished the government’s credibility and led the Court to believe that perhaps the government had misrepresented other facts in the litigation” particularly since “the Court’s consideration of the plausibility of the government’s claims given all of the circumstances of the case is a proper consideration to take into account when evaluating the privilege” and (c) “the government asserted the privilege too broadly, as this Court simply could not reconcile some of the information that the government claimed was privileged with a reasonable danger that compulsion of the evidence will expose state secrets matters that should not be divulged”) (internal citations and alterations omitted); see also *Mohamed v. Jeppesen Dataplan, Inc.*, 563 F.3d at 1003 (9th Cir. 2009) (rejecting the government’s argument that “state secrets form the subject matter of a lawsuit, and therefore require dismissal, any time a complaint contains allegations, the truth or falsity of which has been classified as secret by a government official”).

¹⁴⁵ *United States v. Ahmad*, 499 F.2d 851, 855 (4th Cir. 1974) (“any considerations of national security interests . . . must be viewed in the light of circumstances as they exist at the time the request for disclosure is made—not when the affidavit was prepared or the material filed with the court”); compare *United States v. Koreh*, 144 F.R.D. 218, 222 (D. N.J. 1992) (the identity of sources 50 years ago remains protected because “[c]ommon sense indicates that an intelligence organization which compromises its source of information is unlikely to recruit new sources”).

¹⁴⁶ See, e.g., *Mohamed v Holder*, 1:11-cv- 50 (E.D. Va. Sept. 15, 2014) [Doc. No. 139] (referencing a “particularly strong heightened institutional responsibility” to look beyond filed affidavits where the challenged government

separate, if possible, protected information from protected information;¹⁴⁷ and (3) the risks of inadvertent disclosure through court review, including the parties' demonstrated ability to act appropriately to protect sensitive information.¹⁴⁸ Some judges also appear more disposed to proceed beyond the filed declarations when the privilege arises within the context of significant constitutional claims, rather than statutory claims,¹⁴⁹ or where there are plausible claims that the privilege is asserted to conceal government misconduct.¹⁵⁰ One group of appellate judges summarized the inquiry for this purpose as a "sliding scale" that at one end involves a litigant's losing without the information at issue, coupled with a "dubious" government claim of privilege, and at the other end, a "trivial" showing of need by a litigant coupled with a "significant risk of serious harm if information is disclosed."¹⁵¹ Those same judges also concluded that before conducting an *ex parte, in camera* review, the government should be required to either "publicly explain in detail the kinds of injury to national security it seeks to avoid and the reason those

conduct "involves the extraordinary exercise of executive branch authority . . . that results in the deprivation of basic liberties according to secret executive branch decision making, without pre-deprivation judicial review, based on criteria that require, at a minimum, nothing more than a suspicion of future dangerousness, without the opportunity for an affected citizen to learn of, and respond to, the information relied upon for the government's decision, either before or after the deprivation").

¹⁴⁷ *In re United States*, Misc. No. 375, 1993 WL 262658, at *9 (Fed. Cir. 1993) (" . . . although it is true that the court has the power to disentangle sensitive information from non-sensitive information, in this case the contractors have not even alleged the government's assertion of the privilege is too broad or that it covers any nonsensitive information. Rather, in this case all of the information over which the government has asserted the privilege is plainly sensitive").

¹⁴⁸ See *McDonnell Douglas*, 751 F.2d at 399.

¹⁴⁹ See, e.g., *Stillman v. Dep't of Def.*, 209 F. Supp. 2d 185, 223 n.4, 231 (D.D.C 2002) (noting that "this Court will not allow the government to cloak its violations of plaintiff's First Amendment rights in a blanket of national security" in rejecting the government's position that "the national security interest asserted here always trumps a plaintiff's constitutional claim. The balance of a statutory interest, under for example the Freedom of Information Act, against the compelling interest in controlling access to sensitive information, is a very different question than the balance between equally compelling constitutional interests") (citing *United States v. Wa. Post Co.*, 403 U.S. 713, 729 (1971)) for the proposition that "when everything is classified, then nothing is classified, and the system becomes one to be disregarded by the cynical or the careless, and to be manipulated by those intent on self-protection or self-promotion"), *rev'd* 319 F.3d 546 (D.C. Cir. 2003).

¹⁵⁰ *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d at 1085 n.8 (finding it necessary to review the privilege with a "skeptical[] eye" particularly in the face of allegations of government wrongdoing that would motivate use of the privilege by government officials to "to protect themselves or their associates from scrutiny").

¹⁵¹ *Id.* at 401 (citing *Ellsberg v. Mitchell*, 709 F.2d at 59).

harms would result from revelation of the requested information or . . . indicate why such an explanation would itself endanger national security.”¹⁵²

Whatever the level of inquiry, the judge must determine under *Reynolds* whether “from all the circumstances” there is a “reasonable danger” that disclosure of the information at issue will endanger national security. Judges have not identified or embraced any objective criteria by which to assess the sufficiency of the government’s showing in that regard, beyond those broad subject matter categories discussed above. Likewise, in assessing an assertion of the privilege, judges have not typically attempted to distinguish between the risks of disclosure associated with the process of adjudicating a claim and the risks that harm would actually be inflicted if information were disclosed. Rather, judges appear to extend a very high level of deference to the Executive Branch’s overall judgments concerning whether and how information, if disclosed would affect national security.¹⁵³

In any event, judges appear to accept that they do not need complete knowledge of how a disclosure of information would “endanger” national security¹⁵⁴ or whether harm will in fact result from disclosure of the information at issue.¹⁵⁵ Rather, in one candid formulation, “[t]he crucial aspect of [the various] formulations[s] of the test [determining whether the requisite degree of certainty that harm is threatened] is the [court’s] willingness to credit relatively

¹⁵² *Ellsberg*, 709 F.2d at 63-64 (“[B]efore conducting an *in camera* examination of the requested materials, the trial judge should be sure that the government has justified its claim in as much detail as is feasible (and would be helpful) without undermining the privilege itself”).

¹⁵³ *See, e.g., Al-Haramain Islamic Found., Inc. v. Bush*, 507 F.3d at 1203 (9th Cir. 2007) (“[W]e acknowledge the need to defer to the Executive on matters of foreign policy and national security and surely cannot legitimately find ourselves second guessing the Executive in this arena.”); *Halkin I*, 598 F.2d at 9 (“The standard of review here is a narrow one. Courts should accord the ‘utmost deference’ to executive assertions of privilege upon grounds of military or diplomatic secrets”).

¹⁵⁴ *See, e.g., Halkin II*, 690 F.2d at 990 (“Therefore, the critical feature of the inquiry in evaluating the claim of privilege is not a balancing of ultimate interests at stake in the litigation . . . [but] the determination is whether the showing of the harm that might reasonably be seen to flow from disclosure is adequate in a given case to trigger the absolute right to withhold the information sought in that case”); *see also In re Sealed Cases*, 494 F. 3d at 144 (citing *Halkin II*, 690 F.2d at 991; *Halkin I*, 598 F.2d at 10).

¹⁵⁵ *See, e.g., Northrop Corp.*, 751 F. 2d at 402 (“It is not necessary for the government to show that harm will inevitably result from disclosure, nor . . . is it an essential element that the disclosure be public”).

speculative projections of adverse consequences,” with the “utmost deference” extended to evaluating these “speculative projections.”¹⁵⁶ Some appellate judges have framed the inquiry as whether disclosure presents “a reasonable danger of divulging too much to a ‘sophisticated intelligence analyst;’”¹⁵⁷ others, in terms of whether disclosure would disrupt diplomatic relations¹⁵⁸ or whether “disclosing the information in court proceedings would harm national security interests.”¹⁵⁹ One judge has concluded that the “[the court] must simply assume ultimate danger once the claim of privilege is upheld” in order to avoid an “unwitting compromise of the privilege in the course of attempting to skirt its edges”¹⁶⁰

In assessing these factors, judges do not find themselves limited by the rules of evidence, procedures developed under FOIA, or restrictions on the use of affidavits pertaining to summary judgment.¹⁶¹ One group of appellate judges would not “discourage” the use of unspecified “procedural innovation[;]”¹⁶² and at least one judge has considered the appointment of an expert pursuant to Federal Rule of Evidence 706 “to assist the court in determining whether disclosing particular evidence would create a ‘reasonable danger’ of harming national security.”¹⁶³ Judges appear to accept, however, that a plaintiff is not entitled to participate in the *in camera* examination of putatively privileged materials, through cleared counsel or otherwise, and a district court should not permit any such participation, even if the plaintiffs or their counsel knew

¹⁵⁶ *McDonnell Douglas*, 751 F.2d at 402 (alterations in original and citations omitted) (quoting *Ellsberg*, 709 F. 2d at 58 n.35; *Halkin I*, 598 F.2d at 9).

¹⁵⁷ *In re Sealed Case*, 494 F.3d at 144 (citing *Halkin I* at 10). As summarized by the D.C. Circuit in *Halkin II*, a judge, in determining the propriety of the privilege should remember that “[t]he critical feature of the inquiry in evaluating the claim of privilege is not a balancing of ultimate interests at stake in the litigation . . . [but] the determination . . . whether the showing of the harm that might reasonably be seen to flow from disclosure is adequate in a given case to trigger the absolute right to withhold the information sought in that case.” 690 F. 2d at 990.

¹⁵⁸ See, e.g., *Attorney Gen. v. The Irish People, Inc.*, 684 F.2d 928 (D.C. Cir. 1982); *Republic of China v. Nat’l Union Fire Ins. Co.*, 142 F. Supp. 551 (D. Md. 1956).

¹⁵⁹ *Tenenbaum v. Simonini*, 372 F.3d 776, 777 (6th Cir. 2004).

¹⁶⁰ *Farnsworth Cannon, Inc. v. Grimes*, 635 F. 2d 268, 279 (4th Cir. 1980).

¹⁶¹ See *Ellsberg*, 709 F.2d at 64; *Frost*, 919 F.Supp. at 1466-67.

¹⁶² *Ellsberg*, 709 F.2d at 64.

¹⁶³ *Hepting v. AT&T*, 439 F. Supp. 2d 974 (N.D. Cal. 2006).

or previously had access to some of the information subject to the government's claim of privilege.¹⁶⁴

3. The consequences on the litigation of a valid state secrets privilege.

The privilege, once recognized, is “absolute,”¹⁶⁵ and may not be overcome by any showing of need.¹⁶⁶ Likewise, a court may not compromise the protections afforded by the privilege through less than complete non-disclosure to a litigant.¹⁶⁷ Judges recognize in this regard, and in varying degrees of candor, that the state secrets privilege represents a judgment that the civil litigant's personal claim is “subordinated to the collective interest in national security.”¹⁶⁸ Accordingly, faced with a valid invocation of the privilege, a judge must then consider whether the litigation may proceed without the fact finder's use of the privileged information.

There has been vigorous debate over the years concerning precisely how to make that determination. Some judges adhere to the view that the privileged information is simply unavailable for any purpose, “as though a witness had died, and the case will proceed

¹⁶⁴ *El-Masri*, 479 F.3d at 311 (The use of cleared counsel is “expressly foreclosed by *Reynolds*”); *Ellsberg*, 709 F.2d at 60-61 (stating that it is “well-settled” that a trial judge should not permit plaintiff's counsel to participate in an *in camera* inspection because “our nation's national security is too important to be entrusted to the good faith and circumspection of a litigant's lawyer (whose sense of obligation to his client is likely to strain his fidelity to his pledge of secrecy) or to the coercive power of the protective order”); *Doe v. C.I.A.*, 576 F.3d at 106; *Sterling v. Tenet*, 416 F.3d at 348; *Halkin I*, 598 F.2d at 7 (“However helpful to the court the informed advocacy of the plaintiffs' counsel may be, we must be especially careful not to order any dissemination of information asserted to be privileged state secrets.”); *Jabara v. Kelley*, 75 F.R.D. at 486-87 (“the superiority of well-informed advocacy becomes less justifiable in view of the substantial risk of unauthorized disclosure of privileged information”); *Tilden v. Tenet*, 140 F. Supp. 2d at 626 (finding cleared counsel not entitled to access); *but see Doe*, 576 F.3d at 106 n.8 (“There may be cases in which a district judge would act within his or her permissible discretion by permitting the plaintiff's counsel to take a greater role in the court's state-secrets deliberations where, in the circumstances, doing so would not endanger the secrets”) and at 108 (reserving on “whether and to what extent the government could validly refuse to grant the plaintiffs the access they sought to discuss, view, or record classified information not properly covered by an assertion of the state-secrets privilege”).

¹⁶⁵ *McDonnell Douglas*, 751 F.2d 395, 399 (D.C. Cir. 1984).

¹⁶⁶ *Id.*

¹⁶⁷ *El-Masri*, 479 F.3d at 311-12 (concluding that protective procedures were “expressly foreclosed by *Reynolds*”).

