The State Secrets Privilege: What's Wrong With It, How It Got That Way, and How the Courts Can Fix It

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"What ought to be done under such circumstances present[s] a delicate question, the discussion of which, it is hoped, will never be rendered necessary in this country."

Chief Justice John Marshall[1]

I. Introduction

The state secrets privilege is a common law evidentiary rule that allows for evidence to be protected from discovery where its disclosure would threaten national security.[2] It is a powerful privilege; once invoked, it often leads to dismissal of the case.[3] Formerly a rare tactic, the privilege has been invoked with increasing frequency by the George W. Bush administration in litigation challenging its tactics in its war on terror.[4]

Courts have sustained the government's assertions of the state secrets privilege with such remarkable consistency that when Chief Judge Vaughn Walker of the Northern District of California actually rejected the privilege

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1. States v. Burr, 25 F. Cas. 30, 37 (C.C.D. Va. 1807) (No. 14692d).

2. *In re* United States, 872 F.2d 472, 474 (D.C. Cir. 1989).

3. For example, if the plaintiffs cannot make out the prima facie case without the protected evidence. *See* Kasza v. Browner, 133 F.3d 1159, 1166 (9th Cir. 1998).

4. The privilege was invoked six times between 1953 and 1976. Since 2001, it has been invoked a reported 22 times. *See* PATRICE MCDERMOTT & EMILY FELDMAN, OPENTHEGOVERNMENT.ORG, SECRECY REPORT CARD 2006: INDICATORS OF SECRECY IN THE FEDERAL GOVERNMENT (2006), http://www.openthegovernment.org/otg/SRC2006.pdf; *see also* Scott Shane, *Invoking Secrets Privilege Becomes a More Popular Legal Tactic by U.S.*, N.Y. TIMES, June 4, 2006.

during the summer of 2006, it was viewed as a "rare act of constitutional independence."[5] In the opinion, Chief Judge Walker stated:

> [I]t is important to note that even the state secrets privilege has its limits. While the court recognizes the executive's constitutional duty to protect the nation from threats, the court takes seriously its constitutional duty to adjudicate the disputes that come before it. . . . To defer to a blanket assertion of secrecy here would be to abdicate that duty. . . .[6]

What Chief Judge Walker articulated is that the state secrets privilege has so expanded in scope and in power that it legitimately may be asked whether a court carries out its constitutional duty when it applies the privilege in its current form. It is the goal of this note to explore that question.

To define the judiciary's constitutional duty is a topic all its own, but one worth discussing briefly at the outset. The Constitution itself suggests the judiciary is to adjudicate the cases and controversies that come before it, but that proposition comes in the form of a grant of power, rather than an explicit command.[7] A more specific directive comes from the Supreme Court itself, in *Marbury v. Madison*: "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection."[8] This note contends that the judiciary—by increasing (1) the power of the privilege to get cases dismissed and (2) the degree of deference given to assertions of the privilege—now fails to carry out the judicial duty defined in *Marbury* when applying the state secrets privilege. Accordingly, this note analyzes two judicial missteps.

First, courts have become increasingly likely to use the state secrets privilege to dismiss litigation before the merits.[9] By definition, dismissal before the merits denies an individual the protection of the laws; improper dismissal, then, is constitutionally problematic. Second, courts have granted too much deference to executive assertions of the privilege.[10] The

5. Nat Hentoff, *An Expansive View of 'State Secrets'*, WASH. TIMES, Aug. 14, 2006, at A15.

6. Hepting v. AT&T Corp., 439 F. Supp. 2d 974, 995 (N.D. Cal. 2006).

7. *See* U.S. CONST. art. III, § 2, cl. 1.

8. Marbury v. Madison, 5 U.S. 137, 163 (1803).

9. *See* discussion *infra* Part III.

10. *See* discussion *infra* Part IV.

Supreme Court has crafted a flawed approach to dealing with the privilege, and lower courts have extended even greater deference in applying that approach. The resulting lack of judicial scrutiny means a privilege prone to abuse.

In these two ways—taking the government at its word and giving the privilege fatal effect—a court fails to carry out its constitutional duty when it applies the current approach to claims of the state secrets privilege. This note seeks to explain where and how these problems came about and to suggest an alternative approach to assertions of the privilege. Tracing the evolution of the doctrine is critical to understanding where and how it has come to be overgrown. Accordingly, Part II lays out a brief history of the state secrets privilege in American jurisprudence. Part III examines the problem of increasing use of the privilege to dismiss litigation before the merits. Part IV focuses on the problem of judicial deference, first illustrating that the existing approach is problematic, then explaining how it came to be that way, and finally presenting an alternative approach. Part V concludes.

II. A Brief History

A. The Roots of the Privilege

The privilege finds its earliest American roots in Aaron Burr's trial for treason.[11] In that case, Burr moved to subpoena a letter by General James Wilkinson.[12] The government argued that the letter contained "matter which ought not to be disclosed."[13] Chief Justice Marshall foresaw what would come to be central to future debates over assertions of the state secrets privilege: that a litigant's need for certain information essential to his or her case would collide with the government's need to protect that information, the disclosure of which would "endanger the public safety."[14] Marshall decided that Burr's case did not present such a dilemma, as there was no indication that the letter contained information so dangerous, but noted that "what ought to be done under such circumstances present[s] a delicate question, the discussion of which, it is hoped, will never be rendered necessary in this country."[15] Unfortunately, resolution of Marshall's delicate question would become entirely necessary.

11. *In re* United States, 872 F.2d 472, 474-75 (D.C. Cir. 1989).
12. States v. Burr, 25 F. Cas. 30, 32 (C.C.D. Va. 1807) (No. 14692d).
13. *Id.* at 37.
14. *Id.*
15. *Burr*, 25 F. Cas. at 37.

