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Secrets and Lies: Reynolds' Partial Bar to Discovery and the Future of the State Secrets Privilege

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Secrets and Lies: Reynolds' Partial Bar to Discovery and the Future of the State

Secrets Privilege

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Secrets and Lies: *Reynolds’* Partial Bar to Discovery and the Future of the State Secrets Privilege

John Ames†

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Beginning as early as the 19th century,¹ the government of the United States recognized some form of the “state secrets privilege” as a partial or complete defense to civil litigation in U.S. courts. Although mostly dormant until the seminal case, *United States v. Reynolds*,² which marked the first time the Supreme Court formally recognized the state secrets privilege,³ the doctrine’s long history helps color its evolving standard and may help predict its future. From the privilege’s original usage as a complete dismissal of a case,⁴ to its more relaxed usage as a

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⁴ *See Totten v. United States*, 92 U.S. 105 (1875).
discretionary bar to the introduction of evidence, a recent explosion in the invoking of the privilege in our post-9/11 world has led to multiple calls for reform. This article argues that the current Reynolds standard allowing a judge to dismiss a case before viewing in camera any supposedly confidential information must be reformed in favor of a more plaintiff-friendly standard. The article pushes for a new standard in which judges would be required to view privileged information and make a determination on its admissibility unless they find prior to discovery that the case meets the very narrow Totten standard.

The article will proceed in four parts. Part I traces a recent history of the case law beginning with Totten in 1875 and continuing through current day jurisprudence. Part II outlines the current standard as interpreted today through Reynolds and explain the guidelines that current judges are supposed to follow when faced with a state secrets case. Part III explores whether the doctrine is a constitutional or common-law precept, and thus whether the doctrine can be changed through the evolution of common law. Finally, Part IV makes recommendations for reform to the state secrets privilege, especially in light of its broadening scope in our age of information technology.

I. Tracing Totten, From Dismissal to Privilege—The History of the State Secrets Doctrine

While the idea of a state secrets privilege can be traced to the early 1800s, the modern doctrine found its roots in Totten v. United States. In the case, the estate for an alleged spy for President Lincoln during the Civil War claimed that he was owed $200 pursuant to a contract with Lincoln to procure information from the South. The Court of Claims found that the spy did

5 See Reynolds, 345 U.S. at 1.
8 Chesney, supra note 1, at 1271 (explaining that the dicta in Marbury v. Madison indicated that the confidential information of government officials would not have to be disclosed in certain situations).
9 Totten, 92 U.S. at 105.
10 Id. at 105-06.
indeed have a contract with the President, and had completed his duties, but was only reimbursed for his expenses.\textsuperscript{11} However, the Court dismissed the claim, being divided on the power of the President to bind the United States to a contract for spying.\textsuperscript{12} The Court had no problem validating the power of the President to employ such spies during times of war, but opined that as a clandestine matter, the claim was not justiciable.\textsuperscript{13} In its holding, the Court explained "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."\textsuperscript{14} The Court stated that this bar to suit would by implication apply to matters involving "secret employments of the government in time of war, or upon matters affecting our foreign relations, where a disclosure of the service might compromise or embarrass our government in its public duties, or endanger the person or injure the character of the agent."\textsuperscript{15} Thus, as originally envisioned, the state secrets privilege was not truly a privilege, but a complete ban (the "\textit{Totten} ban")\textsuperscript{16} to suits "where the very subject matter of the action . . . was a matter of state secret."\textsuperscript{17} Additionally, the Court made this determination sua sponte, which differs from how courts analyze \textit{Reynolds} challenges, which will be discussed later in this article.\textsuperscript{18}

In the years following the \textit{Totten} decision, treatises began mentioning the state secrets privilege, and several cases cited \textit{Totten} when blocking discovery of confidential information.\textsuperscript{19} However, it wasn't until the \textit{Reynolds} decision in 1953 that the Court formally recognized a state secrets privilege.\textsuperscript{20} In fact, in the near century and a half since the decision, the "\textit{Totten} ban" has

\begin{itemize}
  \item \textsuperscript{11} \textit{Id.} at 106.
  \item \textsuperscript{12} \textit{Id.}
  \item \textsuperscript{13} \textit{Id.}
  \item \textsuperscript{14} \textit{Id.} at 107.
  \item \textsuperscript{15} \textit{Totten}, 92 U.S. at 106.
  \item \textsuperscript{16} Schwinn, \textit{supra} note 7, at 781.
  \item \textsuperscript{17} \textit{Reynolds}, 345 U.S. at 11 n.26 (1953).
  \item \textsuperscript{18} Chesney, \textit{supra} note 1, at 1278.
  \item \textsuperscript{19} \textit{Id.} at 1280-82.
  \item \textsuperscript{20} \textit{Reynolds}, 345 U.S. at 7 (1953).
\end{itemize}
been used to completely dismiss a case only a handful of times.