¹⁶⁸ *Sterling*, 416 F.3d 338, 348 (4th Cir. 2005).

accordingly, with no consequences save those resulting from the loss of the evidence.”¹⁶⁹ Under this view, a case will proceed unless the plaintiff cannot establish a prima facie case without the privileged information, even if the privilege excludes other information central to plaintiff’s case or a valid defense.¹⁷⁰ Central to this thinking is that the parties should be treated “evenhandedly,” that neither party be “preferred” or given an advantage because of the unavailability of privileged information,¹⁷¹ and that it should not matter which party “has won the race to the courthouse.”¹⁷² For these judges, no evidence would be considered for any purpose that is not “introduced in a fashion in which the plaintiff has access to it,”¹⁷³ with any other approach “potentially frightening.”¹⁷⁴ Nevertheless, these judges would consider such “techniques” as the waiver of a jury and *in camera* dispositions by the court, along with the use of cleared counsel and other courtroom personnel, in order to “minimize the tensions necessarily produced . . . between the accepted doctrine that every litigant is entitled to his day in court and the assertion of the secrecy privilege essential to the common welfare.”¹⁷⁵

Other judges have categorically rejected this approach. They see in the state secrets privilege issues that are “*sui generis* in the administration of justice.”¹⁷⁶ They find in the nature

¹⁶⁹ See, e.g., *Farnsworth Cannon, Inc. v. Grimes*, 635 F.2d at 270-71, *vacated en banc*, 635 F.2d 281 (quoting C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 109 (2d ed. 1972)).

¹⁷⁰ *Id.* at 271-72.

¹⁷¹ *Id.* at 273 (“Hence, in order that the parties may be treated evenhandedly it is crucial that neither party be preferred, that neither be given an advantage because of inaccessibility of evidence on privilege grounds”).

¹⁷² *Id.* at 272 (“[T]he technicality of who is plaintiff and who is defendant should not matter . . . resolution should not relate to who has won the race to the courthouse.”); see also *Gen. Dynamics Corp. v. United States*, 131 S. Ct. 1900, 1907-08 (2011) (citing principles that requires the Court to withhold any relief so that the “the parties will be left where they are”).

¹⁷³ *Id.* at 275 n.16 (citing *Kinoy v. Mitchell*, 67 F.R.D. 1, 15 (S.D.N.Y. 1975)).

¹⁷⁴ *Farnsworth Cannon*, 635 F.2d at 282-83 (en banc) (Murnaghan, J. dissenting) (objecting to the approach endorsed by the majority wherein “[a]ny litigant . . . whose proof is hampered by the invocation of state secrets can hereafter be turned away from his efforts to obtain justice on the questionable grounds that, for reasons as to which he must remain uninformed, he might stumble intrusively into a protected area”).

¹⁷⁵ *Id.* at 275-76.

¹⁷⁶ *Id.* at 276 (Phillips, J., concurring in part and dissenting in part) (“A claim by the national sovereign of state secret evidentiary privilege in litigation between private parties creates a problem that seems to me to be *sui generis* in the administration of justice.”); see also *In re Sealed Case*, 494 F.3d 139.

of the privilege itself something that necessarily compromises the intrinsic fairness of the adversary process and creates a fundamental unfairness in using that litigation process after it has been disabled in its truth finding function because of the privilege.¹⁷⁷ For these judges, how to proceed must be informed by a wide range of considerations including the parties' ability to present their claims or defenses and the dangers of inadvertently disclosing privileged information in the process of litigating claims while observing the privilege.¹⁷⁸

Over the years, and with some still unresolved issues, discussed below, there appears to have emerged a general consensus on how judges should assess the consequences of the privilege on the litigation. On the one hand, judges will allow the case to proceed, at least initially, where the privileged information does not affect the parties' practical ability to litigate the merits of a claim.¹⁷⁹ However, judges generally consider dismissing a case based on a proper invocation of the state secrets privilege where (1) the plaintiff is unable to make out a *prima facie* case without privileged information; (2) an "available" or "valid" defense cannot be established without privileged information;¹⁸⁰ or (3) the privileged "subject matter" of the case precludes litigating the merits of a claim without compromising protected information.¹⁸¹ A

¹⁷⁷ See, e.g., *Farnsworth Cannon*, 635 F.2d at 276-79 (Phillips, J., concurring in part and dissenting in part) (reviewing why the "difficulties and artificialities" associated with the state secrets privilege "may so far inhibit the litigation process as to draw in question its essential utility for resolving a dispute").

¹⁷⁸ *Id.* at 279-80.

¹⁷⁹ See, e.g., *In re Sealed Case*, 494 F.3d at 141 (concluding that plaintiff could establish a *prima facie* *Bivens* claim without privileged information); *Mohamed v. Holder*, 2015 WL 4394958, at *2 (E.D. Va. July 16, 2015) (concluding that any claimed privileged information was not relevant to plaintiff's procedural due process claims concerning the No Fly List).

¹⁸⁰ See, e.g., *El-Masri v. United States*, 479 F.3d at 309-10 ("Furthermore, if *El-Masri* were somehow able to make out a *prima facie* case despite the unavailability of state secrets, the defendants could not properly defend themselves without using privileged evidence"); *Tenenbaum v. Simonini*, 372 F.3d at 777 (affirming summary judgment in favor of defendant after concluding that "defendants cannot defend their conduct with respect to [the plaintiff] without revealing the privileged information").

¹⁸¹ See *In re Sealed Case*, 494 F.3d at 153 ("If the district court determines 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"); *McDonnell Douglas Corp. v. United States*, 323 F.3d 1006, 1021 (Fed. Cir. 2003) ("[W]hen the 'very subject matter of the action' is a state or military secret, the action must give way to the proper invocation of the state secrets privilege") (quoting *Totten v. United States*, 92 U.S. 105, 107 (1875)); *Sterling*, 416 F.3d at 348 (quoting *DTM Research, LLC v. AT&T Corp.*, 245 F.3d 327, 334 (4th Cir. 2001)) (concluding that dismissal is the proper remedy

judge must also decide at what point in the case it is appropriate to rule definitively on whether a case should be dismissed on any of these grounds.¹⁸²

a. Dismissal based on a plaintiff's inability to establish a *prima facie* case.

Dismissal based on the plaintiff's inability to establish a *prima facie* case is simply an application of the general principle, applicable to all evidentiary privileges, that privileged information simply becomes unavailable to all parties; and the merits of the parties' respective positions will be determined without the use of the protected information (the "No Use" principle).¹⁸³ The first inquiry is therefore whether the plaintiff can establish a *prima facie* case without the privileged material. Judges have not required, at least as to constitutional tort claims, that a plaintiff, as part of his initial showing, disprove any possible defenses.¹⁸⁴

In assessing whether a plaintiff can establish a *prima facie* case, judges appear to agree that a plaintiff cannot benefit from any adverse inferences drawn from the government's invocation of the state secrets privilege.¹⁸⁵ But judges have further restricted plaintiffs in their ability to establish a *prima facie* case in primarily two ways. The first is to restrict access to certain non-privileged information. The second is to restrict the use of non-privileged testimony

where "the very question on which a case turns is itself a state secret, or the circumstances make clear that sensitive military secrets will be so central to the subject matter of the litigation that any attempt to proceed will threaten disclosure of the privileged matters") (internal quotations omitted). *But see El-Masri*, 479 F.3d at 306 ("The effect of a successful interposition of the state secrets privilege by the United States will vary from case to case. If a proceeding involving state secrets can be fairly litigated without resort to the privileged information, it may continue").

¹⁸² See generally *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070 (en banc) (where the majority and dissent take different positions concerning when the consequences of recognizing the state secrets privilege as to certain information should be assessed).

¹⁸³ See, e.g., *In re Sealed Case*, 494 F.3d at 144-45 (quoting *Ellsberg*, 709 F.2d at 64 & n.56 (D.C. Cir. 1983); C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 109 (2d ed. 1972)).

¹⁸⁴ See, e.g., *id.* at 145.

¹⁸⁵ See *Monarch Assurance P.L.C. v. United States*, 244 F.3d 1356, 1361 (Fed. Cir. 2001). The state secrets privilege in this respect is treated differently than other privileges asserted in a civil context. See, e.g., *Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976) (quoting 8 J. WIGMORE, WIGMORE ON EVIDENCE 439 (McNaughton rev. ed. 1961)) (internal quotations omitted) ("[T]he Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them: the Amendment does not preclude the inference where privilege is claimed by a party to a Civil cause").

or evidence. Both restrictions are based on the view that the litigation process itself, either in pre-trial or trial proceedings, creates too serious a risk of inadvertent disclosure of protected state secrets information.

(i) Limitations on access to non-privileged information.

There appears to be no serious debate over whether the privilege prohibits the discovery of protected information.¹⁸⁶ Judges have further restricted access to non-privileged information based on the privilege, either in discovery or at trial, either because it cannot not be “disentangled” from the “mosaic” of privileged information without an unacceptable risk of compromising privileged information¹⁸⁷ or because the non-privileged information is deemed insufficiently reliable to outweigh whatever risks from inadvertent disclosure may exist with respect to privileged information.¹⁸⁸ In many cases, these restrictions lead to an outright dismissal and, in effect, constitute an extension of the *Totten* subject matter bar. On the other hand, where the subject matter itself is not privileged, some judges are animated by an obligation to disentangle non-privileged from privileged information whenever possible.¹⁸⁹ For example, some have allowed discovery of non-privileged information closely related to privileged subject

¹⁸⁶ See, e.g., *In re United States*, 872 F.2d at 474.

¹⁸⁷ See, e.g., *Kasza v. Browner*, 133 F.3d at 1166 (quoting *Ellsberg*, 709 F.2d at 57) (“Although ‘whenever possible, sensitive information must be disentangled from nonsensitive information to allow for the release of the latter,’ courts recognize the inherent limitations in trying to separate classified and unclassified information.”); *Halkin I*, 598 F.2d at 8 (“[T]he business of foreign intelligence in this age of computer technology is more akin to the construction of a mosaic . . . [where] [t]housands of bits and pieces of seemingly innocuous information can be analyzed and fitted into place to reveal with startling clarity how the unseen whole must operate.”); *Bareford v. Gen. Dynamics Corp.*, 973 F.2d at 1143 (“*Fitzgerald* and *Farnsworth Cannon* recognize the practical reality that in the course of litigation, classified and unclassified information cannot always be separated”).

¹⁸⁸ See, e.g., *Zuckerbraun v. Gen. Dynamics Corp.*, 935 F.2d at 548 (“Appellant has not designated any sources of reliable evidence on the factual issues going to liability. Any evidence procured through discovery would of necessity be of no greater reliability than dockside rumor, if that, and clearly insufficient to establish a *prima facie* case in an area involving highly sophisticated technology and secret military tactics.”).

¹⁸⁹ See, e.g., *In re Sealed Case*, 494 F.3d at 153 (citing *In re United States*, 872 F.2d at 476) (recognizing the obligation of district courts to “disentangle sensitive information from non-sensitive information”); *Horn v. Huddle*, 647 F. Supp. 2d at 61 (“Regardless of whether the Court accepts or rejects the government’s assertion of the privilege over certain information . . . the Court still must fashion a way for this case to ultimately proceed to discovery and trial, keeping in mind that the very subject matter of the action is not a state secret.”).

matter, particularly from non-government sources, where the discovery relates to essential, but less sensitive elements of a claim, whose resolution might obviate the need to consider dismissal based on the privilege.¹⁹⁰ One judge struck a jury demand in an ordinary contract case and referred the case to a magistrate judge for confidential proceedings.¹⁹¹ Some have used CIPA-type procedures, such as redactions and summaries, to allow for disclosure and use of sensitive but non-privileged information.¹⁹² In permitting such discovery, judges have referenced the “possible unfairness” and “the appearance of impropriety” in dismissing a case without such discovery.¹⁹³ As one group of appellate judges observed, maintaining “that balance [between the government’s security needs and a litigant’s right to develop and present their case] . . . required the court to give a fair amount of leeway to plaintiffs in building their case from non-government sources.”¹⁹⁴ Some judges appear to be more inclined to limit the litigation impact of the privilege within the context of significant constitutional claims, as opposed to statutory or purely

¹⁹⁰ See, e.g., *Monarch*, 244 F.3d at 1361 (district court refused to dismiss on the basis of *Totten* privilege and provided the plaintiffs with “an opportunity to gather any unprivileged information that may establish a prima facie showing that [the purported agent] had the requisite authority to bind the government in contract”).

¹⁹¹ See *Loral Corp. v. McDonnell Douglas Corp.*, 558 F.2d 1130 (2d Cir. 1977).