B. Totten v. United States: A Precursor

In *Totten v. United States*, the Supreme Court established a rule that would become a precursor to the state secrets privilege and moreover, important to the expansion of the power of the privilege.[16] In *Totten*, the plaintiff sued to enforce an alleged contract between the government and the plaintiff's intestate, a former spy.[17] The Court held that the secrecy of the contract precluded any action for its enforcement.[18] It reasoned that if such an action could be brought, the proceeding would necessarily lead to disclosure of the details and mechanics of a clandestine operation, and that such exposure could be to the "serious detriment of the public."[19] Thus, *Totten* established a rule precluding judicial review of cases "where success depends on the existence of [a] secret espionage relationship with the Government."[20]

Totten plays a key role in the story of the state secrets privilege. Not only is it a precursor to the privilege, it has also occasionally been confused with or muddled into the privilege.[21] It has been employed in cases where, arguably, a state secrets analysis should have been used instead.[22] Furthermore, the Supreme Court's principal state secrets case contains a confusing citation to *Totten*, which courts have misread with constitutionally significant ramifications.[23] This issue is discussed in Part III.

C. United States v. Reynolds: The Modern Doctrine

The Supreme Court first articulated the modern state secrets doctrine in *United States v. Reynolds*.[24] In *Reynolds*, the plaintiffs sued the government under the Federal Tort Claims Act after a B-29 military aircraft crashed and killed their civilian husbands.[25] They sought discovery of the Air Force's official accident investigation report.[26] The government

16. Totten v. United States, 92 U.S. 105, 107 (1875).

17. *Id.* at 105.

18. *Id.* at 107.

19. *Id.* at 106-07.

20. Tenet v. Doe, 544 U.S. 1, 8 (2005).

21. *See id.* ("[T]he Court of Appeals also claimed that *Totten* has been recast simply as an early expression of the evidentiary 'state secrets' privilege, rather than a categorical bar to their claims.").

22. *See infra* note 45 and accompanying text.

23. *See* discussion *infra* Part III.B.

24. United States v. Reynolds, 345 U.S. 1 (1953).

25. *Id.* at 2-3.

26. *Id.* at 3.

objected to production of the report, explaining that the plane was engaged in a "highly secret mission."[27] The Secretary of the Air Force filed a formal "Claim of Privilege" and the government submitted the affidavit of the Judge Advocate General, which claimed that the report "could not be furnished 'without seriously hampering national security, flying safety and the development of highly technical and secret military equipment.'"[28] The court sought to review the report in camera to determine whether it indeed contained information that should not be disclosed.[29] The government refused.[30] Pursuant to the Federal Rules of Civil Procedure,[31] the court ordered that the issue of negligence be taken as established in the plaintiffs' favor.[32] Final judgment was entered for the plaintiffs and the Third Circuit affirmed.[33] The Supreme Court granted certiorari to examine the question of the government's privilege to resist discovery.[34]

The Court wrote that when the Secretary of the Air Force filed his Claim of Privilege, he was attempting "to invoke the privilege against revealing military secrets, a privilege which is well established in the law of evidence."[35] After defining the requirements for claiming the privilege, the Court set out the challenge that faced trial courts: "The court itself must determine whether the circumstances are appropriate for the claim of privilege, and yet do so without forcing a disclosure of the very thing the privilege is designed to protect."[36]

The *Reynolds* Court was faced with a challenge of its own: crafting a rule that would allow lower courts to carry out this balancing act. Noting the lack of judicial experience with this new privilege, the Court turned to the privilege against self-incrimination, which it deemed analogous.[37] In dealing with that privilege, courts had rejected the two extreme positions: that the witness' assertion should be taken as conclusive and that the witness should be required to reveal the basis of his claim to the judge for verification.[38] Instead, courts had developed a compromise, under which

27. *Id.* at 4.
28. *Id.* at 4-5.
29. *Id.* at 5.
30. *Id.*
31. *See* FED. R. CIV. P. 37(b)(2)(A).
32. *Reynolds*, 345 U.S. at 5.
33. *Id.*
34. *Id.* at 3.
35. *Id.* at 6-7.
36. *Id.* at 7-8 (footnotes omitted).
37. *Id.* at 8.
38. *Reynolds*, 345 U.S. at 9.

the court would accept the claim of privilege if it were "satisfied from all the evidence and circumstances, and 'from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result.'"[39]

Thus, the *Reynolds* Court defined the modern approach for dealing with assertions of the state secrets privilege by analogy. Under this approach, a judge may not require disclosure of the evidence—even ex parte and in camera—in all cases.[40] Importantly, however, *Reynolds* does not foreclose the possibility of review. For non-disclosure to be appropriate, the judge must be convinced from all other evidence and circumstances "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."[41] Moreover, where the plaintiffs show a greater necessity for the evidence, the court should be more demanding in satisfying itself that invocation of the privilege was appropriate.[42] Applying its newly formulated approach, the *Reynolds* Court sustained the government's claim of privilege.[43]

III. The First Problem: Courts Have Been Too Quick to Dismiss Litigation Before the Merits

In the area of state secrets cases, courts have become increasingly likely to dismiss litigation before the merits.[44] They have done this in two ways. First, they have expanded *Totten* to apply to a wider range of cases—cases that otherwise could be handled under the state secrets privilege.[45] While the state secrets privilege affords some procedure, *Totten* is an absolute bar to suit; when it is invoked, the case is dismissed.[46] Second, they have misread *Reynolds*' citation to *Totten*.[47] The product of

39. *Id.* (quoting Hoffman v. United States, 341 U.S. 479, 486-87 (1951)).