In *Weinberger v. Catholic Action of Hawaii/Peace Education Project, et al.*, the Navy was constructing ammunition and weapons storage facilities with the capacity to hold nuclear weapons in Hawaii. Under the National Environmental Policy Act of 1969, federal agencies are required to file an environmental impact statement when making proposals that will significantly affect the environment, "to the fullest extent possible." The Navy conducted an environmental impact assessment, and after determining that the facilities would not have an environmental impact, did not prepare an environmental impact statement. As the Navy considered the information "classified for national security reasons," the information was not released to the public. Respondents brought suit, demanding an environmental impact statement be prepared and released to the public. The court of appeals found in favor of the respondents and required the Navy to release to the public a hypothetical impact statement.

On appeal, the Supreme Court did an analysis of whether the Navy had complied with the law "to the fullest extent possible," ultimately finding the claim to be a non-justiciable issue. Citing *Totten*, the Court held that public policy prevented the suit from being tried, as the case concerned matters that were confidential and trial would lead to their disclosure. In this case, the "Totten ban" was invoked by the court on its own, in response to a matter directly affecting national security.

The Court revisited *Totten* in 2005 when deciding the case of *Tenet v. Doe*. A husband and wife team, spying for the United States during the Cold War, alleged that they carried out years of

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22 *Id.* at 139.
23 *Id.*
24 *Id.*
25 *Id.*
26 *Id.*
27 *Weinberger*, 454 U.S. at 139.
28 *Id.* at 146.
29 *Id.* at 147.
espionage for the U.S. government in return for a promise of sanctuary and compensation in the United States.\textsuperscript{31} After the spies defected and became U.S. citizens, the U.S. government assisted the male spy in obtaining employment, and he agreed to the discontinuation of his CIA benefits.\textsuperscript{32} Soon after, the respondent was laid off from his job and brought suit when the CIA denied him any future benefits.\textsuperscript{33}

In this case, the government cited \textit{Totten} as a defense, alleging that the very essence of the espionage contract was secret and needed to remain secret.\textsuperscript{34} The court of appeals originally rejected the government's \textit{Totten} claim, stating that it had been "recast simply as an early expression of the evidentiary 'state secrets' privilege, rather than a categorical bar to their claims."\textsuperscript{35} The Supreme Court disagreed.\textsuperscript{36} The Court explained that \textit{Reynolds} "in no way signaled our retreat from \textit{Totten}'s broader holding that lawsuits premised on alleged espionage agreements are altogether forbidden."\textsuperscript{37} The Court went on to explain that \textit{Reynolds} actually "refutes this very suggestion," as the \textit{Reynolds} Court cited \textit{Totten} as a case that would 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.'"\textsuperscript{38} The Court concluded that the state secrets privilege and "use of in camera judicial proceedings simply cannot provide the absolute protection we found necessary in enunciating the \textit{Totten} rule."\textsuperscript{39}

After more than 100 years, the Court explicitly stated that the "\textit{Totten} ban" is alive and well, although it had only succeeded as a complete dismissal to suit in three cases, including \textit{Totten}. Although the government later found another basis to prevent the introduction of confidential information through the \textit{Reynolds} standard, it is important that the Court has recognized both options

\begin{itemize}
\item \textsuperscript{31} \textit{Id.} at 3-4.
\item \textsuperscript{32} \textit{Id.} at 4.
\item \textsuperscript{33} \textit{Id.} at 4-5.
\item \textsuperscript{34} \textit{Id.} at 1.
\item \textsuperscript{35} \textit{Id.} at 8-9.
\item \textsuperscript{36} See \textit{Tenet}, 544 U.S. at 8.
\item \textsuperscript{37} \textit{Id.} at 9.
\item \textsuperscript{38} \textit{Id.} (emphasis added) (citing \textit{United States v. Reynolds}, 345 U.S. 1, 11 (1953)).
\item \textsuperscript{39} \textit{Id.} at 11.
\end{itemize}
as distinct prongs. As will be argued later in this article, the much narrower scope of *Totten* can be employed to put the broader scope of *Reynolds* into context and curb potential abuse.

II. The Evolution of a Doctrine: *Reynolds*’ Three-Prong Approach and Judicial Interpretation

In its 1953 decision, *United States v. Reynolds*, the Supreme Court redefined the state secrets privilege under a new definition, employing it as a potential bar to the introduction of evidence in a civil trial. The suit involved the death of three civilians in a crash involving a B-29 plane in 1948. After taking off for a flight with the purpose of testing secret electronic equipment, one of the plane’s engines developed a fire, resulting in the plane crashing and the death of three civilians aboard. Widows of the civilians brought suit requesting production of the Air Force’s official investigation report, as well as statements of the three surviving crewmembers. A privilege claim was rejected at the district court level on the basis that the Federal Tort Claims Act required production of the documents. Thereafter, the Secretary of the Air Force submitted a letter stating that it “would not be in the public interest to furnish this report.” The district court ordered production of the documents in order to determine privilege, to which the government declined. Damages were awarded, and the court of appeals affirmed both the district court’s decision to require the Air Force to produce the documents and also to award damages. The Supreme Court granted a writ of certiorari and took the case.