¹⁹² See, e.g., *In re Sealed Case*, 494 F.3d at 154 (“[N]othing in this opinion forecloses a determination by the district court that some of the protective measures in CIPA . . . which applies in criminal cases, would be appropriate.”); *Horn*, 647 F. Supp. 2d at 59 (“If the Court determined the case could proceed using CIPA-like procedures, it would have to weigh whether the advantage gained from the procedures would outweigh the concomitant intrusion on national security.”); see also *Sterling v. Tenet*, 416 F.3d at 338 (“Such procedures, whatever they might be, still entail considerable risk. Inadvertent disclosure during the course of a trial—or even in camera—is precisely the sort of risk that Reynolds attempts to avoid. At best, special accommodations give rise to added opportunity for leaked information. At worst, that information would become public, placing covert agents and intelligence sources alike at grave personal risk.”); *El-Masri v. Tenet*, 437 F. Supp. 2d at 539 (finding that special procedures involving cleared counsel and application of CIPA have been effectively used in other cases, but that those procedures are ineffective “where . . . the entire aim of the suit is to prove the existence of state secrets”).

¹⁹³ *Monarch*, 244 F.3d at 1362, 1364 (“The evidentiary decision the trial court made . . . denying direct discovery from official government sources but allowing further discovery from other sources—struck an appropriate balance between the security needs of the Government and the rights of litigants under establish evidentiary rules and procedures to develop and present their case.”).

¹⁹⁴ *Id.* (“We think that under the circumstances here, when plaintiffs were already severely constrained in their discovery effort, the trial court abused its discretion by not allowing [additional] discovery”).

economic claims.¹⁹⁵ But even judges most disposed to facilitating the litigation of claims in the face of subject matter protected by the state secrets privilege have acknowledged strict limits on a court's ability to do so within acceptable boundaries.¹⁹⁶

In fashioning procedures designed to allow a case to proceed, judges have confronted particular challenging and unsettled issues concerning whether a court can order that a party or his lawyer have access to classified information.¹⁹⁷ Central to that inquiry is whether “the Executive Branch ha[s] the exclusive right to determine whether counsel, who have been favorably adjudicated for access to classified information, have need-to-know classified information within the context of litigation or can that be a judicial determination?”¹⁹⁸ In assessing these issues, judges have considered, *inter alia*, the nature and age of the clearances previously obtained, the scope of the subject matter to which cleared access had been obtained, the nature of the relevant classified, but non-privileged information and its relationship to privileged information, a judge's ability to make the necessary decisions without the assistance

¹⁹⁵ See, e.g., *Stillman v. Dep't of Def.*, 209 F. Supp. 2d 185, 223 n.24 (D.D.C. 2002) (“[A]lthough the balance of interests between a plaintiff's constitutional or statutory rights and the government's interest in national security is relevant in state secrets cases only to the level of scrutiny to be applied by the court, many of the state secrets cases cited in support of defendants' argument are further distinguishable because plaintiffs assert only statutory claims. These cases do not support the proposition argued by the government here that the national security interest asserted here always trumps the plaintiff's *constitutional* claim. The balance of a statutory right, under for example the Freedom of Information Act, against the compelling interest in controlling access to sensitive information, is a very different question than the balance between equally compelling constitutional interests”).

¹⁹⁶ See *Horn v. Huddle*, 647 F. Supp. 2d at 59-60 (confronting “what to do when the government has improperly asserted the privilege, asserted it too broadly, or when the Court contemplates it must order that the parties or their counsel have access to classified information in order to prevent a future breach of national security”). In rejecting the government's assertion of the state secrets privilege and electing to proceed with discovery, the Court “was tempered by a few considerations,” including: (1) the ability to provide clear boundaries in closed “CIPA-like” proceedings as to what information is privileged; (2) the ability to limit the scope of these proceedings to information already known to the parties with cleared counsel; (3) the possibility of imposing CIPA-type protective measures; and (4) the ability to narrow the scope of these proceedings to information the parties intended to use at trial and over which it could justify why the information was not privileged. *Id.* at 59-60.

¹⁹⁷ See *Horn v. Huddle*, 647 F. Supp. 2d at 56 (“While there are a plethora of cases concerning the state secrets privilege, very few cases even tangentially discuss how a Court is to proceed when the Court has denied the assertion of the privilege, but the government still claims that portions of the non-privileged materials are ‘classified.’”).

¹⁹⁸ *Id.*

of counsel, and the extent to which classified information can be adequately safeguarded during discovery and at trial without involving an informed counsel.¹⁹⁹

Judges have divided over these issues. While judges uniformly recognize that whether and how to classify information is a discretionary, non-justiciable matter committed solely to the Executive Branch, some think it is “beyond dispute” that a judge is authorized to order disclosures of classified information under CIPA-like procedures within the context of civil litigation.²⁰⁰ For these judges, “[w]ere the rule otherwise the Executive Branch could immediately ensure that the ‘state secrets privilege’ was successfully invoked simply by classifying information and the Executive’s actions would be beyond the purview of the judicial branch.”²⁰¹ At least one judge has concluded when confronting these issues that the appropriate course is not dismissal or the exclusion of non-privileged information, but additional disclosures to cleared parties and/or counsel that would allow them to “. . . precisely map the division between what portion of the information [they] know is covered by the privilege and what isn’t.”²⁰² Other judges have expressed serious reservations about such judicial innovations.²⁰³

¹⁹⁹ *See id.*

²⁰⁰ *Horn v. Huddle*, 647 F. Supp. 2d at 62 (rejecting the government’s position that “the Court does not have the power to conduct these CIPA-like proceedings because it would require the plaintiff and defendants to discuss classified information with their attorneys, and the Court cannot order the Executive Branch to grant a security clearance to a particular individual because that decision is committed by law to the appropriate agency of the Executive Branch”) (citations and internal quotation marks omitted); *see also Stillman*, 209 F. Supp. 2d at 193, 222 (rejecting the government’s contention that “the United States Constitution has placed the discretion to control access to classified information solely in the hands of the Executive Branch” and disputing the “blanket proposition that national security interests necessarily outweigh any constitutional interests asserted by a plaintiff in litigation”).

²⁰¹ *Horn*, 647 F. Supp. 2d at 62; *see also Mohamed*, 563 F.3d at 1006 (citing *United States v. Reynolds*, 345 U.S. 1 (1953)) (“*Reynolds* makes clear that ‘classified’ cannot be equated with ‘secret’ within the meaning of the doctrine.”); *Ellsberg*, 709 F.2d at 58 (“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”).

²⁰² *Horn*, 647 F. Supp. 2d at 62 (alternation in original) (quoting *In re Sealed Case*, 494 F.3d at 159 (Brown, J., dissenting in part)) (“[O]nly by providing clear boundaries to counsel in closed, ‘CIPA-like’ proceedings can national security interests be adequately safeguarded.”); *Id.* at 59 ([W]ithout clear boundaries as to what information is privileged and what is not, there would be an unacceptable risk to national security were this case to ultimately proceed to discovery and trial”); *Id.* at 61–62 (quoting *Farnsworth Cannon, Inc. v. Grimes*, 635 F.2d at 281 (“Moreover, if the parties and attorneys are kept completely in the dark as to the extent of the privilege, they will

Whatever their disposition, judges have generally been reluctant to order access to any classified information, absent special or exceptional circumstances, even where a party or his counsel has the necessary clearances or had such access previously.²⁰⁴ In one case, appellate judges barred access to the plaintiff's own complaint.²⁰⁵

Judges have also generally rejected constitutional challenges to security clearance restrictions based on judicial independence,²⁰⁶ due process,²⁰⁷ and First Amendment consideration,²⁰⁸ effectively deferring to the Executive Branch's security clearance judgments, primarily on separation of powers grounds. Judges also have not been particularly receptive to

'probe as close to the core secrets as the trial judge would permit' and '[s]uch probing in open court would inevitable be revealing').

²⁰³ See, e.g., *Stillman v. C.I.A.*, 319 F.3d 546 (D.C. Cir. 2003). There, the district court allowed plaintiff to access, together with his counsel, the classified information the government claimed was disclosed in plaintiff's manuscript about China's nuclear weapons program. The Court of Appeals reversed, holding that the court must first conduct an *in camera* review of the material and determine whether it could resolve the classification issue without the assistance of plaintiff's counsel. "If not, then the court should consider whether its need for such assistance outweighs the concomitant intrusion upon the Government's interest in national security." *Id.* at 549. See also *In re United States*, 872 F.2d 472 (D.C. Cir. 1989) (vacating the district court's order that required the Air Force to grant plaintiff's counsel special access to classified information); *Horn v. Huddle*, 647 F. Supp. 2d at 59 (when assessing the appropriateness of alternative procedures, "the Court was not without hesitation in ordering the participation of the plaintiff, his counsel, the defendants, and their counsel in solving difficult questions of privilege and classification").

²⁰⁴ See, e.g., *Northrop Corp. v. McDonnell Douglas Corp.*, 751 F.2d at 402 n.9 ("[P]rior disclosure of similar information does not preclude the potential for harm resulting from the present, requested disclosure"); *In re United States*, 1 F.3d 1251 (Table), 1993 WL 262656, at *7 (Fed. Cir. Apr. 19, 1993) (quoting *Halkin I*, 598 F.2d at 9 (Under the special access rules set forth in executive orders each program is separate, each potential "accessesee" is a separate issue, and "[t]he government is not estopped from concluding in one case that disclosure is permissible while in another case it is not"); *Id.* ("That the United States' attorneys may have reviewed the compartmented information at issue here is entirely irrelevant to whether there would be a 'reasonable danger' to national security if the information is released to someone new, including the contractors' attorneys in connection with this lawsuit. Under *Reynolds*, that is the sole issue that is judicially reviewable"); see also *Doe v. C.I.A.*, 576 F.3d 95, 106 (2d Cir. 2009) (quoting *Sterling v. Tenet*, 416 F.3d at 348 ("Even if they already know some of it, permitting the plaintiffs, through counsel, to use the information to oppose the assertion of privilege may present a danger of '[i]nadvertent disclosure'—through a leak, for example, or through a failure or misuse of the secure media that plaintiffs' counsel seeks to use, or even through over-disclosure to the district court *in camera*—which is precisely the 'sort of risk that *Reynolds* attempts to avoid.'")); *Latif v. Holder*, 28 F. Supp. 3d 1134 (D. Or. 2014) (concluding that it would be inappropriate to order the disclosure of classified information to the plaintiff).

²⁰⁵ *Doe v. C.I.A.*, 576 F. 3d at 106-107.

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ See, e.g., *In re United States*, 1993 WL 262658, at *6 (citations omitted) ("Because application of the Military and State Secrets Privilege can require complete dismissal of a case, any subsidiary limitation on conferring with counsel which might otherwise be precluded by the constitution cannot apply here.").

claims that such discovery is necessary to prevent the privilege's use to conceal wrongdoing, embarrassment or incompetence, and to the extent judges have expressed a willingness to consider such possibilities, they have required a plaintiff to make an essentially impossible threshold showing.²⁰⁹ But again, in this context, as in others, judges will react adversely to any attempts to mislead or stonewall the court; and at least one of the few published decisions to order access to classified but not privileged information appears to have been influenced to a significant degree by the government's misrepresentations concerning the basis for its privilege claim.²¹⁰

(ii) Limitations based on the inherent nature of the litigation process.

Judges have also restricted a plaintiff's ability to establish a prima facie case where the realities of the litigation process itself present dangers of disclosure deemed too high to accept. Judges have acted in this fashion particularly when (a) the government's formal and public response to the plaintiff's allegations would essentially constitute disclosure of state secrets information, if only by negative inference,²¹¹ or (b) witnesses cannot be safely examined without

²⁰⁹ See *McDonnell Douglas*, 323 F.3d at 1023 (“[A]lthough the Contractors ascribe a fraudulent and deceptive intent to the government and its agents [in using the state secrets privilege to restrict the ability to proceed on the merits], they have not presented any evidence or corroborative facts to support their allegations. Nor have they cited any case in which the government has actually misused the Military and State Secrets privilege as they describe”).

²¹⁰ See *Horn*, 636 F. Supp. 2d at 17 (“The Court does not give the government a high degree of deference because of its prior misrepresentations regarding the state secrets privilege in this case”).

²¹¹ See *El-Masri*, 437 F. Supp. 2d at 537 (“[A]ny admission or denial of these allegations by defendants in this case would reveal the means and methods employed pursuant to this clandestine program and such a revelation would present a grave risk of injury to national security.”); *Al-Haramain*, 451 F. Supp. 2d at 1229 (refusing to require the government to confirm or deny whether plaintiffs' communications have been or continue to be intercepted, but requiring the government to confirm or deny particular “surveillance events”), *aff'd in part and rev'd in part*, 507 F.3d 1190, 1204-05 (refusing to require the government to respond generally and in all respects on the grounds that “[t]he [privileged] document, its contents, and any individuals' memories of its contents, even well-reasoned speculation as to its contents, are completely barred from further disclosure in this litigation by the common law state secrets privilege”).

risking the disclosure of protected information.²¹² Some judges have expressed contrary views.²¹³

In determining whether the litigation process can operate without undue risk to national security, judges appear to be influenced, as on other state secrets issues, primarily by the core subject matter, and the extent to which it is infused with privileged information. Other significant considerations appear to be the parties' litigation conduct and attitudes, and that of their counsel, as reflected in such matters as their candor with the court and a demonstrated ability to cooperate in discovery, disentangle classified from non-privileged information, or protect classified information already in their possession.²¹⁴

b. Dismissal based on a “valid defense.”