40. *See id.* at 10.

41. *Id.*

42. *Id.* at 11.

43. *Id.* at 10-12.

44. *See* Erin M. Stilp, *The Military and State-Secrets Privilege: The Quietly Expanding Power*, 55 CATH. U. L. REV. 831, 839 n.74-75 (2006) (citing, by way of example, eighteen cases dismissed at the pleadings stage between 1988 and 2006, but ten cases from 1958 to 1984 in which the litigation was allowed to continue after upholding of the privilege).

45. *See, e.g.*, Weinberger v. Catholic Action of Haw., 454 U.S. 139, 146-47 (1981) (dismissing the case on the grounds that the question whether the Navy had complied with the National Environmental Policy Act was beyond judicial scrutiny, citing *Totten*).

46. *See supra* note 20 and accompanying text.

47. *See* discussion *infra* Part III.B.

this misreading is a state secrets privilege which more often leads to outright dismissal.[48] Improper dismissal of litigation before the merits threatens *Marbury*'s "very essence of civil liberty."[49] Accordingly, any tendency to do so should be examined carefully.

A. Expanding *Totten*

Totten originally stood for the proposition that a plaintiff could not bring suit against the government based on a secret espionage agreement.[50] The imposition of such an outright bar was justified by the fact that the case centered on a contract that had itself been secret.[51] The bilateral acknowledgement of secrecy in entering into the contract was the critical underpinning of the *Totten* Court's decision that no action could be founded upon it.[52]

However, the end of the opinion contains dictum which has since been used to expand the application of *Totten* to a range of cases beyond those which center on secret contracts: In concluding, the *Totten* Court wrote, "[i]t may be stated as a general principle, 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."[53] Based on this language, courts have expanded the scope of *Totten*'s application, using it to defeat otherwise valid claims in a number of areas of law.[54]

48. *Id.*

49. Marbury v. Madison, 5 U.S. 137, 163 (1803). As Chief Judge Walker stated, "The compromise between liberty and security remains a difficult one. But dismissing this case at the outset would sacrifice liberty for no apparent enhancement of security." *Hepting*, 439 F. Supp. 2d at 995.

50. *Totten*, 92 U.S. at 105. *See* Tenet v. Doe, 544 U.S. 1, 3 (2005).

51. *Totten*, 92 U.S. at 106 ("Our objection is not to the contract, but to the action upon it . . . The service stipulated by the contract was a secret service . . . Both employer and agent must have understood that the lips of the other were to be for ever sealed respecting the relation of either to the matter.").

52. *Id.*

53. *Id.* at 107.

54. *See* Sean C. Flynn, *The Totten Doctrine and Its Poisoned Progeny*, 25 VT. L. REV. 793, 794 (2001) ("In recent years, courts have used *Totten* to defeat otherwise valid claims under the Resource Conservation and Recovery Act . . . and the National Environmental Policy Act.").

B. By Misreading Reynolds' Citation to *Totten*, Courts Have Improperly Increased the Power of the State Secrets Privilege to Dismiss Litigation before the Merits

Even more troubling than the courts' application of *Totten* to a widening range of cases has been their increasing tendency to lend the state secrets privilege the Tottenesque ability to dismiss litigation on the pleadings.[55] The Supreme Court has explicitly distinguished between "the categorical *Totten* bar [and] the balancing of the state secrets evidentiary privilege."[56] However, due to the thematic relationship between the two doctrines and *Reynolds'* confusing citation to *Totten*, courts have improperly employed the state secrets privilege to dismiss litigation before the merits.[57] *Kasza v. Browner*, a Ninth Circuit case from 1998, serves as an illustration.[58]

In *Kasza*, the plaintiffs alleged that the Air Force had violated the Resource Conservation and Recovery Act by improperly storing, treating, and disposing of hazardous waste.[59] The government refused to provide almost all of the information requested in discovery, invoking the state secrets privilege.[60] Based on a declaration of the Air Force Vice Chief of Staff, the trial court accepted the claim of privilege and granted summary judgment in favor of the government.[61]

The Ninth Circuit affirmed, stating that application of the state secrets privilege can have three effects.[62] First, the evidence covered by the privilege is removed from the case; if the plaintiff can no longer prove the prima facie claim without the privileged evidence, the case will be dismissed.[63] Second, if removal of certain evidence by the privilege deprives the defendant of an otherwise available defense, the court may grant summary judgment for the defendant.[64] Third, "if the 'very subject matter of the action' is a state secret, then the court should dismiss the

55. *See supra* note 44 and accompanying text.

56. *Tenet*, 544 U.S. at 9-10.

57. *See, e.g.*, Kasza v. Browner, 133 F.3d 1159, 1170 (9th Cir. 1998) (dismissing the case prior to discovery because the "very subject matter" of the action was deemed a state secret); Edmonds v. U.S. Dep't of Justice, 323 F. Supp. 2d 65, 81 (D.D.C. 2004) (dismissing the case prior to discovery based on the Attorney General's invocation of the state secrets privilege).

58. *Kasza*, 133 F.3d at 1159.

59. *Id.* at 1163.

60. *Id.*

61. *Id.*

62. *Id.* at 1166.

63. *Id.*

64. *Kasza*, 133 F.3d at 1166.

plaintiff's action based solely on the invocation of the state secrets privilege."[65] This third option is cause for particular concern. If a court finds the "very subject matter" of a litigation to be a state secret, the case is dismissed outright.[66] It is of tremendous import, then, considering the due process implications of dismissal before the merits, what exactly "very subject matter" is taken to mean. A closer look reveals that the "very subject matter" language, which was taken from *Reynolds*, has been misinterpreted and applied too broadly.[67] This third category should encompass only a narrow range of cases, exemplified by *Totten*.