In stating its opinion, the Court established what is now known as “The *Reynolds* Privilege.” The privilege is described:

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41 See id. at 7-8.
42 Id. at 2-3.
43 Id. at 3.
44 Id.
45 Id. at 4
46 Reynolds, 345 U.S. at 4.
47 Id. at 5.
48 Id.
49 Mohamed v. Jeppesen Dataplan, Inc., 614 F.3d 1070, 1079 (9th Cir. 2010) (en
(a) [T]he claim of privilege must be formally asserted by the head of the department charged with responsibility for the information; (b) the reviewing court has the ultimate responsibility to determine whether disclosure of the information in issue would pose a "reasonable danger" to national security; (c) the court should calibrate the extent of deference it gives to the executive’s assertion with regard to the plaintiff’s need for access to the information; (d) the court can personally review the sensitive information on an in camera, ex parte basis if necessary; and (e) once the privilege is found to attach, it is absolute and cannot be overcome by a showing of need or offsetting considerations.50

Under this standard, Chief Justice Vinson decided that the suit should not be allowed to proceed as it posed a "reasonable danger" to national security.51 The Supreme Court reversed the opinion of the court of appeals and remanded the case to the district court (the plaintiffs later settled with the government after remand).52 Thus, Reynolds established a second option for courts to dismiss a case prior to discovery.

However, it is important to note that unlike Totten, which always results in the complete dismissal of a case if successfully invoked prior to discovery, Reynolds is viewed under the lens of an evidentiary privilege.53 When encountering a Reynolds claim, it is up to the discretion of the district court judge to view the evidence or not, and also to determine whether the evidence is indeed privileged. Thus, the judge is presented with four options under Reynolds: (1) dismiss the case prior to discovery on the belief that the evidence at issue bars the case as it prevents the plaintiff’s ability to establish a prima facie case or bars the defense from presenting a valid defense; (2) proceed to discovery and conduct an in camera ex parte review of the document, decide that the privileged material is not truly privileged, and allow the suit to continue; (3) proceed to discovery, review the evidence, determine that it is in fact privileged but does not prevent the suit from

50 Chesney, supra note 1, at 1251-52 (citations omitted).
51 See id. at 1286.
52 Reynolds, 345 U.S. at 12.
53 Mohamed, 614 F.3d at 1077.
continuing without it, and allow the suit to continue; or (4) proceed to discovery, review the evidence, and determine that it is not privileged and should be included in the case.\textsuperscript{54} Chief Justice Vinson remanded the case to the district court with these instructions and a new evidentiary privilege was born.\textsuperscript{55}

In the wake of \textit{Reynolds}, numerous notable decisions were handed down based on the state secrets privilege, which later exploded with the extraordinary rendition cases the United States has been faced with since 9/11.\textsuperscript{56} Several main categories of cases where the privilege has been invoked are intellectual property, extraordinary rendition, and surveillance. What follows is a synopsis of several important cases that added gloss to the \textit{Reynolds} decision and reinterpreted it over time.

\textbf{a. Intellectual Property}

The first case to put a spin on \textit{Reynolds} was \textit{Halpern v. United States},\textsuperscript{57} where an inventor was issued an order of secrecy by the U.S. government precluding him from using a military patent that he developed for commercial application.\textsuperscript{58} The inventor sued for damages related to the secrecy order.\textsuperscript{59} The government moved to dismiss, stating among other claims that the state secrets privilege not only required dismissal of the case, but also forbade the district court from conducting a trial in camera.\textsuperscript{60} The court struck down the government’s invocation of the state secrets privilege, finding that “the plaintiff did not require production of any secret information he did not already possess . . . [and] conducting the entire trial in camera should suffice to address the government’s concerns.”\textsuperscript{61} This case was important as it distinguished the privilege in \textit{Reynolds} from the complete bar of \textit{Totten},

\textsuperscript{54} \textit{See generally} El-Masri v. United States, 479 F.3d 296, 304 (4th Cir. 2007) (examining potential outcomes of a \textit{Reynolds} inquiry).

\textsuperscript{55} \textit{Reynolds}, 345 U.S. at 12. Although Chief Justice Vinson did not specifically lay out these four options under the new standard, later courts would interpret the standard under such an analysis.

\textsuperscript{56} Chesney, \textit{supra} note 1, at 1289.

\textsuperscript{57} Halpern, 258 F.2d 36 (2d Cir. 1958).

\textsuperscript{58} Chesney, \textit{supra} note 1, at 1289.

\textsuperscript{59} \textit{Id.}

\textsuperscript{60} \textit{Halpern}, 258 F.2d at 38.

\textsuperscript{61} Chesney, \textit{supra} note 1, at 1290.
reestablishing both the judge's option to proceed with in camera review, and also asserting that semi-privileged information (in this case Halpern already knew the information involved in the patents) would not bar a case from proceeding.\textsuperscript{62} The gap between \textit{Totten} and \textit{Reynolds} was beginning to widen.