Judges generally agree that a case must be dismissed if the privileged information deprives a defendant of an “available” and “valid” defense. But judges disagree over how central to a defense the excluded privileged information must be to justify dismissal. In answering that “exceedingly difficult question,” judges appear to agree that the appropriate inquiry is whether the exclusion of protected information so “distorts” an adjudication that a case

²¹² See, e.g., *Fitzgerald v. Penthouse Int'l, Ltd.*, 776 F.2d at 1243 (case must be dismissed because allowing testimony about what was not classified would allow inferences as to what was classified.); *El-Masri*, 479 F.3d at 310–11 (case must be dismissed where any inquiry into relevant facts would implicate sensitive protected information concerning the details of an extraordinary rendition program for terrorist suspects); *Farnsworth Cannon, Inc. v. Grimes*, 635 F.2d at 281 (contract case must be dismissed because any adjudication would involve reference to the organizational structure of classified Navy programs).

²¹³ See *In re Sealed Case*, 494 F.3d at 153 (“Although witnesses in the trial proceedings . . . will likely have had access to some classified materials in the course of their federal employment in addition to the unprivileged materials that form the basis of [plaintiff]’s remaining claim, there is no basis on this record for a presumption that a witness who has access to classified materials is unable to testify without revealing information that he knows cannot lawfully be disclosed in a public forum; see also *United States v. Reynolds*, 345 U.S. at 11 (commenting favorable on plaintiff’s access to witnesses who possessed state secrets information for the purpose of obtaining non-protected information).

²¹⁴ See *McDonnell*, 323 F.3d at 1022 (citations omitted) (“Given the history of security breaches and discovery abuses in this litigation, there is a risk that the military and state secret once divulged is unlikely to remain protected in this case. The public good must prevail over individual needs by enforcing the privilege and protecting the military secrets at issue here.”); *Attorney General v. The Irish People, Inc.*, 684 F.2d at 954 (“The Government . . . has been cooperative in the suit thus far, and has an important and legitimate interest in maintaining this lawsuit.”).

should not proceed.²¹⁵ But the standard by which to measure the “distortion effect” has been the subject of animated judicial debate. Some judges take the view that a case should be dismissed *only* when privileged information would dispositively establish a valid defense, essentially a summary judgment standard.²¹⁶ Other judges have adopted the less demanding standard that dismissal is appropriate whenever a determination of a case’s merits, on either affirmative claims or defenses, cannot be fairly litigated without disclosing or threatening the disclosure of privileged information.²¹⁷

In adopting a “dispositive evidence” standard for dismissal, judges have referenced the unfairness that a lower standard would impose on a plaintiff unable to know or respond to the privileged evidence relied upon for that determination.²¹⁸ These judges appear to resist compounding further what they regard as the uneven treatment already imposed on a plaintiff by virtue of the privilege, recognizing that once the “distortion effect” is deemed too great, a

²¹⁵ See, e.g., *Molerio*, 749 F.2d at 825 (concluding, after reviewing an *in camera* affidavit that substantiated the reason for denying plaintiff’s employment, that it would be a “mockery of justice” to allow the case to proceed, knowing the applicable law and supporting facts would prevent a reasonable jury from rendering a verdict in favor of the plaintiff); see also *In re Sealed Case*, 494 F.3d at 151 (finding that dismissing the case would be appropriate when after an *ex parte, in camera* review of the privileged material, “the truthful state of affairs would deny a defendant a valid defense that would likely cause a trier of fact to reach an erroneous result”); *Simonini*, 372 F.3d at 777–78; *Kasza*, 133 F.3d at 1166; *Zuckerbraun*, 935 F.2d at 547; Cf. *Bareford*, 973 F.2d at 1141.

²¹⁶ *Sealed Case*, 494 F.3d at 149.

²¹⁷ *Id.* at 157–58 (Brown, J., concurring in part and dissenting in part) (“By stripping meritorious defenses from [defendant] and leaving gaping holes in [plaintiff’s] prima facie case, the invocation of the privilege so distorts this case that dismissal is necessary”); see also *Farnsworth Cannon, Inc. v. Grimes*, 635 F.2d at 279 (Phillips, J., concurring and dissenting) (“It is quite conceivable . . . that in a given case it might rightly be judicially determined that the undisclosed scope of privilege lies so completely athwart the scope of proof relevant to resolution of the issues presented that litigation constrained by administration of the privilege simply could not afford the essential fairness of opportunity to both parties that is a fundamental assumption of the adversary system”).

²¹⁸ See *Sealed Case*, 494 F.3d at 149–50, where the D.C. Circuit has summarized this view as follows:

Were the valid defense exception expanded to mandate dismissal of a complaint for any plausible or colorable defense, then virtually every case in which the United States successfully invokes the state secrets privilege would need to be dismissed. This would mean abandoning the practice of deciding cases on the basis of evidence—the unprivileged evidence and privileged-but-dispositive evidence—in favor of a system of conjecture. 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.

(quoting *Halkin I*, 598 F.2d 1 (D.C. Cir. 1978)).

plaintiff has no ability to prevail on a claim, no matter how dispositive the evidence supporting his claim.²¹⁹ As one judge observed, any lesser standard would adopt an “all-or-nothing” approach to state secrets.²²⁰ In a similar vein, some judges see a lower standard as simply a further “draconian” erosion of the plaintiff’s substantive rights from the outset.²²¹ They also point to other recognized means, other than dismissal, to accommodate the parties’ respective interests when less than dispositive evidence affects a defense.²²² For example, they point to the ability of the Executive Branch to protect its interests by separating privileged from unprivileged information,²²³ the use of an immunity defense for its sued employees deprived of a defense because of privileged information,²²⁴ and the ability to indemnify a sued employee acting within the scope of employment.²²⁵

Other judges have reacted sharply against a filtering standard of proof that effectively establishes a presumption that a plaintiff, able to make out a *prima facie* case, prevails over available, possibly meritorious, privileged defenses, unless the privileged information essentially

²¹⁹ *Id.* at 150 (“Faced with the opposite situation, where a plaintiff has proof of a defendant’s liability that is inaccessible because of privilege, the courts are powerless to afford a remedy”).

²²⁰ *Id.* at 152 (characterizing the position as “adopting a ‘heads I win, tails you lose’ approach to state secrets: whenever the plaintiff lacks information about his claim, the complaint must be dismissed for failure to make out a *prima facie* case, but as soon as any information is acquired, it becomes too risky to introduce the evidence at trial, also necessitating dismissal”); *see also Ellsberg*, 709 F.2d at 69.

²²¹ *In re Sealed Case*, 494 F.3d at 145, 151 (“In the context of the state secrets privilege, the court has recognized that where, as here, the plaintiff is not in possession of the privileged material, ‘dismissal of the relevant portion of the suit would be proper only if the plaintiff[] w[as] manifestly unable to make out a *prima facie* case without the request information.’”) (quoting *Ellsberg*, 709 F.2d at 65) (alteration in original); *see also 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 . . . is indeed draconian”).

²²² *Sealed Case*, 494 F.3d at 150 (“[O]ur concurring and dissenting colleague seems to liken a meritorious defense to one that is merely potential or colorable. While suggesting that justice requires the court to withdraw from proceedings even where such defenses become unavailable, our colleague overlooks how this circuit’s precedent has accommodated the interests of both plaintiffs and defendants”) (citations omitted).

²²³ *Id.*

²²⁴ *Id.*

²²⁵ *Id.* at 150–51 (also observing that any “non-pecuniary costs” that may not be susceptible to indemnification are outweighed by “the potential costs of a federal service that fails to protect the employees’ constitutional rights”).

establishes that defense as a matter of law.²²⁶ For these judges, the “dispositive evidence” standard is too limiting; and dismissal as a consequence of the privilege should not be based exclusively on that standard. From their perspective, allowing a case to proceed in the face of anything less than dispositive adverse evidence results in the “elevation of the rhetoric of perfect justice over the realities of distortion and disclosure.”²²⁷ The issue is not “whether we like or approve of the state secrets privilege. It exists. The question is how the existence of the privilege, properly invoked, reshapes the case.”²²⁸ They fundamentally question whether a plaintiff has a right to use a disabled litigation process. For them, the answer lies in accepting that “‘by its very nature,’ the state secrets privilege ‘compromises the intrinsic fairness of the adversary litigation process which has been provided for formal dispute resolution’ – for both plaintiffs and defendants alike.”²²⁹ The critical issue therefore becomes “[w]hen application of the privilege so ‘compromises the intrinsic fairness’ of a judicial proceeding – whether because it has removed too much information from the plaintiff’s case or from the defendant’s defense, or . . . both”²³⁰ that the litigation process no longer becomes a legitimate fact finding process. Under that standard, dismissal should be available whenever “removal of facts relevant to the plaintiff’s prima facie case or the defendant’s defenses, or both, so distort the case that the litigation no longer even approximates reality” or when “further litigation threatened inadvertent

²²⁶ *In re Sealed Case*, 494 F.3d at 155-56, 158 (Brown, J., concurring and dissenting) (“By stripping meritorious defenses from [defendant] and leaving gaping holes in [plaintiff’s] prima facie case, the invocation of the privilege so distorts this case that dismissal is necessary. By equating a ‘valid’ defense with a ‘dispositive’ defense . . . the majority papers over the novelty of the defense standard it is applying”).

²²⁷ *Id.* at 160 (Brown, J., concurring in part and dissenting in part).

²²⁸ *Id.* See also *El-Masri*, 479 F.3d at 310–11 (the focus is on the facts necessary to litigate a plaintiff’s case and not merely those necessary to discuss it in general terms since “the controlling inquiry is not whether the general subject matter of an action can be described without resort to state secrets. Rather we must ascertain whether an action can be *litigated* without threatening the disclosure of such state secrets”).

²²⁹ *Farnsworth Cannon*, 635 F.2d at 277 n.2 (Phillips, J., specially concurring and dissenting), *maj. op. rev’d per curiam*, *id.* at 281 (en banc), *quoted with approval* in *In re Sealed Case*, 494 F.3d at 157 (Brown, J., concurring in part and dissenting in part).

²³⁰ *Farnsworth Cannon, Inc. v. Grimes*, 635 F.2d at 279 n.5, *quoted with approval* in *In re Sealed Case*, 494 F.3d at 157 (Brown, J., concurring in part and dissenting in part).

disclosure.”²³¹ At that point, “the right solution is not simply to muddle on, but rather ‘to withdraw from . . . litigants their normal right of access to the formal dispute resolution forum provided by the sovereign.’”²³² Otherwise, the lawsuit becomes “only a parody of the real facts” and to allow the case to continue “is not justice, and only invites injustice.”²³³ For judges adhering to this more flexible approach, the correct analysis is “a case-by-case assessment of how the privilege has affected the shape of the case being presented to the factfinder, not ‘dismissal of a complaint for any possible or colorable defense.’”²³⁴ The approach is a practical one, rather than doctrinal or formalistic²³⁵ and appears to align closely with the view that dismissal is appropriate whenever “the very subject matter” of the litigation is so infused with privileged information that non-privileged information cannot be disentangled from privileged information.²³⁶

Judges also display somewhat different dispositions when the *government* is the plaintiff at risk of dismissal. For example, where the government, as a plaintiff, refuses to produce privileged information pertaining to a defense, judges appear to be less inclined to dismiss a case

²³¹ *In re Sealed Case*, 494 F.3d at 160 (Brown, J, concurring in part and dissenting in part).

²³² *Farnsworth Cannon*, 635 F.2d at 279.

²³³ *In re Sealed Case*, 494 F.3d at 157 (Brown, J, concurring in part and dissenting in part).

²³⁴ *See In re Sealed Case*, 494 F.3d at 157, 157, n. 4 (Brown, J, concurring in part and dissenting in part); *see also Farnsworth Cannon*, 635 F.2d at 277 n.2 (“[Dismissal is appropriate] where the judge can sense that the actual dispute as defined by the issues so far differs from the dispute that could be litigated while honoring the privilege as to draw question the fairness of attempting to apply to the restricted dispute the legal principles appropriate to resolution of the actual dispute”).

²³⁵ *In re Sealed Case*, 494 F.3d at 160.