The *Kasza* court wrote that outright dismissal of the suit was proper because "[a]s the very subject matter of [the plaintiff's] action is a state secret, we need not reach her other arguments regarding invocation of the privilege."[68] The "very subject matter" language comes from a footnote in *Reynolds*.[69] In that section of *Reynolds*, the Court explains that in state secrets analysis, a stronger showing of necessity for the evidence by the plaintiff calls for a more aggressive inquiry by the court.[70] However, at the extreme, "even the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that military secrets are at stake."[71] As an illustration of such an extreme situation, the Court cites *Totten*.[72] The footnote reads: "See [*Totten*] where the very subject matter of the action, a contract to perform espionage, was a matter of state secret. The action was 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."[73]

In other words, *Reynolds* says that, in extreme cases, the privilege may trump even the strongest need for the evidence by the plaintiff.[74] But *Reynolds* does *not* say that any case involving something the government considers confidential may be dismissed on the pleadings. The confusion stems from the court's use of the phrase "very subject matter," which at first blush, may seem to apply to cases "involving" or "about" something of a secret nature. But in *Reynolds*, "very subject matter" is used to describe

65. *Kasza*, 133 F.3d at 1166 (quoting *Reynolds*, 345 U.S. at 11 n.26).
66. *Id.*
67. *See United States v. Reynolds*, 345 U.S. 1, 11 n.26 (1953).
68. *Kasza*, 133 F.3d at 1170.
69. *Reynolds*, 345 U.S. at 11 n.26.
70. *Id.* at 11.
71. *Id.*
72. *Id.* at 11 n.26.
73. *Id.*
74. *See id.* at 11.

the alleged spy contract that formed the entire *basis* of the suit in *Totten*.[75] Dismissal on the pleadings was justified in *Totten* only because it was entirely "obvious" that the action could never prevail.[76] But, examining *Totten*, it was only obvious that action could never prevail because the entire action hinged on the existence of a secret contract.[77] To try the case would have *necessarily* meant disclosure of that secret contract.[78] Thus, it was "obvious" the action could never prevail.[79] By comparison, the action in *Kasza* did not rest entirely on the existence of something secret; it merely involved secret evidence.[80] So it was not entirely obvious, as it was in *Totten*, that the action was unsustainable. *Kasza* is not analogous to *Totten*, and dismissal on the pleadings is not justified under *Reynolds*.

To summarize: *Reynolds* says that dismissal on the pleadings may be justified in extreme cases, where it is obvious the action can never prevail.[81] It is obvious an action can never prevail where, as in *Totten*, the entire action is built upon the existence of something that cannot be disclosed, such as an espionage contract.[82] Unfortunately, perhaps because the phrase "very subject matter" may seem to encompass cases "involving" or "thematically about"—as distinguished from built-upon—secret evidence, courts have been too apt to dismiss litigation on the pleadings.

Moreover, *Totten* was distinct in that the due process concerns that accompany outright dismissal based on a governmental claim of privilege were alleviated by the bilateral acknowledgment of the secrecy of the contract. The *Totten* Court held that no action could be founded on such a contract because "[b]oth employer and agent must have understood that the lips of the other were to be for ever [sic] sealed respecting the relation of either to the matter."[83] In such a situation, where the plaintiff has entered into an agreement that both he and the government considered secret, the plaintiff had reason to know that he could never bring suit in a court of law to enforce the contract. Accordingly, concern over depriving him of his day in court is less troubling. Arguably then, considering the gravity of a threat to "[t]he very essence of civil liberty,"[84] courts should only employ

75. *Reynolds*, 345 U.S. at 11 n.26.

76. *Id.*

77. *Totten v. United States*, 92 U.S. 105, 106 (1875).

78. *Id.*

79. *Reynolds*, 345 U.S. at 11 n.26.

80. Kasza v. Browner, 133 F.3d 1159, 1162-63 (9th Cir. 1998).

81. *Reynolds*, 345 U.S. at 11 n.26.

82. *Totten*, 92 U.S. at 106.

83. *Id.*

84. Marbury v. Madison, 5 U.S 137, 163 (1803).

the drastic measure of outright dismissal where due process concerns are similarly alleviated.

C. The "Very Subject Matter" Trigger for Dismissal Before the Merits Should Be Read Narrowly

To the extent possible, courts should strive to make the operation of the privilege consonant with the fundamental proposition that citizens shall not be deprived of life, liberty, or property without due process of law.[85] It is entirely possible to do so, simply by limiting the "very subject matter" trigger for dismissal to the narrow set of cases to which it was originally meant to apply.

Courts, such as the Ninth Circuit in *Kasza*, have given liberal (and erroneous) construction to the phrase "very subject matter."[86] A more careful reading of *Reynolds* suggests that dismissal on the pleadings is permissible only in the most extreme set of circumstances, exemplified by *Totten*, where such a drastic measure is justified. There are two features of *Totten* that justified dismissal before the merits. First, the case did not simply *involve* a secret spy contract; it was an action to enforce that contract.[87] Going to trial would have necessarily required its disclosure. Only because the action was built *upon* secret evidence was it "obvious" that the action could not prevail.[88] Second, there was a bilateral acknowledgment of secrecy upon entering into the alleged spy contract.[89] This acknowledgment alleviates, at least to some extent, concerns over depriving the plaintiff of the ability to sue over the contract. Where both features are present—where there exist both an absolute need for the evidence and some justification for denying the plaintiff the right to sue—outright dismissal is justified. To restrict the ability of the privilege to trigger dismissal on the pleadings to such circumstances is a narrow reading of *Reynolds*, to be sure. But a narrow reading is entirely appropriate where nothing short of a citizen's due process rights are at stake.