In a more recent case, a plaintiff brought action under the Invention Secrecy Act (the same Act that Halpern brought action under), alleging that the U.S. government had illegally used his patent for a cryptographic encoding device.\textsuperscript{63} Like Halpern, the plaintiff in \textit{Clift} filed a patent application for the device, and a secrecy order was placed on it, but later lifted.\textsuperscript{64} The plaintiff sued for damages relating to the secrecy order and also alleged that the government had appropriated his invention.\textsuperscript{65} In order to prove his case, the plaintiff sought the production of documents concerning the "origins and design of several types of cryptographic devices used by national security and military agencies of the Government."\textsuperscript{66}

The district court denied the plaintiff's motion, finding that "information about the design, construction, and use of the Government's cryptographic encoding devices falls within the scope of the state secrets privilege."\textsuperscript{67} Citing \textit{Reynolds}, the court found that disclosure of the information would pose a "reasonable danger" to the United States' defense.\textsuperscript{68} Unlike the court in \textit{Halpern}, this court found that the danger posed to national security was so strong that an in camera review was not warranted and dismissed the case before viewing the evidence.\textsuperscript{69} Without this information, the court ultimately found that the plaintiff would not be able to present a prima facie case and dismissed the case.\textsuperscript{70} The court disapproved of \textit{Halpern} by stating that the \textit{Halpern} court granted too much classified information to Mr. Halpern

\textsuperscript{62} Id.
\textsuperscript{64} Id. at 102-03.
\textsuperscript{65} Id. at 103.
\textsuperscript{66} Id.
\textsuperscript{67} Id. at 105.
\textsuperscript{68} Id. at 106.
\textsuperscript{69} Clift, 808 F. Supp. at 106.
\textsuperscript{70} Id. at 107.
through the use of an in camera trial, and that in this case the national secrets were too important to warrant even an in camera review of the documents by the judge. Just as the Halpern decision displayed that the Reynolds privilege could allow a claim to continue, this decision showed that the privilege could also act similar to a “Totten ban,” barring the case in certain circumstances.

b. Extraordinary Rendition

Starting in the Clinton administration, the U.S. government embarked on a quiet program of extraordinary rendition where suspected terrorists could be captured, transported to another country, and detained against their wills. When these suspects were thereafter released, many sought justice in U.S. courts, alleging illegal rendition, torture, and inhumane treatment, among other claims. In response, the U.S. government often invoked a Reynolds claim of state secrets privilege and sought to have the cases dismissed.

In El-Masri v. United States, a German citizen of Lebanese descent was travelling in Macedonia when Macedonian law enforcement officials detained him. El-Masri was detained for twenty-three days in Macedonia and was taken by CIA operatives to a detention facility in Kabul, Afghanistan, where he was held for another four months. Finally, he was transported to Albania where he was taken to an airport and flown home to Germany. It was later determined that El-Masri had been captured by mistake. After returning home, El-Masri brought suit in the United States, claiming that he had been “beaten, drugged, bound, and blindfolded during transport; confined in a small unsanitary

71 Id. at 109-10.
72 See Totten v. United States, 92 U.S. 105 (1875).
74 Id. at 300.
75 Id. at 296.
76 Id.
77 Id. at 300.
78 Id.
79 El-Masri, supra note 73, at 300.
80 Chesney, supra note 1, at 1250.
cell; interrogated several times; and consistently prevented from communicating with anyone outside the detention facility. . . . "81

Unsurprisingly, the government asserted a state secrets privilege claim, relying on Reynolds.82 The Director of the CIA submitted sworn declarations, one of which was classified and explained why court proceedings would lead to an unreasonable risk of disclosure.83 At the district court level, the judge dismissed the case under the Reynolds standard, prior to discovery, finding that "special procedures . . . are not appropriate," as "the entire aim of the suit is to prove the existence of state secrets."84 The court of appeals affirmed.85 The court explained that when assessing this risk, the court is "obliged to accord the 'utmost deference' to the responsibilities of the executive branch."86 The court went on to explain that "[w]here there is a strong showing of necessity, the claim of privilege should not be lightly accepted . . . [but] even the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that military secrets are at stake."87 The court went on to reaffirm the strength of the privilege in Reynolds, stating that "the court should not jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence, even by the judge alone, in chambers."88

In applying this standard, the court asked the question not of whether the general subject matter of the action could be explained without revealing state secrets, but whether the case could be litigated.89 The court decided that it could not.90 The court not only decided that El-Masri could not make a prima facie showing without revealing the CIA’s most sensitive intelligence operations, but also that the government would not be able to make a proper

81 El-Masri, 479 F.3d at 300.
82 Id. at 301.
83 Id.
85 El-Masri, supra note 73, at 296.
86 Id. at 305 (quoting United States v. Nixon, 418 U.S. 683, 710 (1974)).
87 Id. (quoting United States v. Reynolds, 345 U.S. 1, 11 (1953)).
88 Id. at 306 (quoting United States v. Reynolds, 345 U.S. 1, 10 (1953)).
89 Id. at 309.
90 Id. at 313.
defense even if he could.\textsuperscript{91} Under those two principles, the court dismissed his case, and El-Masri was left without justice in the U.S. courts.