²³⁶ *Id.* at 158; *see also Kasza*, 133 F.3d at 1170; *Farnsworth Cannon*, 635 F. 2d at 28; *Bareford*, 973 F.2d at 1183 (relying on “the practical reality that in the course of litigation, classified and unclassified information cannot always be separated”); *Black v. United States*, 62 F.3d at 1118; *Fitzgerald v. Penthouse Int’l, Ltd.*, 776 F.2d at 1242 n.8 (dismissal is necessary because “the merits of this controversy are inextricably intertwined with privilege matters”); *White v. Raytheon Co.*, No. 07-10222, 2008 WL 5273290 (D. Mass. Dec. 17, 2008) (concluding “there was no practical means by which Raytheon could be permitted to mount a fair defense without revealing state secrets”). This school of thought appears to rely on the presumption, discussed above, that the testimony of witnesses with personal knowledge of classified secrets relevant to the litigation presents too great a risk of inadvertent disclosure of privileged information. *See Fitzgerald*, 776 F.2d at 1242; *Bareford*, 973 F.2d at 1143-44.

than they otherwise would be,²³⁷ resisting “the meat-axe approach” in favor of a “balancing of interests.”²³⁸ Overall, these judges appear to be more disposed than they otherwise would be to find workable alternatives to a dismissal.²³⁹ In determining how to proceed, they would consider the significance of the privileged information with respect to a defense,²⁴⁰ the need for the affected defense,²⁴¹ the sensitivity of the information at issue,²⁴² the subject matter of the case, including whether it involved constitutional rights or statutory claims,²⁴³ the importance of the interests at stake for the government, including whether the relief the government seeks is criminal, regulatory or purely civil in nature,²⁴⁴ what the defendant stands to lose in the case and “the likelihood of injustice” were the case to proceed.²⁴⁵ These judges also look generally to the parties’ respective behavior, cooperation and good or bad faith during the course of the lawsuit,²⁴⁶ although some judges have questioned whether the government’s “good faith” could ever be a dispositive or even particularly important factor in assessing “the relative weights of the parties’ competing interests with a view towards accommodating those interest, if possible.”²⁴⁷

²³⁷ See *Black Panther Party v. Smith*, 661 F.2d 1243, 1270–74 (D.C. Cir. 1981); *United States v. U.S. Currency*, 626 F.2d 11, 14–18 (6th Cir. 1980).

²³⁸ See, e.g., *Attorney Gen. v. The Irish People, Inc.*, 684 F.2d at 955 (“The factual circumstances surrounding the litigation must be borne in mind and a balancing the interests of both parties must be undertaken”). In this civil enforcement action under The Foreign Agents Registration Act, the Circuit Court reversed the trial court’s dismissal based on the government’s refusal to produce in discovery documents claimed to be protected under the state secrets privilege that related to defendant’s selective prosecution defense, observing that even if, on remand, there were a colorable showing of selective prosecution, and an adequate showing of need for discovery, “outright dismissal may be too extreme a measure to invoke for plaintiff’s inability to comply with defendants discovery requests” and a judge should consider a number of “competing factors.”

²³⁹ *Id.*

²⁴⁰ *Id.* at 950–51.

²⁴¹ *Id.*

²⁴² *Id.*

²⁴³ *Id.*

²⁴⁴ *Id.*

²⁴⁵ *Id.*

²⁴⁶ *Id.*

²⁴⁷ *Id.* at 955 (Bazelon, J., dissenting)

In a case that may substantially affect the approach adopted by judges in earlier cases, the Supreme Court recently considered “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.”²⁴⁸ It concluded in that regard that in assessing the consequences to be imposed based on the privilege “it is claims and defenses *together* that establish the justification, or lack of justification, for judicial relief; and when public policy precludes judicial intervention for one it should preclude judicial intervention for the other as well.”²⁴⁹ Under this jurisprudence, where because of the state secrets privilege, neither claims nor defenses can be “judicially determined,” the parties would be left “where they stood when they knocked on the courthouse door.”²⁵⁰ It is unclear whether this more holistic approach would apply in settings other than the specific circumstances of that case.²⁵¹

c. Dismissal based on the subject matter.

As discussed above, whether justified under the *Totten* or the *Reynolds* privilege, judges will dismiss a case when, as a practical matter, the “centrality” of privileged subject matter precludes an adjudication of the merits in any respect without threatening the disclosure of privileged information, regardless of whether the plaintiff can establish a *prima facie* case through non-privileged evidence. When such dismissals occur, they typically occur at early

²⁴⁸ *Gen. Dynamics Corp. v. United States*, 561 U.S. 1057 (2010) (“Petition for writ of certiorari to the United States Court of Appeals for the Federal Circuit in No. 09–1302 granted limited to Question 1 presented by the petition. Petition for writ of certiorari to the United States Court of Appeals for the Federal Circuit in No. 09–1298 granted limited to Question 2 presented by the petition”).

²⁴⁹ *Gen. Dynamics Corp.*, 131 S. Ct at 1907 (emphasis in original).

²⁵⁰ *Id.* at 1907-08.

²⁵¹ *Id.* at 1910 (“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”).

stages of a case, and without requiring a substantive response to the plaintiff's allegations.²⁵² In determining whether dismissal is appropriate on this basis, one group of appellate judges would focus on "not whether the general subject matter of an action can be described without resort to state secrets...[but] whether an action can be *litigated* without threatening the disclosure of such state secrets."²⁵³ For these judges, "the 'essential facts' and 'very subject matter' of the action are those facts that are essential to prosecuting the action or defending against it."²⁵⁴ In assessing whether dismissal is necessary on these grounds, judges have considered the information necessary to both plaintiff's case and the government's possible defenses,²⁵⁵ as well as whether a specific enabling statute contemplates a trial that by its nature concerns security information.²⁵⁶ Judges recognize that dismissal based on the subject matter of the case has unfair, harsh, case ending consequences on possibly meritorious claims²⁵⁷ and will sometimes reference the availability of other, non-judicial remedies available to a plaintiff,²⁵⁸ although other judges see such remedies as unrealistic and illusory.²⁵⁹

²⁵² See, e.g., *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070 (dismissal of Alien Tort Statute claim arising from extraordinary rendition program operated by CIA); *El-Masri v. United States*, 479 F.3d (same); *Sterling v. Tenet*, 416 F.3d 338 (dismissal of racial discrimination claim against C.I.A. based on covert identities and responsibilities); *Bareford v. Gen. Dynamics Corp.*, 973 F.2d 1138 (dismissal of wrongful death claim based on military weapons system); *Fitzgerald v. Penthouse Int'l, Ltd.*, 776 F.2d 1236 (dismissal of defamation case based on allegations of espionage).

²⁵³ *El-Masri*, 479 F.3d at 308; see also *Bareford*, 973 F.2d at 1143–44 (dismissal required because critical fact inquiries could not be answered without threatening disclosure of privileged state secrets); *Kasza*, 133 F.3d at 1170 (concluding that specific information needed to litigate a plaintiff's claim was privileged and the action needed to be dismissed even though the revelation that the Air Force might have unlawfully handled hazardous waste did not endanger national security); *Black v. United States*, 62 F.3d 1115, 1118–19 (8th Cir. 1995) (although general subject matter could be discussed, adjudication required "the identity of the alleged wrongdoers, the relationship to the government, and their contacts with [plaintiff]," all of which was privileged).

²⁵⁴ *El-Masri*, 479 F.3d at 308.

²⁵⁵ See, e.g., *El-Masri*, 479 F.3d at 310 (considering not only likely defenses, but any "hypothetical defenses" and concluding that "any conceivable response to [plaintiff's] allegations would disclose privileged information").

²⁵⁶ See, e.g., *Halpern v. United States*, 258 F.2d 36, 44 (2d Cir. 1958) (an *in camera* trial under the Invention Secrecy Act is possible if, "in the judgment of the district court, such a trial can be carried out without substantial risk that secret information will be publicly divulged"); see also *Clift v. United States*, 597 F.2d 826, 830 (2d Cir. 1979).

²⁵⁷ See, e.g., *In re Sealed Case*, 494 F.3d at 145; *El-Masri*, 437 F. Supp. 2d at 541.

²⁵⁸ See, e.g., *Mohamed*, 614 F.3d at 1091–92; *El-Masri*, 437 F. Supp. 2d at 54.

²⁵⁹ See, e.g., *Mohamed*, 614 F.3d at 1101 (Hawkins, J., dissenting).

Part II. Interviews and Observations

Thirty-one federal judges were interviewed.²⁶⁰ The group consisted of 23 men and 8 women, 4 circuit court judges and 27 district court judges, with at least one district court judge sitting within the geographical boundaries of each of the federal circuits.²⁶¹ The judges averaged approximately 18 years of service as a federal district or circuit court judge, with several having prior judicial experience, either as state court judges or as federal magistrate judges. Four had served thirty years or more as a federal district or circuit judge. Fifteen had served 20 years or more. Twenty seven had served ten years or more and four had served less than 10 years. The women judges averaged nearly 18 years of federal judicial experience and included the judge who had served the longest of any judge interviewed and also the judge who had served the shortest period of time.

Nineteen judges had been appointed by Republican presidents and twelve by Democratic presidents. Thirteen judges had military service. Sixteen had some law enforcement experience before becoming a federal judge, typically with a U.S. Attorney's Office or the Department of Justice. Eight had both military service and law enforcement experience. Fourteen had actually dealt with state secrets issues, although all but one judge had dealt with classified information in some context, typically under CIPA in criminal cases.

The interviews typically lasted approximately 30 to 45 minutes, although some ran as long as 1½ hours. Overall, there were approximately twenty hours of interviews. Although the interviews were not rigidly structured but fairly free-wheeling and developed in different

²⁶⁰ The author thanks each of these judges for their willingness to be interviewed and the generous amounts of time they devoted to reflecting on these issues and their candid comments. In order to ensure the promised confidentiality, limited information is provided as to their specific court and all judges are referred to in the masculine.

²⁶¹ The interviewed judges were selected based primarily on information known to the author concerning their level of experience with state secrets and national security experience (viz., because they had a great deal, some or not much), geographical location, years of judicial service and general reputation as a judge. No attempt was made to make this group statistically representative in any way of the federal judiciary as a whole.

directions depending on the judge's experience and focus, the interviews explored (1) a judge's background and general experience in national security matters, including the use of state secrets and classified information; (2) the information a judge would want to know in deciding the issues associated with the assertion of a state secrets privilege, including when the judge would go beyond obtaining information facially sufficient to support the privilege; (3) how the judge viewed the court's institutional role and competency to independently assess the privilege; and (4) at what point and upon what showing would the judge defer to executive branch judgments that no disclosure of any kind should occur, even at the expense of a case's dismissal, including how the judge would assess the risks of disclosure. Overall, the judges were asked how they would deal with Jane's case.²⁶² The substance of those interviews is reflected in the following general observations and conclusions:

1. There appears to be widespread alignment between how judges actually deal with a state secrets claim and the principles and procedures reflected in published opinions.

As a general matter, the judges were aware of and subscribed to the principles applicable to an assertion of the state secrets privilege discussed in Part 1. In particular, judges recognized the Executive Branch's primacy in assessing national security issues and the corresponding need to defer to properly substantiated Executive Branch judgments. However, as reflected in the discussion below, a significant number of interviewed judges have views somewhat at odds with generally accepted judicial pronouncements on certain issues. In that regard, some judges are generally (1) more inclined to look beyond the declarations, and examine documents *ex parte, in camera*, than the *Reynolds* principles seem to counsel, even where the declarations have detailed, plausible assertions of the state secrets privilege; and (2) more open to the use of CIPA-type

²⁶² Before the interviews, the judges were provided the hypothetical concerning Jane, an overview of the state secrets privilege substantially as presented in the Introduction, and the questions attached as Appendix A.

procedures than the case law appears to sanction or endorse in order to allow the use of non-privileged information closely related to privileged information.

2. There did not appear to be any significant correlation between a judge's background and his attitudes or disposition concerning the state secrets privilege

There were no apparent correlations with a judge's overall approach or disposition concerning the state secrets privilege and (a) party affiliation of the appointing President; (b) gender; (c) geographical location; or (d) military experience. For example, both Democratic and Republican appointed judges were among the most and least pre-disposed to look beyond the Executive Branch declarations submitted in support of a state secrets privilege. Likewise, men and women were among those more inclined and less inclined to engage in a questioning inquiry; and the same can be said with respect to judges with and without military, law enforcement, or criminal defense experience, with the qualification that many (but not all) judges with substantial law enforcement experience were among those most disposed to a deep, probing inquiry into the basis for the privilege. Geography did not appear to correlate in any particular way except to the extent that judges in certain locations tended to have more experience in national security matters than others.

3. Experienced judges, particularly in the national security area, are more disposed to a higher level of inquiry than less experienced judges.

Some (but not all) judges with the most experience in dealing with Executive privileges, national security issues and classified information were among those inclined to be the least deferential and most probing concerning an invocation of the state secrets privilege. A number of judges surmised that their dispositions in this regard related to their increased comfort over time in dealing with national security related issues and top secret or higher classified information in criminal cases. For example, one experienced judge recalls that he was "bowled over" and "his

brain wanted to blow up” the first time he looked at highly sensitive national security information, with no sense that he could separate out what was truly sensitive from what was less so but that he quickly became more able to separate out “the wheat from the chaff.”