As this discussion demonstrates, it is critical to distinguish the state secrets privilege from the outright *Totten* bar. The distinction is critical because, while *Totten* is an absolute bar to suit, the state secrets privilege

85. *See* U.S. CONST. amend. XIV, § 1.

86. *See* discussion *supra* Part III.B.

87. *See* Totten, 92 U.S. at 106.

88. *Reynolds*, 345 U.S. at 11 n.26.

89. *See supra* note 83 and accompanying text.

affords the plaintiff at least some procedure.[90] Accordingly, that procedure—the approach employed by courts upon assertion of the privilege—is of tremendous import. The following section scrutinizes that approach.

IV. The Second Problem: Courts Have Been Too Deferential in Handling Claims of the State Secrets Privilege

During the Jefferson Administration, Chief Justice Marshall anticipated the dilemma that would face a court where a given piece of evidence was both essential to the claim or defense of a litigant and simultaneously so secret that its disclosure would "endanger the public safety."[91] Forty administrations later, the issue has been pushed to the point of urgency: Chief Justice Marshall's "delicate question"[92] is the essence of Chief Judge Walker's concern over the abdication of the judiciary's constitutional duty.[93] This section examines the way in which courts have dealt with assertions of the privilege and whether they have failed to fulfill their constitutional obligations in doing so.

While this section criticizes the extent to which courts have deferred to governmental assertions of the privilege, it is not meant to trivialize the importance of guarding closely those secrets whose revelation legitimately would endanger public safety. Undoubtedly, there exist secrets of state which categorically should not be revealed. This section simply asks: Does there exist a judicial approach that would allow courts to determine when such a situation exists?

A. A Flawed Approach

The *Reynolds* Court knew the challenge it faced. Introducing the state secrets privilege, the Court cited Chief Justice Marshall's quote that "what ought to be done . . . presents a delicate question."[94] Answering that question would require the Court to create a rule that would prevent disclosure of information "which, in the interest of national security, should not be divulged," yet at the same time, ensure that "[j]udicial control over the evidence in a case [not] be abdicated to the caprice of executive

90. At a minimum, the court must decide whether the privilege applies. *Reynolds*, 345 U.S. at 10.

91. *Burr*, 25 F. Cas. 30, 37 (C.C.D. Va. 1807) (No. 14692d).

92. *Id.*

93. *See* Hepting v. AT&T Corp., 439 F. Supp. 2d 974, 995 (N.D. Cal. 2006).

94. *Reynolds*, 345 U.S. at 7 n.18 (quoting *Burr*, 25 F. Cas. at 37).

officers."[95] With those dueling concerns in mind, the Court set out to define an approach. Unfortunately, perhaps precisely because it sought to serve two conflicting ends, it wrote a singularly confused opinion. In the same breath, the Court announced that "the claim of privilege should not be lightly accepted," but also that, "even the most compelling necessity cannot overcome the privilege if the court is ultimately satisfied that military secrets are at stake."[96] The result of such a Jekyll and Hyde approach? Lower courts, in applying the approach defined *Reynolds*, have come to all but ignore the caution against the abandonment of judicial control.[97] Instead, courts have too often read *Reynolds* as a command to "accept the executive branch's claim of privilege without further demand."[98]

1. The Reynolds *Approach, Defined*

The Court sought to define an approach that would allow a court to "determine whether the circumstances are appropriate for the claim of privilege, and yet do so without forcing a disclosure of the very thing the privilege is designed to protect."[99] Acknowledging a lack of judicial experience with the state secrets privilege, the Court modeled its rule on the approach to claims of the privilege against self-incrimination.[100]

Distilling a single "approach" from the *Reynolds* opinion is a challenge, but a few things are clear:

(1) Examination of the evidence, even ex parte and in camera, is not required in all cases.[101]

(2) The trial judge is to look at "all the circumstances of the case" to determine 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."[102]

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95. *Id.* at 9-10.

96. *Id.* at 11.

97. A number of circuit courts, in upholding decisions to accept the privilege without examination of the evidence, have cited the phrase, "utmost deference" in support of their decision. *See, e.g.*, Black v. United States, 62 F.3d 1115, 1119 (8th Cir. 1995); Zuckerbraun v. Gen. Dynamics Corp., 935 F.2d 544, 547 (2d Cir. 1994). This language is taken from dictum in *United States v. Nixon*, a case about executive privilege, not state secrets. 418 U.S. 683, 710 (1974).

98. El-Masri v. United States, No. 06-1667, 2007 U.S. App. LEXIS 4796, at *21 (4th Cir. Mar. 2, 2007).

99. *Reynolds*, 345 U.S. at 8.

100. *Id.*

101. *Id.* at 10.

102. *Id.*

(3) The showing of necessity for the evidence made by the plaintiff should determine the degree of scrutiny applied to the claim of privilege.[103]

Thus, *Reynolds* stops short of giving the trial judge the ability to examine the contested evidence in each case. Instead, the judge is pointed toward the "circumstances of the case."[104] But since the state secrets privilege is invoked at such an early stage of a litigation, those circumstances are essentially limited to what has been plead, and what the government has submitted in the form of affidavits. Thus, under *Reynolds*, judges must often determine whether evidence should be removed from trial by looking not at the evidence itself, but at what one party says the evidence is. In short, there is no meaningful check on the veracity of the government's assertion. For an illustration of the risks inherent in such an approach, one need look no further than the story of *United States v. Reynolds* itself.