Expanding on this case was \textit{Mohamed v. Jeppesen Dataplan},\textsuperscript{92} which added a third option for a reviewing judge to claim the state secrets privilege under \textit{Reynolds}.\textsuperscript{93} The facts of the case closely mirror those of El-Masri’s plight. An Egyptian national seeking asylum in Sweden was captured, transferred to American custody, flown to Egypt, and allegedly kept in a small cell for weeks where he was beaten and shocked with electricity.\textsuperscript{94} Other plaintiffs joined in the suit, alleging similar claims against Jeppesen Dataplan, a U.S. corporation that “provided flight planning and logistical support services to the aircraft and crew on all of the flights transporting each of the five plaintiffs among the various locations where they were detained and allegedly subjected to torture.”\textsuperscript{95} This case is also notable as it is not the U.S. government itself asserting the claims, but the defense claiming a privilege as a contractor for the U.S. government. The U.S. government did intervene prior to Jeppesen answering the complaint by moving to dismiss under the state secrets privilege.\textsuperscript{96}

The court began by reasserting the “\textit{Totten ban}” that was upheld in \textit{Tenet} five years earlier.\textsuperscript{97} The court rejected an overly narrow view of \textit{Totten}, reaffirming it as a bar to suit when the subject matter is itself a state secret, and also stating that the bar is not limited to cases where the plaintiff is in a secret relationship with the government.\textsuperscript{98} What was more interesting, however, was the court’s treatment of the \textit{Reynolds} privilege.

In reviewing the court’s interpretation of the \textit{Reynolds} privilege, the court reestablished the two bases relied on in \textit{El-Masri} and also added a new one. If the privilege is found to

\textsuperscript{91} \textit{El-Masri}, supra note 73, at 310.
\textsuperscript{92} \textit{Mohamed v. Jeppesen Dataplan}, Inc., 614 F.3d 1070 (9th Cir. 2010) (en banc).
\textsuperscript{93} \textit{Id.} at 1070.
\textsuperscript{94} \textit{Id.} at 1074.
\textsuperscript{95} \textit{Id.} at 1075.
\textsuperscript{96} \textit{Id.} at 1076.
\textsuperscript{97} \textit{See id.} at 1077-78.
\textsuperscript{98} \textit{Mohamed}, 614 F.3d, at 1079.
attach, the reviewing judge is faced with three options. If "the plaintiff cannot prove the prima facie elements of her claim with nonprivileged evidence, then the court may dismiss her claim as it would with any plaintiff who cannot prove her case." Under this first option, the result would be similar to that in Totten, and the claim would be completely dismissed without chance for discovery. Under the second option, "if the privilege deprives the defendant of information that would otherwise give the defendant a valid defense to the claim, then the court may grant summary judgment to the defendant." This second option thus serves as a "Totten ban" as well. The third option, referred to as the "mosaic theory," states that:

\[
\text{[E]ven if the claims and defenses might theoretically be established without relying on privileged evidence, it may be impossible to proceed with the litigation because—privileged evidence being inseparable from nonprivileged information that will be necessary to the claims or defenses—litigating the case to judgment on the merits would present an unacceptable risk of disclosing state secrets.}
\]

Under this principle, if the state secrets and evidence are so intertwined that litigating the case would result in the leakage of confidential information, the case must be dismissed. Again, this is a similar result to that in Totten. This third option broadened an already strong Reynolds state secrets privilege, and also muddied the standard, as will be seen below. It is important to note that under any of these three principles, if the judge determines that the information is either not privileged or the case can proceed in spite of the privileged information, the case may proceed, as Reynolds

99 Id. at 1083.

100 Id. (quoting Kasza v. Browner, 133 F.3d 1159, 1166 (1998)) (internal quotations omitted).

101 Id. (internal quotations omitted).

102 See Todd Garvey & Edward C. Liu, Cong. Research Serv., R41741, The State Secrets Privilege: Preventing the Disclosure of Sensitive National Security Information During Civil Litigation 5 (2011), http://www.fas.org/sgp/crs/secrecy/R41741.pdf (noting that the "mosaic theory" is based on "the principal that federal judges are not properly equipped to determine which pieces of information, when taken together, could result in the disclosure 'of the very thing the privilege is designed to protect'").

103 Mohamed, supra note 49, at 1083.
involves an evidentiary privilege and does not require the dismissal of a case solely based on the presence of privileged information.