Those in this group also saw aspects of their law enforcement experience before becoming a judge influencing their approach to a state secrets claim. For example, one such judge saw his willingness to look behind a state secrets assertion reinforced by his pre-judicial experience in dealing with federal law enforcement agencies inclined to over classify information and assert overly broad law enforcement privileges. Another judge saw his insistence on obtaining corroborating evidence with respect to national security claims related to his prior law enforcement experience dealing with information obtained from confidential informants. Similarly, several judges with over ten years of judicial experience but with no or limited experience in dealing with the state secrets privilege, surmised that their approach today in dealing with a state secrets claim would be much less deferential than it would have been earlier in their judicial careers because of their experiences more generally in dealing with government claims, which one judge described as, on occasion, “overstated” and “hyperbolic.”

The willingness of more experience judges to probe deeper also appeared to relate to their commonly held belief that, with effort, most issues of disclosure can be resolved in a way that allows the litigation to proceed and not be dismissed based on the state secrets privilege or classified information more generally. Several talked about how the scope of a privilege claim narrows substantially once a judge “pushes back.” (“Fifty percent of the time the government will narrow the claim.”) One judge observed that the government often objects to disclosure not so much because of “the what,” that is, the substance of the information, which can often be desensitized without losing substance, but “the how,” that is, how the information was obtained or

collected, which implicates sources and methods, which is often irrelevant to the claims in a case. One judge reflected the general sentiment of many judges when he said that in the end, “it’s all about what is fair and how you make it a fair process,” and that even if you cannot disclose all the information to the parties, “you can learn it and decide whether you can do anything about it.” For these reasons, judges find that they can often find “a way forward” in the face of classified information, whether or not state secrets, by “working through” the parties’ specific needs for particular pieces of information and usually finding ways to have the substance of what is needed provided through non-classified stipulations or summaries. As one judge explained with substantial experience in this area, “if you get into the nitty-gritty you can usually find a way to make information usable.” Judges with the most experience also thought that less experienced judges should not be hesitant in “get into the details.”

At that other end of the spectrum, judges with little or no national security experience expressed concern over their ability to assess in any meaningful way facially plausible Executive Branch judgments and were therefore initially inclined to accept those claims without further inquiry. These judges also were those who were most receptive to having access to court appointed experts, specialized courts or other forms of assistance.

4. A judge’s view concerning the appropriate level of inquiry appeared to correlate to, or at least be influenced by, his views concerning agency proclivities for secrecy.

The more probing dispositions seemed generally coupled with certain views about agency proclivities. For example, one judge who would look at the documents in every case, but is otherwise inclined to extend a high degree of deference, thought the government engaged in “egregious” over classification of information. Several other judges in this category, particularly those with substantial state secrets experience, mentioned, in substance, that intelligence agencies do not “like to share,” often assert a scope broader than necessary, and “dig their heels

in.” These judges saw these attitudes often causing the initial assertion of privilege claims broader than the government can ultimately defend and attributed this conduct, in various articulations, to an attempt, for the most part, to avoid “the hard analysis” and the sometimes tedious and difficult task of separating protected information from non-protected information until a judge reacts adversely. Some judges with a background in law enforcement saw that over time, people dealing in intelligence gathering become “jaded,” promptly the need to engage in a iterative process to pare down the scope of the privilege to truly sensitive information. For these reasons, the “reality” with respect to the state secrets privilege, as one judge framed it, is that judges need to “push back” on the initial level of disclosure before getting to the appropriate scope for the privilege. Several judges also expressed in various ways concerns about a “bureaucratic tendency” to assert the privilege in “too rote a fashion.” Some judges see the “layered structure” of the Executive Branch as an impediment to getting at what is truly state secrets information.

5. Judges broadly divided as to their presumptive level of scrutiny concerning a state secrets claim.

Judges divided essentially into four groups when discussing how they would initially approach an assertion of the privilege and decide whether to look beyond initial declarations of the Executive Branch. One group professed a pre-disposition to review the underlying documents *ex parte, in camera*, in every case, even in the face of plausible privilege claims substantiated by declarations from high level officials. As one judge put it, he rejects the “trust me” approach. Another in this group observed that “you just don’t take the government at its word.” One judge rhetorically asked “why wouldn’t you look at the documents?” and “how could you justify not looking at the documents and simply say you relied on an affidavit” before dismissing a case or imposing outcome determinative restrictions.

A second group had a pre-disposition not to review documents unless the judge found some specific justification to do so, such as where the declarations were too conclusory or lacked detail, the claimed scope seemed excessive or the subject matter on its face did not plausibly involve state secrets. As one judge in this group remarked, he would use the “until proven otherwise” standard, under which he would assume that the government is acting in good faith and that facially plausible, detailed claims of state secrets were appropriate unless there was reason to believe otherwise. The judges in this group essentially viewed Executive Branch judgments concerning national security as too bound up with military and diplomatic considerations to be “second-guessed” by the judiciary, absent some special showing. Judges less experienced in national security matters were more often in this category; but other, more experienced judges were in this group as well. For example, one judge with substantial national security case experience, while recognizing the court’s obligation not to give the government “a free pass,” thought that national security and state secrets judgments invariably involve “multi-layered” considerations that a judge cannot adequately assess and that disclosures can have “ripple” effects that are difficult to predict or assess within the confines of a particular case. He also thought that judges do not “make foreign policy” or “run wars” and that there were “political” dimensions to national security judgments; and to the extent that the Executive Branch’s judgments are unwise, as opposed to unsubstantiated or unconstitutional, “that’s why we have elections.” Another judge, with these perspectives, while positing that he does not believe in “blind acceptance” of a privilege claim, thought there was an element of “hubris” for a judge to attempt a *de novo* assessment of national security risks. He also thought that to a significant degree, the inquiry takes place in a “black hole” where it is difficult, if not impossible, to make any judgments beyond plausibility and facial validity. Another judge with

experience in national security issues, speaking to this issue within the context of Jane's case, viewed the privilege as an essential aspect of the Executive Branch's authority and responsibilities for the national defense, which must take precedence over the interests of any particular litigant in order to protect the rights and safety of citizens generally. Another very experienced judge with substantial experience in dealing with classified information in criminal cases, but with no specific experience in state secrets issues in civil cases, viewed his obligation as simply to determine whether information is within the scope of what the government has determined is classified and privileged, not whether it should be, and whether information deemed protected could be used in some unclassified form.

A third group had no particularly pre-disposition but rather took a decidedly practical, case by case approach to deciding whether to inspect the actual documents over which privilege was claimed. As one judge put it, he would "go with his nose." One judge candidly observed that to some extent he might be influenced by "how much hell" the plaintiff's lawyer credibly raised. One judge who had never dealt with a state secrets claim (but had dealt with classified documents) thought his interaction with the government would involve a "delicate dance" between deference and inquiry.

A fourth group consisted of several judges who straddled dispositional categories in certain respects. One judge disposed to extend a great deal of deference in light of the "harsh realities" of modern threats nevertheless thought such deference was appropriate only after obtaining "clear assurances" through the preparation of a "traditional record," with an actual review of the underlying documents. Another judge, while beginning with a "presumption of good faith" on the part of the government and in the end extending a great deal of deference to Executive branch judgments in the face of "credible evidence of risk," nevertheless would look

at the underlying documents in every case, would require something more than “theoretical risks” associated with use of information in a litigation, and place the burden on the government to show why a case cannot be proven or defended without privileged information.

As to Jane’s case, most judges thought that the facial inequity and unfairness of Jane’s situation would cause them to engage in a more probing inquiry. One judge would want “a live person to look him in the eye” and tell him why her security clearance was pulled. Nearly every judge would want detailed explanations concerning any link between Jane and any threat from her brother. Several thought that there should be a way for Jane to be told definitively why her clearance was terminated and she was fired. Assuming that the “taint” emanating from her brother was speculative and nothing more substantial than a familial relationship with a suspected terrorist, most judges were disposed to finding a way to provide some relief to Jane, although many commented on the practical difficulties likely to be encountered. Several judges talked about “pushing hard” on the government and the company to find a way to give relief to Jane. Some judges thought that the company should be able to tell Jane why she was fired and she should be given some opportunity for another position within the Company unless there is some evidence-based reason disclosed to the company that would justify some other treatment. One judge talked in terms of “getting everyone in a room” and “banging heads” about a solution. Some talked about pushing to have Jane placed into a less sensitive position. Others thought that any relief for Jane might need to be pursued, if possible, in a lawsuit directly against the government for not having a sufficient process to contest her treatment. Some judges raised concerns about “too cozy” a relationship between the Company and the government that might allow the privilege to be asserted at the Company’s request in order to shield itself from Jane’s legitimate claims; and for that reason would be inclined to require information about the

frequency with which the state secrets privilege is asserted at the request of a private actor. Many thought it unclear what remedy, if any, could be given Jane, given the wide discretion that the Executive Branch has with respect to granting or withdrawing security clearances. Some doubted any relief was available, given what they thought was the government's unreviewable discretion with respect to security clearances and the necessary link between Jane's job and having the necessary clearances.

Some judges, on the other hand, while recognizing the unfairness that Jane might experience, saw very little that would justify going beyond facially valid reasons for an assertion of the privilege. One judge viewed Jane's case as "straightforward" in that the only issue to be tried was whether she was properly terminated for lack of a security clearance, with no state secrets information likely precluding that issue from being tried.

6. Certain considerations centrally influence whether a judge would look beyond initial disclosures, regardless of their presumptive level of inquiry.

Judges most often mentioned the following considerations in determining whether to look beyond the initial disclosures in support of an assertion of the state secrets privilege:

a. *The subject matter of the claimed privileged information.* The judges tended to view subject matter as the most important factor in determining the appropriate level of scrutiny. In that regard, the categories of information that the judges typically identified as presumptively qualifying for state secrets protection included the identity of covert operatives, the sources of sensitive information, on-going investigations and, as one judge put it, "anything that can get someone killed." One judge thought that these categories of information were so sensitive that there was "too much risk and not enough reward" in requiring anything beyond the declarations typically submitted (for one judge, "even coming to the courthouse" would be too dangerous for a covert operative).

Beyond these categories, many judges thought that it was “common sense” what information had too high a risk of danger to national security if disclosed. But judges with substantial national security experience thought the judgments became much more difficult when the information related to completed historical events, had been publicly disclosed, for whatever reason, or whose protection is claimed under the “mosaic” theory, which one judge observed forces a judge to confront “the difficult issue of what you take on faith.”

b. Subject matter of the litigation. In deciding whether to require additional information beyond the initial declarations, judges are fundamentally influenced by the nature and facial merits of the claims to be litigated and the seriousness of the plaintiff’s injuries. Most judges thought constitutional claims would have a higher “weight” over purely economic claims or statutory claims, such as FOIA requests, in deciding how far to probe, particularly where a litigant is alleging an on-going constitutional deprivation. Some judges also thought it appropriate to consider the extent to which relevant evidence would be available from non-privileged sources and whether a litigant was on notice that any dispute might be affected by an inability to rely upon or disclose sensitive or classified information, such as claims arising out of sensitive military contracts or employment claims against intelligence gathering agencies such as the CIA.

c. The level of detail contained in the initial disclosures. Regardless of their overall disposition concerning whether to require the actual submission of the documents at issue, critical to every judge in deciding how to proceed is the level of detail provided in the *ex parte* declarations; and judges have a fundamental suspicion of conclusory claims of national security, even by high level officials or the Attorney General. One judge saw such conclusory claims, without any detail, as a “red flag.”

d. Whether the privilege is being asserted simply to conceal embarrassment or illegality. The judges had different views about whether the privilege should extend to information or conduct that evidenced governmental wrongdoing or illegalities. But nearly all judges, even those judges who thought “embarrassing” or even “illegal” conduct would be privileged if sufficiently related to protecting national security, would likely subject such claims to a heightened scrutiny. Other judges had the view that at least illegal conduct was presumptively not privileged and would engage in a much more probing inquiry than they would otherwise likely pursue. One judge quipped that if he “smells” any attempt to avoid embarrassment or illegality he would aggressively require additional information and disclosures. Relatedly, judges expressed more willingness to look behind privilege claims with respect to historical information having no obvious on-going significance to national security. For some judges, such claims raised the prospect that the privilege was being asserted in order to conceal embarrassment or wrongdoing rather than to protect current security needs.

7. Judges broadly divided over the likely scope and nature of their inquiry, were they to go beyond the filed declarations.

There was also a variety of attitudes concerning the nature of the inquiry beyond the initial declarations that a judge would pursue. Those with the narrowest approach emphasized that to the extent it is necessary to review documents *in camera*, they would be reviewed only “in gross” with “a blind eye to the validity of the plaintiff’s claim,” since judges are only looking for “facial validity for the claim of national security.” On the other hand, the most probing judges thought it imperative that a judge look at the documents “one by one,” with an eye toward finding a way for the litigation to proceed. As one judge explained, it is necessary to “get down and dirty” and go through each document in order to properly assess the significance of any particular document and the risks associated with disclosure.