2. *The Problem with the* Reynolds *Approach, Illustrated*

In the trial below, the district court ordered the government to produce the Air Force's accident investigation report so it could determine, ex parte and in camera, whether the report in fact contained privileged information.[105] The government refused, claiming the report "could not be produced 'without seriously hampering national security, flying safety and the development of highly technical and secret military equipment.'"[106] Applying its newly defined standard, the Supreme Court ratified the government's refusal to produce the report, finding that even ex parte in camera review was not warranted.[107] The Court trusted that, even though the trial judge had not been allowed to examine the report itself, the affidavit of the executive official was sufficient proof that the report indeed contained something that shouldn't be revealed in the interest of national security.

When the accident report was declassified, it was revealed to contain no secrets that would have threatened national security.[108] Instead, the report showed that the crash was most likely caused by engine fire because a protective shield designed to prevent engine overheating had not been

103. *Id.* at 11.

104. *Id.* at 10.

105. *Id.* at 5.

106. *Id.*

107. *Id.* at 10.

108. Timothy Lynch, Op-Ed., *An Injustice Wrapped in a Pretense; In '48 Crash, the U.S. Hid Behind National Security*, WASH. POST, June 22, 2003, at B3.

installed.[109] In other words, the report contained not covert mission plans or top secret aircraft designs, but plain evidence of negligence. The *Reynolds* rule, intended to avoid surrender of judicial control to the caprice of executive officers,[110] had allowed exactly that.

B. The Failures of the *Reynolds* Opinion

The story of *Reynolds* illustrates that the rule established in that case fails to prevent executive abuse of the privilege. Moreover, courts have since read *Reynolds* as requiring an even more deferential approach for which it in fact called.[111] What went wrong? In what way did the *Reynolds* Court fail to accomplish its goal of answering Chief Justice Marshall's delicate question? First, the Court attempted to define the approach to analogizing the state secrets privilege to the privilege against self-incrimination. But the two privileges are hardly analogous. The result is a rule that fails to accomplish its intended goal of limiting executive control of the litigation. Second, the Court wrote an opinion that would not, in practice, effect the Court's intended compromise. The result has been far greater judicial deference in the lower courts than was likely intended.

1. The Court Improperly Analogized the State Secrets Privilege to the Privilege against Self-Incrimination

The *Reynolds* Court thought it had the solution to the challenge presented by assertions of the new privilege. After all, the privilege against self-incrimination had presented courts with a similar challenge: walking the line between accepting the bare assertion of the witness as conclusive on the one hand and requiring the witness to reveal the matter behind the claim on the other.[112] So the Court drew an analogy, modeling the new approach to claims of the state secrets privilege on the familiar approach to claims of the privilege against self-incrimination.[113] Unfortunately, while the two privileges present courts with similar challenges, the analogy is improper for two reasons. First, the approach—which directs a court to "look to the circumstances" in making its decision—assumes that there exist circumstances upon which the judge can base a well-informed decision.[114] But since the state secrets privilege is asserted before discovery, there exist very limited "circumstances" for the judge to

109. *Id.*

110. *Reynolds*, 345 U.S. at 9-10.

111. *See supra* note 97 and accompanying text.

112. *Reynolds*, 345 U.S. at 9.

113. *Id.* at 8.

114. *Id.*

examine. Second, compared to the consequences of accepting a claim of the privilege against self-incrimination, the consequences of accepting a claim of the state secrets privilege are much more dramatic.

The Fifth Amendment provides that no person shall be compelled in a criminal case to be a witness against himself.[115] Under the privilege against self-incrimination established pursuant to that provision, a witness may refuse to answer a question where doing so would establish a link in the chain of evidence needed to prosecute him.[116] However, the claim is not accepted upon mere assertion; the court must be satisfied that an answer would indeed result in a harmful disclosure.[117] In *Reynolds*, the Court stated its self-incrimination-inspired approach as follows: "[T]he court must be satisfied from all the evidence and circumstances, and 'from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result.'"[118]

This approach works in the context of a claim of the privilege against self-incrimination: if a witness on the stand claims that privilege, the judge can look at the facts of the case and the question asked and make a well-informed determination of whether an answer would likely be harmful. But in the state secrets context, the question is whether disclosure would be harmful to national security. And the only basis the judge has for making that determination is what the government tells her. The approach assumes circumstances that simply do not exist where the state secrets privilege is invoked. In essence, trial judges are forced to take the government at its word.

The second reason the analogy is improper is that the consequences of accepting a claim of the state secrets privilege can be dramatic.[119] The case can be dismissed on the pleadings, and at the very least the plaintiff is deprived of what is likely critical information.[120] By comparison, when the privilege against self-incrimination is accepted, the witness does not answer the question. This result is not trivial, but it is not nearly as troubling as the sometimes fatal consequence of a state secrets claim.

115. U.S. CONST. amend. V.

116. Hoffman v. United States, 341 U.S. 479, 486 (1951).

117. *Id.* at 486-87.

118. *Reynolds*, 345 U.S. at 8 (quoting *Hoffman*, 341 U.S. at 486-87).

119. *See* discussion *supra* Part III.

120. *See supra* notes 57-61 and accompanying text.

2. *The* Reynolds *Opinion Failed to Effect the Court's Intended Compromise*

In drawing analogy to the privilege against self-incrimination, the *Reynolds* Court purported to define a middle ground between the two extremes of accepting the bare assertion of the government as conclusive and requiring outright revelation of the basis for the claim.[121] The Court seemed to write a balancing test: "[T]he showing of necessity which is made will determine how far the court should probe in satisfying itself that the occasion for invoking the privilege is appropriate."[122] However, as courts have applied *Reynolds*, the affidavit of a government official is routinely accepted as conclusive, regardless of the strength of the plaintiff's showing of necessity.[123] Why did this happen? While *Reynolds* purports to adopt a compromise between the dueling concerns of giving too much discretion on the one hand, and requiring a dangerous amount of disclosure on the other,[124] it failed to give any teeth to the former concern. As a result, *Reynolds* has come to represent something close to one of the extremes it purported to reject.