The court went on to apply the facts of the case to both the "Totten ban" and the Reynolds privilege.\textsuperscript{104} The court rejected a Totten claim, alleging that while Totten would bar some of the plaintiff’s claims, the entire subject matter was not a state secret, and thus Reynolds was a more appropriate standard.\textsuperscript{105} The court eventually decided the case under the “mosaic theory,” finding after a Reynolds analysis that “the claims and possible defenses are so infused with state secrets that the risk of disclosing them is both apparent and inevitable.”\textsuperscript{106} The future of this third category of dismissal remains uncertain and will almost certainly lead to an increase in future litigation. It is unclear what mix of claims and defenses will rise to a level requiring complete pre-discovery dismissal under this new theory.

c. Surveillance

With the explosion in technology that has accompanied the beginning of the 21\textsuperscript{st} century, government surveillance has become an important concern for many Americans, and non-U.S. citizens alike. Directly following the 9/11 terrorist attacks, President Bush directed the National Security Agency (NSA) “to conduct a warrantless communications surveillance program.”\textsuperscript{107} Under the program, the NSA intercepted communications coming in and out of the United States through alleged terrorist networks.\textsuperscript{108} The government claimed that messages would only be intercepted “if there were reasonable grounds to believe that one party to the communication was a member or agent of al Qaeda or an affiliated terrorist organization.”\textsuperscript{109} The New York Times broke the story in 2005, and the plaintiff, a Muslim charity with operations in over 50 countries, soon after brought suit alleging warrantless

\textsuperscript{104} See id.
\textsuperscript{105} Id. at 1084-85.
\textsuperscript{106} Id. at 1089.
\textsuperscript{107} Al-Haramain Islamic Found., Inc. v. Bush, 507 F.3d 1190, 1192 (9th Cir. 2007).
\textsuperscript{108} Id.
\textsuperscript{109} Id. at 1194.
electronic surveillance.\footnote{i10} Once again, the government asserted a state secrets privilege claim.\footnote{i11}

The appellate court first found that the subject matter of the litigation was not a state secret, and thus rejected a Totten claim.\footnote{i12} The court found that the President had already publicly acknowledged the existence of the surveillance program, and the government had officially declared Al-Haramain to be a terrorist group with ties to al Qaeda.\footnote{i13} As the government had tried to assuage the American public’s fears that they would not be subject to the program, the court found that these disclosures proved that the subject matter was not itself a state secret.\footnote{i14}

When assessing the Reynolds claim, the court looked both at whether Al-Haramain had been surveilled, and at an issue with a sealed document.\footnote{i15} In showing its power of discretion under the Reynolds standard, the court conducted an in camera review of the sealed document, finding a strong showing of necessity by Al-Haramain to establish a prima facie case.\footnote{i16} After reviewing the document, the court determined that the document was in fact a state secret and subject to privilege.\footnote{i17} Furthermore, the court went on to explain that just as the document itself was subject to privilege, so too were “reconstructed memories” which could serve to “circumvent[] the document’s absolute privilege.”\footnote{i18} After finding this information to be privileged, the court found that Al-Haramain could not establish a prima facie case, and dismissed the plaintiffs’ suit.\footnote{i19}

Four years later, the American public’s fears regarding electronic eavesdropping and surveillance were realized. Again at issue was the warrantless surveillance program in Al-Haramain,
but residential telephone customers brought the case this time.\textsuperscript{120} The plaintiffs, AT&T customers, alleged that the U.S. government was eavesdropping on their communications, in violation of their First and Fourth Amendment rights.\textsuperscript{121} In stark contrast to the government’s claims of narrowly targeted interception of alleged terrorist communication, the complaint claimed that the government “operated a ‘dragnet collection’ of communications records by ‘continuously solic[iting] and obtain[ing] the disclosure of all information in AT&T’s major databases of stored telephone and Internet records.”\textsuperscript{122}

After the government moved for summary judgment, the district court dismissed the claim, ruling that the plaintiffs did not have standing to sue as they did not make a prima facie showing that they were actually harmed (or subjected to surveillance) under the program.\textsuperscript{123} On appeal, the appellate court reversed, finding that the defendants did in fact make a prima facie showing that their communications passed through the dragnet and were potentially captured.\textsuperscript{124} The appellate court remanded with instructions for the district court to determine whether the government’s state secrets privilege claim was proper to dismiss the suit.\textsuperscript{125}

On remand, citing \textit{Al-Haramain}, the court found that because the government publicly disclosed information about the surveillance program, the subject matter was not itself a state secret, and again rejected a \textit{Totten} claim.\textsuperscript{126} The court then moved on to a \textit{Reynolds} analysis, and determined that significant evidence should be excluded, but that such exclusion was not a complete bar to the case.\textsuperscript{127} Again citing \textit{Al-Haramain}, the court found that the Foreign Intelligence Surveillance Act (FISA)\textsuperscript{128} “preempts the

\textsuperscript{121} \textit{Id.}
\textsuperscript{122} \textit{Id.} (citations omitted).
\textsuperscript{123} \textit{Id.} at 907.
\textsuperscript{124} \textit{Id.} at 910.
\textsuperscript{125} \textit{Id.} at 913-14.
\textsuperscript{127} \textit{Id.}
state secrets privilege in connection with electronic surveillance for intelligence purposes . . . ."129 Accordingly, as the court did in Al-Haramain, the judge decided that the in camera review procedure from "FISA applies and preempts the determination of evidentiary preclusion under the state secrets doctrine."130 The court reserved ruling on the case until further briefing,131 but clearly this was a blow to the state secrets privilege, and showed that judges may increasingly be more inclined to conduct an in camera review before finding the privilege applies.