Beyond an examination of specific documents at issue, some judges, including some with the most national security experience, would want access to the people who can explain the particular documents and their significance, including the analysts and agents who often tend to be the most helpful, although in their experience, an agency's "natural tendency" is to "protect them." Others would require some substantiation concerning why a public disclosure, were it to occur, presented a significant or substantial threat for actual injury to the national security, as opposed to simply embarrassment or "theoretical possibilities." For example, one judge said he would want information about whether the government's concerns about the dangers associated with disclosure are based on any actual experiences with unauthorized disclosures of the type of information at issue in a case, through such events as WikiLeaks, the Pentagon Papers, the disclosures by Edward Snowden or unauthorized hacking into computers. Other judges would be interested in knowing such things as whether unauthorized disclosures have, in fact, occurred when CIPA procedures were used and what effect those disclosure have had.

As to whether information was sufficiently "secret" such that its disclosure would present an unacceptable risk of danger to national security, the judges likewise evidenced a range of views concerning what inquiry it would conduct. One judge said he might go so far as to require disclosure of how many people actually know or have access to information claimed to endanger national security, if disclosed. In that regard, judges evidenced a range of views concerning the effect unauthorized leaks or official acknowledgments would have on whether information remained "secret." Some thought none at all. Others thought that a judge could not simply "ignore realities" once "the cat was out of the bag." Other judges thought that there was a difference between disclosures affecting military secrets and those pertaining to relationships

with other countries, with the privilege pertaining to military secrets likely less affected by public disclosures than diplomatic secrets.

8. Whatever their presumptive level of scrutiny, judges widely shared certain values, beliefs and expectations in assessing an assertion of the state secrets privilege.

Despite differences in a judge's presumptive level of scrutiny, judge broadly shared values and expectations of the Executive Branch with respect to an assertion of the state secrets privilege.

a. Judges are most influenced by “separation of powers” principles. Judges most often mentioned the “separation of powers” as the overarching principle that governs their approaches to and assessments of a state secrets claim. That principle operates, however, as both an empowering and a restraining influence.

On the one hand, the judges said, in substance, that their constitutional obligation is to be, in a very real sense, an “independent check” on Executive Branch power. As one judge remarked, “there is no one else out there” to play that role. Others talked about how the public is relying on the judge to ask “the hard questions,” make “the tough choices” and be the “fair broker.” Many said they would reject anything that resembled a “trust me” approach on the part of the Executive Branch. One judge thought judges need to be “gadflies.” (One judge remarked that he “never meet an Article III judge that would roll over or lay down for the Executive or Legislative Branch.”) Several saw their obligation of inquiry related to the consequences of unreviewed government conduct on civil liberties and how the privilege compromises fundamental values within our system of justice, including access to the courts, notice and a meaningful opportunity to respond to information that affects rights or liberties. Several were concerned about government contractors or other private actors, particularly within the context of Jane's case, who would attempt through the privilege to insulate themselves from claims

arising out of their own improper or unlawful conduct. In short, every judge expressed in some fashion the core belief that a court could not act or be perceived as acting as a “rubber stamp” or “blindly accepting” a privilege claim. And though judges felt challenged in varying degrees concerning their ability to understand and assess the complete contours of national security issues, judges generally believe that an adequately informed judge can assess whether national security claims are reasonable, while recognizing that a judge, as one judge put it, “can always be fooled” through misinformation,

On the other hand, no matter how probing their inquiry, judges recognize that their “independent check” on assertions of the state secrets privilege is, by its nature, a limited one whose scope is dictated by separation of powers principles. Based on those principles, judges recognize in some fashion that there are tangible limits to the obligation or authority to assess risks to national security. As a result, an inherent sense of restraint is embedded in their approach to a state secrets claim. In that regard, one experienced judge observed that he has developed a greater appreciation over the years for the complex nature of national security information. Overall, even those judges most inclined to exercise an aggressive level of scrutiny thought that there inevitably comes a point when a judge must defer to plausible Executive Branch judgments about the risks and dangers to national security associated with the disclosure of information. As one judge mentioned, reflecting the general sentiments of the group, he would not substitute his own “reasonable” judgments for “reasonable” Executive Branch judgments or “balance away” national security. Reflecting a frustration associated with a compromised ability to address the merits of cases because of the privilege, some judges expressed the hope that some extra-judicial remedies would be available for meritorious claims

sacrificed in the name of national security, although they also expressed little optimism in that regard.

b. *Judges want a meaningful public record.* There were widely expressed concerns associated with the recognized need to proceed, for the most part, *ex parte, in camera*. In that regard, the judges generally thought it critical that a meaningful public record assures the public that an independent review had, in fact, occurred, particularly when it has case-ending consequences. Many judges thought it essential that a public record identify the process that was used to consider the privilege and the issues that were considered and decided, with the court's decisions public as much as possible. For these reasons, the judges thought it important that unclassified opinions and orders be publicly docketed as much as possible in order to educate the public concerning the positions taken by the government..

c. *Judges give substantial weight to the judgments made at the highest levels of the Executive Branch.* The judges generally had a high level of confidence that the Executive Branch was well-intentioned and asserted the privilege in good faith and not for purely litigation-driven motives, other than to protect state secrets. More specifically, judges were unanimous in their high regard for declarations provided by high ranking agency officials; and even judges with the highest levels of self-proclaimed skepticism concerning the accuracy of classification decisions in general are prepared to extend a high degree of credibility to the declarations of an agency head or the Attorney General, as opposed to "some local FBI guy." Several experienced judges remarked that they attach a great deal of significance to such declarations because they know that there is a rigorous internal agency process before a state secrets claim is presented to a court. Indeed, judges with the most experience in dealing with national security issues and high ranking national security officials, and who were often the most demanding in their assessment

of a privilege claim, also had the highest level of confidence that a state secrets privilege would be asserted sparingly, in good faith and only after a rigorous internal consideration, although the scope might be initially too broad.

Conversely, judges expect, as *Reynolds* contemplates, that a high level official and the Attorney General will, in fact, personally review whether the privilege should be asserted and will discount declarations from even such high ranking officials to the extent a judge thinks that the substance of the declarations is simply, as one judge put it, “bureaucratic routine.” The judges ranged widely in their views concerning whether they would entertain challenges to claims that a senior official had, in fact, personally reviewed documents and the assertion of the privilege.

d. Judges expect a high degree of candor and transparency. Commensurate with their high regard for high level officials of the intelligence community, judges expect the Executive Branch to provide candid, complete and accurate information in support of a privilege claim. For many judges, this expectation is underscored by the *ex parte*, non-adversarial process that is used to assess the privilege. It is also reinforced by the widespread belief among the judges that the government overclassifies information, as well as for some, the possibility that the privilege might be asserted at the insistence of lower level officials for purely tactical litigation reasons or to conceal embarrassment or governmental wrongdoing. Judges are therefore attuned to any perceived attempts at stonewalling, concealing, misleading or obstructing a judge’s ability to understand the basis for the privilege. One judge expected the government to “put its cards on the table” with candid disclosures about the level of risk to national security associated with disclosure. One judge becomes “easily annoyed” with the government when it claims national security issues in a conclusory fashion without specificity. For these reasons, most judges, in

substance, wanted a clear, candid articulation concerning what specific information was claimed to be privileged and why it would endanger national security (“what is it that they’re actually saying needs to be protected.”) and then isolate precisely what part of that information would be essential to the government’s litigation position. Likewise, judges generally mentioned, in one fashion or another, that they expect the government to provide enough information to allow them to understand “the overall picture” concerning why information was privileged, although for that purpose many judges did not think that a judge necessarily needed to see every piece of information.

Consistent with these views, judges offered that intelligence gathering agencies would increase their credibility with the courts by providing more transparency concerning the qualifications of the people making the underlying judgments as to the claimed privileged information, including why certain information cannot be adequately protected through classification designations that provide less protections than the “absolute” protections afforded a “state secret.” The interviewed judges also thought that the agencies would promote within the judiciary a higher level of confidence in their judgments by more openly and candidly sharing their thinking that demonstrated that they had in fact reached considered judgments after considering the range of competing considerations.

e. Judges do not consider inadvertent disclosure as a result of ex parte, in camera review a significant risk. Contrary to the concerns often mentioned in published cases, the judges generally had very little concern about the judiciary’s ability to preserve the secrecy of information submitted for *ex parte, in camera* review. (One judge responded to the question, “Do you have any concerns about a judge’s or court’s ability to maintain the secrecy of documents submitted for in camera review? , with “Heavens No!”), Several remarked that in

their experience, leaks typically come from the Executive Branch itself for self-serving reasons. One judge with very substantial national security experience remarked that the Executive Branch always claims concerns about leaks resulting from submitting documents for judicial review, but can never point to any that have ever occurred, except by one of its own agencies.

f. *Judges are hesitant to dismiss cases based on the state secrets privilege.* Judges are inclined to search for alternatives to dismissal and not to impose case determinative consequences on the litigation because of the privilege, particularly dismissal before considering documents at issue in a specific evidentiary context. The judges mentioned in this regard the *ex parte*, non-adversarial process surrounding an assessment of the privilege and the impact it has on a litigant's access to the courts. Likewise, judges resist the notion that certain claims must be dismissed outright as "non-justiciable" and naturally gravitate to a more flexible analysis concerning whether a case can proceed in the face of a state secrets claim. Many judges allowed, without subscribing to any particular approach, that they would attempt to explore any reasonable approach that affords a plaintiff an opportunity to present his case, "even if in less than an ideal manner," and that dismissal should be regarded as "a last resort." One judge offered, based on experience, that managing a case with that objective involves "a lot of work," under-appreciated by "the uninitiated."

g. *Judges think information is over classified.* Judges think information generally is overly classified, particularly when done at relatively low levels of authority; and there is a widespread concern that, however well-intentioned, the assertion of national security-based privileges is sometimes influenced by a tendency to exaggerate the importance of information to national security. Judges see a widespread inability or unwillingness to distinguish between information whose disclosure would actually endanger the national security and information that

while sensitive enough to be protected in some fashion, would not endanger national security in any tangible or demonstrative way, were it disclosed and which could be adequately protected through CIPA-type procedures. For example, one judge saw a tendency for the government to invoke “national security” whenever there were more general “public safety” concerns.

Similarly, several judges experienced instances where classified information made “a mountain out of a mole hill.” Some judges attributed this tendency to overzealousness, others to a “culture” within particular agencies and others to a myopic view of how the sensitivity of information should be measured. Some judges, based on their experience, both before and after becoming a judge, see a “mindset that flows down” to cause the assertion of unduly broad claims of privilege. Others thought that many classification decisions simply reflect the request of a field agent who is “invested” in a case and that the tendency is “when in doubt, classify.” For these reasons, some judges, based on their experience in law enforcement, thought that classification decisions should be, as matter of course, reviewed by more senior agency officials who do not have a bureaucratic stake in the decision other than to protect national security information.

There were very mixed views on a judge’s authority to order disclosure of classified information not protected under the state secrets privilege. Some judges thought that while a judge can pressure the government into making more limited claims of privilege, a judge should not require the government to provide classified information to even cleared parties or counsel over its objections. Other judges saw in their inherent authority over cases the ability to sanction the Executive Branch like any other litigant who would disobey a court order, recognizing that its authority in that regard would need to be exercised cautiously.

Many judges, including those who have dealt most often with these issues, saw no reason why a CIPA-type process could not be used in civil cases to allow a litigant to pursue claims as

much as possible. These judges thought such procedures were appropriate not only to allow the use of classified information that is not a “state secret,” as some judges have, in fact, done, but also to facilitate the disclosure and use of state secrets information itself, although they recognized that such devices are not currently available. Some judges are “big fans” of cleared counsel, redactions and summaries, as authorized under CIPA and would favor congressional authorization to utilize such procedures with respect to state secrets in civil litigation. One judge mentioned the ombudsman arrangement currently authorized under FISA as a potential useful approach. Overall, there was a widespread sentiment that Congress should formally authorize CIPA-type procedures in civil cases in order to allow for greater disclosure, not only for classified, but non-privileged, information, but also for state secrets information itself, including such devices as the use of cleared counsel and or “specialized counsel” along the lines authorized under recent amendments to the FISA.

8. Most judges were not receptive to the use of specialized courts or court appointed experts.

As a general sentiment, the judges believe that with proper Executive Branch disclosures courts have the institutional competency to assess assertions of the state secrets privilege; and while some judges thought specialized courts might be useful, most judges did not react favorably to their use, with nearly all judges expressing the sentiment that the “pluralism” of generalist judges best facilitates over time reaching proper answers to difficult questions. Some judges were adamantly opposed to concentrating the consideration of state secrets issues in a particular court. Some judges also doubted that judges appointed to a specialized court would have any greater expertise to assess these issues than any other federal judge unless such an assignment was an exclusive, long term assignment that allowed the development of a special expertise. On balance, the judges were skeptical about the role a specialized court could play in

assessing the state secrets privilege issues. One judge offered as “a point of pride” that federal judges are the “world’s last generalists” and that the country is better off without a “specialized judiciary.”