Looking at the language of *Reynolds*, it is clear that the Court was attempting to draft a compromise.[125] But while the opinion *cautions* courts not to give too much discretion, it *requires* courts not to insist on complete disclosure.[126] More specifically, the Court writes that "[j]udicial control over the evidence in a case cannot be abdicated to the caprice of executive officers," but immediately follows with, "[y]et we will not go so far as to say that the court may automatically require a complete disclosure to the judge before the claim of privilege will be accepted in any case."[127] At first glance, the opinion appears to give something to plaintiffs' lawyers and something to government lawyers—one for you and one for you. But the plaintiffs get only an abstract caution while the government gets a rule: no in camera review in every case. Similarly, as soon as the Court is finished saying that "[w]here there is a strong showing of necessity, the claim of privilege should not be lightly accepted," it immediately says, "but even the most compelling necessity cannot overcome the claim of privilege if the

121. *Reynolds*, 345 U.S. at 9.

122. *Id.* at 11.

123. *See, e.g.*, Edmonds v. U.S. Dep't of Justice, 323 F. Supp. 2d 65, 81 (D.D.C. 2004) (dismissing the case prior to discovery based on the Attorney General's invocation of the state-secrets privilege).

124. *See* Reynolds, 345 U.S. at 9-10.

125. *Id.* at 9 ("Regardless of how it is articulated, some like formula of compromise must be applied here.").

126. *Id.* at 9-10.

127. *Id.*

court is ultimately satisfied that military secrets are at stake."[128] Again, plaintiffs get a caution flag to wave; the government gets a rule: the privilege can defeat any showing of necessity if the court is satisfied.

As a result, courts applying *Reynolds* have, perhaps understandably, paid more attention to the fact that *Reynolds* forbids them from insisting on in camera review of the evidence in every case than the fact that it cautions them not to surrender too much control.[129] Accordingly, courts have often failed to take seriously *Reynolds'* instruction to demand more where the plaintiff's need is strong.[130] Instead, courts often dismiss cases on the pleadings after the state secrets privilege is claimed,[131] often citing *Reynolds'* statement that "even the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that military secrets are at stake."[132]

To summarize: The Court failed to create a rule that would protect both of the two conflicting concerns it sought to address. It failed by drafting the rule by flawed analogy, and by writing an opinion that only gave effect to one of those concerns. As a result, lower courts have extended great deference to the government when faced with state secrets claims. As *Reynolds'* postscript illustrates, such a deferential approach carries a great risk of abuse. This picture signals the importance of some sort of meaningful check on claims of the privilege. The remainder of this section lays out an alternative approach that would provide such a check.

C. Courts Should Embrace Ex Parte In Camera Review as a Viable Option

Foreshadowing what would become Chief Judge Walker's concern some fifty-five years later, the Third Circuit Court of Appeals in its *Reynolds* opinion wrote:

> [T]o hold that the head of an executive department of the Government in a suit to which the United States is a party may conclusively determine the Government's claim of privilege is to abdicate the judicial function and permit the executive branch of the Government to infringe the independent province of the judiciary as laid down by the Constitution.[133]

128. *Id.* at 11.

129. *See supra* notes 97-98 and accompanying text.

130. *See supra* notes 97-98 and accompanying text.

131. *See* discussion *supra* Part III.

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

133. Reynolds v. United States, 192 F.2d 987, 997 (3d Cir. 1951).

Accordingly, the court thought the evidence should be examined ex parte and in camera.[134]

But the Supreme Court was not comfortable with a rule that would allow in camera review in every case.[135] The Court believed they had an approach that would work—that courts would be able to make informed evidentiary rulings without looking at the evidence itself.[136] Two subsequent developments show that they were wrong. First, the recent declassification of the accident report illustrates that the standard fails adequately to guard against executive abuse of the privilege.[137] Second, lower courts applying *Reynolds* have been extremely deferential, more likely to take the government at its word and less likely to employ in camera review.[138]

The approach should be changed. Courts should recognize—as did the Third Circuit and Justices Black, Frankfurter, and Jackson—that in camera review is a viable option that would limit the risk of executive abuse while maintaining the requisite level of secrecy.[139]

1. *Ex Parte In Camera Review Is Viable under Existing Supreme Court Jurisprudence and* Reynolds *Itself*

The Supreme Court has held that a trial court may review in camera allegedly privileged evidence when making evidentiary rulings.[140] Moreover, the Court has specifically noted the value of in camera review as a method of ensuring an appropriate balance between one party's claim of privilege and the other party's asserted need for the evidence.[141]

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134. *Id.*

135. *Reynolds*, 345 U.S. at 10 ("Yet we will not go so far as to say that the court may automatically require a complete disclosure to the judge before the claim of privilege will be accepted in any case.").

136. *Id.*

137. *See* discussion *supra* Part IV.A.2.

138. *See supra* notes 97-98 and accompanying text.

139. Reynolds v. United States, 192 F.2d 987, 997 (3d Cir. 1951) ("[A] claim of privilege against disclosing evidence relevant to the issues in a pending law suit involves a justiciable question, traditionally within the competence of the courts . . . ."); United States v. Reynolds, 345 U.S. 1, 12 (1953) (Black, Frankfurter & Jackson, JJ., dissenting).

140. United States v. Zolin, 491 U.S. 554, 574 (1989) (holding that in camera review may be used to determine whether allegedly privileged attorney-client communications fall within the crime-fraud exception).