In 2007, Robert Timothy Reagan of the Federal Judicial Center published a guide for judges entitled: Keeping Government Secrets: A Pocket Guide for Judges on the State-Secrets Privilege, the Classified Procedures Act, and Court Security Officers.132 At issue in all of these cases is what the government would characterize as "classified" information: "information designated by the executive branch as not subject to public discussion . . . [which] [t]he unauthorized disclosure of . . . can cause irreparable damage to the national security and loss of human life."133 While "[g]enerally access to classified information requires a security clearance[,] Article III judges are automatically entitled to access to classified information necessary to resolve issues before them."134 The guide goes on to explain that criminal proceedings are governed by the Classified Information Procedures Act (CIPA)135, that outlines court procedures for classified information, and that civil cases should mirror these.136

So how should judges proceed? First, they must determine if the privilege has been submitted properly, as "the privilege must be (1) invoked by the United States government (2) by formal claim made by the head of the department controlling the secret

129 Id. at 7 (citation omitted) (internal quotations omitted).
130 Id. at 7.
131 Id. at 15.
133 Id. at 1.
134 Id. at 3.
136 See id. at 8.
(3) after personal review of the matter." If this procedure is properly followed, the judge has flexibility under Reynolds to determine whether or not to conduct an in camera review, or to decide the information is classified without reviewing the document itself. The guide cites Reynolds for the idea that "the court should not jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence, even by the judge alone, in chambers." This is determined under the previously noted "reasonable danger" standard, and is weighed against the necessity of the information (while not being able to be overcome by necessity alone). Thus, a good deal of discretion is left up to the judge.

In summary, following the history of cases and judicial guidelines, a judge should use the following thought process: (1) determine if the subject matter of the case is a state secret itself, and if so, apply Totten and dismiss the case; (2) if not a state secret in itself, determine if a Reynolds claim has been submitted properly; (3) based on the public record, necessity of both parties, and the state secrets privilege, determine if an in camera review is warranted; (4) determine if the information is privileged; (5) if the information is privileged, determine if a) it is needed to establish a prima facie case, b) it is needed to establish a proper defense, or c) it is so intertwined with the case, and dismiss if the answer is yes to any of these three; and (6) if the case can proceed without use of the privileged material, allow the suit to proceed.

This is a fairly amorphous standard, especially in light of the "mosaic theory" prong of the fifth step and has led to calls for reform. Since 2001, over 120 law review articles have been written regarding reform of the privilege in response to the explosion of state secrets cases, as well as much being written about the privilege in the media. Judging by the evolving standard of review found in the case history, and in light of the court’s recent decision in Jewel, it seems that the doctrine might

137 Id. at 4-5.
138 See id. at 5.
139 REAGAN, supra note 132, at 5 (quoting United States v. Reynolds, 345 U.S. 1, 10 (1953)).
140 See id. at 5-6.
141 Donohue, supra note 3, at 78.
be ripe for change.

III. An Evolving Standard: Can and Will Congress Change the State Secrets Doctrine?

Before determining if the state secrets privilege should be changed, the first question to ask is if it can be. Most scholars feel that the doctrine has roots in the Constitution, but has “emerge[d] in the traditional common-law fashion.”142 While the “constitutional core of the state secrets privilege is best understood as a consequence of functional considerations associated with the particular advantages and responsibilities of the executive branch vis-à-vis national defense and foreign relations... this constitutional core does not account for the full scope of the privilege.”143 Furthermore, courts have cited legislation as overriding the privilege at times (e.g., FISA), and the privilege itself has evolved over time, as evidenced by the case history.144 As the court explained in El-Masri, “[t]he state secrets privilege that the United States has interposed in this civil proceeding thus has a firm foundation in the Constitution, in addition to its basis in the common law of evidence.”145 Accordingly, Congress could legislate to reform the privilege if it chose to do so.146

Twice Congress has attempted to do just this, with the introduction of the State Secrets Protection Act, originally introduced in 2008.147 The purpose of the bill was “[t]o enact a safe, fair, and responsible state secrets privilege.”148 Principally, the bill would no longer leave it to the discretion of judges to determine if an in camera review is warranted, and they would always have to review the evidence in camera if a proper basis of privilege has been established.149 The government would be required to submit an affidavit explaining the privilege asserted,

142 Chesney, supra note 1, at 1308-09.
143 Id. at 1309.
144 See id. at 1309-10.
146 See Chesney, supra note 1, at 1310.
148 Id.
149 See id. § 4052(b).
which the court would be forced to review. If the evidence warrants an ex parte proceeding, hearings should be limited to attorneys with appropriate security clearances. If the court finds that the information is privileged, it should not be disclosed. However, if the court finds that a non-privileged substitute can give an "equivalent opportunity to litigate the claim or defense . . . the court shall order the United States to provide such a substitute." The bill sought to construct a larger hurdle to dismissal under the state secrets privilege.