Judges were divided over whether experts should be available to the court to assist in assessing a state secrets claim. Some judges thought access to a pool of cleared consultants with appropriate experience or court-appointed subject matter experts might be useful sources of assistance to a judge; but overall, the large majority of judges were not inclined to think that experts would be useful, feasible or even appropriate in determining whether information should be treated as state secrets. Some thought using experts would be inconsistent with a judge’s “non-delegable” obligation to independently review the information at issue, likening the obligation to that involved in criminal sentencing. Some observed that “what’s important is the judge’s judgment, not some expert’s.” Some saw experts as a “crutch” to avoid the tough judgments. Others talked in terms of transparency (“We’re the ones selected to make, and who get paid to make decisions, whether good or bad.”). Many saw in providing sufficient information to experts the same intractable disclosure problems that exist with respect to even cleared counsel and therefore questioned whether an expert could ever be in a position to provide meaningful assistance because of an inability to access the necessary information. Some doubted that an expert would ever have any more competency than a properly briefed judge. (One judge quipped that in his experience “for every three experts, you get four opinions.”) Some judges were skeptical about who any experts would be and where their loyalties would lie. One judge remarked, based on his experience, that the types of people who would be among the pool of experts would be people who have retired from intelligence agencies and that there is a widespread belief that these former employees “never really leave the agency.” In a similar vein,

another judge worried about “who these experts would be working for” and thought that they would inevitably have close ties to intelligence agencies. Others thought, however, based on their own experience, that there are many people with intelligence experience who have the necessary reputations for integrity and independence to serve as helpful experts to the court.

Conclusion

At its core, this paper explores whether published opinions accurately reflect how judges go about dealing with national security cases, and state secrets privilege cases in particular. The responses of a relatively small, randomly selected group of federal judges cannot be considered representative of the federal judiciary as a whole, and this very preliminary and limited study does not allow for any definitive pronouncements concerning what actually influences judges in dealing with state secrets claims. Nor does it allow for any statistically meaningful conclusions concerning whether any particular background or experience correlates with how a particular judge will deal with a state secrets issue. Nevertheless, the interviews, however limited, do suggest that some jurisprudential re-thinking and educational initiatives may be useful and appropriate.

First, the current standard for recognizing a state secrets privilege - whether 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 - is so general that it provides almost no practical guidance as far as how to actually assess a state secrets claim. Similarly, the answers to many of the questions raised in the Introduction remain unclear and elusive, particularly those pertaining to the scope and substance of a judge’s inquiry into the factual basis for the privilege claim. For example, there appears to be no clear view concerning how the “necessity” that triggers further inquiry under *Reynolds* actually defines what a judge should look at and for what

purpose. Does that “necessity” simply require a Court to confirm that a “plausible” claim of privilege is actually supported by the underlying documents and information, or does it require some level of actual fact findings concerning whether information is “secret” and its disclosure would endanger national security? How tangible or demonstrable must the risk of harm to national security be for information to receive its “absolute” protections under the privilege. Is an articulable, but mostly theoretical, risk of danger to national security sufficient to foreclose entirely the adjudication of a claim?

Similarly unclear is at what point does privileged information becomes so entangled with non-privileged information so as to remove access to even unprivileged information and effectively to create a *Totten* subject matter bar to adjudicating a claim. In *Reynolds*, the Supreme Court endorsed taking the depositions of the surviving crew members as an acceptable alternative to the privileged investigative report without any expressed concern that these witnesses, who surely had first- hand knowledge of at least some of that privileged information, might inadvertently disclose that privileged information. Yet lower courts have dismissed cases for fear that privileged information might be disclosed through the gathering of non-privileged information no more closely tied to privileged information than in *Reynolds*. Courts have struggled with these issues, particularly when confronted with substantial claims of constitutional infringements, and have questioned, at least implicitly through their efforts to find a way to adjudicate those claims, whether a private litigant, as opposed to the government, must always bear the consequences attendant a recognition of the privilege.

Second, and perhaps because of these issues, there appears to be widespread support for extending into civil cases the same types of procedures authorized in criminal cases under CIPA. The most experienced judges interviewed, relying principally on their experience in criminal

cases, uniformly believed that in the vast majority of cases the iterative process authorized in CIPA would allow for civil cases to be litigated rather than dismissed, without any real threat to national security, even were the ultimate consequences different than in criminal cases when essential privileged information cannot be presented in an unclassified format.

Third, there appears to be widespread support for more judicial education on how judges should actually work through state secrets claims. As reflected in the interviews, judges believe they become more adept at navigating through state secrets issues as they gain experience in dealing with classified information and national security claims; and they generally endorsed continuing judicial education that actually allowed judges to work through national security issues in specific case studies. It may also be useful, as one experienced judge suggested, to develop “best practices” for a judge’s consideration.

As issues related to the War on Terror continue to infuse themselves into the daily workings of society, from the methods and means of communication, data collection and storage to privacy issues and domestic and international travel, a wider array of judges from across the country will deal with assertions of the state secrets privilege with increasing frequency; and the difficulties and trade-offs embedded into the state secrets privilege in its present form will come into sharper focus for not only courts, but Congress and the general public. As one judge perceptively observed more than three decades ago, “the successful assertion of a state-secrets privilege by the United States government results not only in the exclusion of the privileged information but also in an alteration in the usual rules by which courts allocate burdens of production and persuasion and according to which they ordered dismissal or summary judgment.”²⁶³ Notwithstanding this paper’s limitations, it is fair to suggest that whatever their disposition concerning the privilege, judges feel challenged in this jurisprudential environment,

²⁶³ *Farnsworth Cannon, Inc. v. Grimes*, 635 F.2d 268, 268 (4th Cir. 1980) (Murnaghan, J.).

which, perhaps unlike any other, requires case deciding judgments about “risk” based on “plausibilities” and “deference” rather than demonstrated likelihoods or causality. They see in the “absolute” nature of the privilege a not totally comprehensible break with the long recognized and relied upon judicial mechanisms for adjudicating claims in a way that balances and accommodates as best as possible all relevant considerations. As a result, and as the actual instances of domestic terrorism increase, judges seem to be very much caught up in the “Lincolnian tension between principle and expediency.”²⁶⁴ Judges, as well as the Academy²⁶⁵ and Congress,²⁶⁶ continue to engage in a critical analysis of this jurisprudence; and the most recent pronouncements by Supreme Court Justices may infuse more neutral principles into the process of adjudicating the state secrets privilege.²⁶⁷ Inextricably connected to the larger ongoing debate concerning the role of the judiciary in the War of Terrorism, the state secrets privilege will no doubt be shaped by developments within that larger context.

²⁶⁴ ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH – THE SUPREME COURT AT THE BAR OF POLITICS*, 68 (1962).

²⁶⁵ See, e.g., David Rudenstine, *The Irony of a Faustian Bargain: Reconsideration of the Supreme Court’s 1953 United States v. Reynolds Decision*, 34 *CARDOZO L. REV.* 1283 (2013); Galit Ragan, *Masquerading Justiciability: The Misapplication of the State Secrets Privilege in Mohamed v. Jeppesen--Reflections from a Comparative Perspective*, 40 *GA. J. INT’L & COMP. L.* 423 (2012); David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb--Framing the Problem, Doctrine, and Original Understanding*, 121 *HARV. L. REV.* 689 (2008); Erwin Chemerinsky, *Civil Liberties and the War on Terrorism*, 45 *WASHBURN L.J.* 1 (2005).

²⁶⁶ See, e.g., Senate Report 110-442 – State Secrets Protection Act, available at <https://www.congress.gov/congressional-report/110th-congress/senate-report/442/1>.

²⁶⁷ See *Gen. Dynamics Corp. v. United States*, 563 U.S. 478 (2011); see also *Kerry v. Din*, 576 U.S. ___, 135 S. Ct. 2128, 2147 (2015) (Breyer, Ginsberg, Sotomayor, and Kagan, J., dissenting from the plurality opinion) (“[T]he presence of security considerations does not suspend the Constitution. Rather, it requires us to take security needs into account when determining, for example, what ‘process’ is ‘due.’”) (citations omitted).

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Appendix A: Interview Questions

The following is an outline of the questions that served as the basic structure for the interviews.

1) Background

- a. How long have you been a federal judge? When were you appointed?
- b. How many cases have you handled in which the state secrets privilege has been asserted?
- c. Have you ever served in the military?
- d. Before becoming a federal judge, did you have occasion to deal with classified information or national security issues?
- e. Have you been involved in other national security cases where the state secrets privilege was not asserted? What about cases involving CIPA proceedings?
- f. Before becoming a federal judge, did you have any experience as a prosecutor or criminal defense counsel?
- g. As a general proposition, what level of confidence do you have that the Executive Branch appropriately asserts the state secrets privilege or claims of national security?

2) Judicial Approach

- a. What information should a judge ask for in deciding whether information is protected under the state secrets privilege?
- b. Should a judge go beyond obtaining information facially sufficient to support the privilege or should a court engage in a more substantive analysis of the information? And if so, what information should a court ask for to determine independently whether certain information, if disclosed, would endanger national security?
- c. To what extent do you think there is a risk of public disclosure of state secrets through *ex parte* filings under seal and *in camera* review?
- d. How should a judge go about assessing the risks associated with the disclosure of information pertaining to national security?
- e. At what point, and upon what showing of necessity, should or must a court defer to the judgment of the Executive Branch that no disclosure of any kind should occur (even at the expense of a case's dismissal)? For example, the risk of

disclosure in some cases may be obvious, such as the identity of targets and participants in on-going investigations, but how should the court go about assessing risk where the risk of disclosure is unclear (such as where the information deals with historical facts in past investigations)?

- f. Should a court balance those risks against the rights of a litigant?
- g. Should a judge consider whether procedural devices used to protect sensitive law enforcement and other information in other contexts (such as protective orders, filings under seal, cleared counsel, and “attorneys’ eyes only” disclosure) would adequately protect information to take it out of the category of state secrets, which cannot be disclosed to an adverse party in any fashion?

3) Resources and Reform

- a. What level of institutional competence do you think courts have to independently assess executive judgments about whether a claimed state secret is in fact a state secret whose disclosure may endanger national security?
- b. Are there any resources or procedures that might better allow a court to independently assess the validity of a state secrets claim? For example, would the use of experts or specialized courts make any sense?
- c. Do you think it would be helpful for Congress to enact legislation that codifies the state secrets privilege or procedures for dealing with state secrets in civil litigation as it has done for criminal cases through CIPA?

4) Jane’s case

- a. How would you approach Jane’s case.
- b. What relief would be appropriate/possible.

Appendix B: Summary Chart of Interviewed Judges

	Years	Gender	President	Law Enforcement	Criminal Defense	Military	National Security	
							State Secrets	CIPA
A	14	Male	G.W. Bush	Y	N	Y	Y	Y
B	11	Male	G.W. Bush	N	Y	N	N	Y
C	12	Male	G.W. Bush	Y	N	Y	Y	Y
D	22	Female	Clinton	Y	N	N	Y	Y
E	34	Male	Reagan	Y	N	Y	Y	Y
F	5	Female	Obama	N	N	N	N	N
G	11	Female	G.W. Bush	Y	N	N	Y	Y
H	7	Male	G.W. Bush	N	N	N	N	Y
I	21	Male	Clinton	N	Y	N	Y	Y
J	34	Male	Reagan	N	Y	Y	Y	Y
K	29	Male	Reagan	N	N	Y	Y	Y
L	3	Male	Obama	Y	Y	Y	N	Y
M	21	Male	Clinton	Y	Y	Y	Y	Y
N	30	Male	Reagan	Y	N	N	N	Y
O	25	Male	H.W. Bush	N	N	Y	N	Y
P	13	Male	G.W. Bush	Y	N	N	Y	Y
Q	13	Male	G.W. Bush	N	N	N	N	Y
R	28	Male	Reagan	Y	N	Y	Y	Y
S	10	Female	Obama	Y	N	N	N	Y
T	17	Male	Clinton	N	Y	N	Y	Y
U	14	Male	G.W. Bush	Y	N	N	Y	Y
V	20	Male	Clinton	N	N	N	N	Y
W	19	Male	Clinton	N	N	Y	N	Y
X	8	Male	G.W. Bush	Y	N	Y	N	Y
Y	23	Male	H.W. Bush	N	N	Y	N	Y
Z	15	Female	Clinton	Y	Y	N	Y	Y
AA	23	Female	H.W. Bush	N	N	N	N	Y
BB	24	Male	H.W. Bush	Y	N	Y	N	Y
CC	12	Female	G.W. Bush	N	N	N	N	Y
DD	15	Male	Clinton	Y	N	N	Y	Y
EE	36	Female	Carter	N	N	N	N	Y