However, the bill has failed passage both times it was introduced. Originally, after being approved by an eleven to eight vote to be sent to the Senate floor for consideration, it was met with intense opposition. The biggest opposition to the bill came from Attorney General Michael B. Mukasey, who largely cited the doctrine's long-standing history and importance to national security. He further went on to argue that the privilege was "rooted in the Constitution and is not merely a common law privilege." Others claimed the bill is "unnecessary, unconstitutional, and undemocratic." These oppositionists also claim that there has been no evidence of abuse. Statistical studies on the subject have fallen both ways, with scholar Robert Chesney finding no definable increase in frequency in the privilege being asserted during the Bush administration, and no "breaking [of] new ground" in respect to scope. However, one

150 See id. § 4053(d).
151 See id. § 4052(c).
152 Id. § 4054(e).
153 S.2533, § 4054(f).
156 Id.
158 See id.
159 Chesney, supra note 1, at 1301-05.
must ask whether such a nebulous standard can be subject to abuse, especially in light of the recent groundbreaking cases involving the governmental surveillance of ordinary U.S. citizens.\textsuperscript{160}

IV. A Dated Standard: The Totten/Reynolds Dichotomy and The Potential For Reform

With the advent of new technologies bringing increased surveillance and more complicated military tactics, it is nearly certain that the state secrets privilege will continue to be used as a governmental defense. As it now stands, the privilege is a difficult one for judges to apply effectively and evenly, and damages the efficiency of the judicial system. What is a “reasonable danger?” How much necessity is needed to overcome this danger? Are some state secrets more important than others? All of these are questions that judges now face, and could be mitigated with a more discrete standard of judicial review.

First, tracking the bill that was introduced in 2008, a judge should be forced to view the privileged information if he determines that the privilege applies via an in camera review. As previously stated, Article III judges are already qualified to view classified information, and have sworn to uphold the Constitution, including the safekeeping of confidential information. Whatever the reasoning of the Reynolds Court in making this review discretionary, it is outweighed by the potential for abuse by the defense should the information not truly be privileged. Indeed, even in Reynolds, where the judge did not proceed to in camera review and dismissed the case prior to discovery, the evidence at issue turned out to not be truly privileged information.\textsuperscript{161} As Louis Fisher stated in an article relating to the state secrets privilege, “[b]y failing to examine the document, the Reynolds Court risked being fooled. As it turned out, it was.”\textsuperscript{162}

Requiring in camera review would mitigate this issue almost entirely. Judges, sworn to secrecy, would view the information in


a limited capacity, and make a threshold determination of whether the information is truly privileged. The case could then move on accordingly.

Furthermore, the privilege should be simplified and the distinction between *Totten* and *Reynolds* collapsed. Indeed, the recent legislation introduced on the Senate floor seems to track *Reynolds* and not really mention *Totten*. Perpetuating the confusing lines between the two is the Ninth Circuit’s recent decision in *Jeppesen Dataplan*, by adding a third area of dismissal if the court determines that the prima facie case or defenses are too intertwined with state secrets for the case to go on. How should a judge make this decision?

I suggest that this third "mosaic theory" prong alluded to in *El-Masri* is really *Totten* in disguise. If the claims and defenses are so intertwined with state secrets as to not allow the case to move forward, does this not mean that the subject matter of the case is essentially a state secret? Accordingly, I would make this the first step in the judicial process. A judge should ask if the subject matter is so clearly a state secret that the case cannot proceed. Only under this prong can the judge proceed without conducting in camera review. Unlike the "mosaic theory," which broadens *Reynolds* in scope, this would curtail the potential abuse incurred when a case is thrown out prior to discovery, while still providing for an outright dismissal in extreme cases. As stated previously, *Totten* has only been successfully applied fewer than a handful of times, and an outright bar to suit prior to a chance for discovery should track this trend not be expanded via *Reynolds*.

If the judge determines that the subject matter (i.e. claims and defenses) is not a state secret in itself, the case should proceed with in camera review. Here, the judge will view the evidence at issue and first make a determination if the evidence is privileged. If she determines it is not, the case will resume with the evidence included. If the judge determines the evidence is indeed privileged, she will ask the same two questions originally asked in *Reynolds*: 1) can the plaintiff establish a prima facie case; and 2) can the defense establish a proper defense? If the answer is no to either, the case must be dismissed. If the answer is yes, and the case can proceed without the privileged evidence being included, the judge should allow the case to proceed.

By curtailing the third prong enunciated in *Jeppesen Dataplan*
and incorporating *Totten* as an initial step, the court would both be protecting the privilege and curbing its potential for abuse.

V. Conclusion

As we enter a new age in information technology, the state secrets privilege becomes an increasingly important doctrine. Recent decisions to broaden the privilege’s scope have moved the privilege in the wrong direction, and have granted the government too much power to dismiss potential claims. In too many situations, judges dismiss a plaintiff’s claim before viewing the evidence at issue. This pre-discovery dismissal leaves a plaintiff without any recourse in U.S. courts, and does not align with the Due Process clause of the Constitution.

By reclassifying the vague “mosaic theory” option as what it truly is (a “*Totten* ban”), and proceeding to in camera review in all but the most extreme cases of national security, courts can redefine the state secrets privilege as a legitimate defense to cases involving confidential information, while providing plaintiffs with increased due process at little cost.