141. Kerr v. U.S. Dist. Court, 426 U.S. 394, 405 (1976) ("[I]n camera review of the documents is a relatively costless and eminently worthwhile method to insure that the balance between petitioners' claims of irrelevance and privilege and plaintiffs' asserted need for the documents is correctly struck.").

Furthermore, the Court has cited *Reynolds* itself for the proposition that the Court "has long held the view that *in camera* review is a highly appropriate and useful means of dealing with claims of governmental privilege."[142] Thus, in camera review is a viable approach under *Reynolds* and the Court's jurisprudence on privilege in general.

In *United States v. Zolin*—in which the Court unanimously held in camera review of allegedly privileged attorney-client communications to be proper—the Court discussed *Reynolds* specifically.[143] The *Zolin* Court read *Reynolds* as merely forbidding a per se rule that in camera review *must* be conducted in every case.[144] Yet, as discussed, it often evades courts that *Reynolds* permits in camera review.[145] Courts need simply remind themselves that *Reynolds* does not forbid them to review allegedly privileged evidence; indeed, the Supreme Court itself has read *Reynolds* as an approval of in camera review.[146]

2. Ex Parte In Camera Review Is a Modest Proposal

Judicial deference to assertions of the state secrets privilege was so consistent that when Chief Judge Walker dared to deny the claim, one commentator wrote, "[i]f there is a future book of judges' profiles in courage—and there should be—Judge Walker would be an inspirational choice for inclusion."[147] Given such a landscape, it is worth noting that calling for ex parte in camera review is a modest proposal—an approach relatively accommodating to the government, particularly in comparison to alternative methods.

For example, Congress has adopted the Classified Information Procedures Act (CIPA) to deal with claims by a criminal defendant that privileged information is necessary for his or her defense.[148] Under CIPA, the court reviews the evidence in camera.[149] If the court finds that the evidence is indeed exculpatory, the government must choose between

142. *Kerr*, 426 U.S. at 405-06 (citing United States v. Nixon, 418 U.S. 683, 706 (1974); United States v. Reynolds, 345 U.S. 1 (1953)).

143. *Zolin*, 491 U.S. at 570-71.

144. *Id.* at 571.

145. *See supra* notes 97-98 and accompanying text.

146. *See supra* note 142 and accompanying text.

147. Nat Hentoff, Op-Ed., *An Expansive View of 'State Secrets'*, WASH. TIMES, Aug. 14, 2006, at A15.

148. *See* Frank Askin, *Secret Justice and the Adversary System*, 18 HASTINGS CONST. L.Q. 745, 752 (1991).

149. *Id.*

disclosing the information and dropping the case.[150] By comparison, in camera review in the state secrets context would merely allow the judge to determine the veracity of the claim; disclosure would never be the consequence.

Alternatively, at least two authors and one district court have suggested following proposed Federal Rule of Evidence 509(e).[151] Rule 509(e) was the state secrets component of a proposal for determining evidentiary privileges in federal courts that was never passed.[152] Essentially, this argument makes two assertions. First, Rule 501 directs courts to determine privileges according to "the principles of the common law as they may be interpreted . . . in the light of reason and experience."[153] Second, a proposed rule—having been "developed by a representative committee of bench, bar and scholars, twice published and commented on by the bench and bar, adopted by the Judicial Conference and finally forwarded by the Supreme Court to Congress"—is as close to an embodiment of the light of reason and experience as one could find.[154] Therefore, under Rule 501, judges should follow proposed Rule 509(e). Rule 509(e) directs that if a state secrets claim is upheld, the judge may do any of a number of things, including declaring a mistrial, finding *against* the government upon the issue as to which the evidence is relevant, or dismissing the action.[155] Thus, under this proposed alternative, which has been applied by at least one district court,[156] acceptance of the privilege can lead to a finding against the government. This was the same result reached by the district court in *Reynolds*, suggesting that it is not out of line with the common law pre-*Reynolds*.[157]

In comparison to these alternative proposals, simple in camera review is favorable to the government. Indeed, one author has described use of in camera review for verification of a privilege claim as "Creeping

150. *Id.*

151. Liuzzo v. United States, 508 F. Supp. 923 (E.D. Mich. 1981); Askin, *supra* note 148, at 769-72; Anthony Rapa, *When Secrecy Threatens Security:* Edmonds v. Department of Justice *and a Proposal to Reform the State Secrets Privilege*, 37 SETON HALL L. REV. 233, 256 (2006).

152. Askin, *supra* note 148, at 770 (suggesting that the generic Rule 501 was passed after disagreement over some of the privilege rules threatened forestallment of the entire package, but noting that 509(e) was not one of the rules objected to by the Department of Justice, one of the most vocal critics).

153. FED. R. EVID. 501.

154. Askin, *supra* note 148, at 771.

155. Askin, *supra* note 148, at 770.

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

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

Kafkaism."[158] After all, "[t]he adversarial system is central to the American notion of due process."[159] The author emphasized that "'[o]ur system of justice does not encompass *ex parte* determinations on the merits of cases in civil litigation.'"[160] Since an upholding of the state secrets privilege may lead to outright dismissal,[161] it may seem the functional equivalent of such an ex parte merits decision from the perspective of a plaintiff.

Such a departure from the traditional adversarial system is a recognition of the uniquely sensitive nature of state secrets; it acknowledges that, where it is appropriate, the privilege should wield considerable force. It takes seriously the executive's constitutional duty to protect the nation from threats,[162] seeking only to prevent abdication of judicial control over the case to the caprice of executive officers.[163]

V. Conclusion

The state secrets privilege, in its current form, poses a threat to "the very essence of civil liberty."[164] Too often, cases are improperly dismissed before the merits; too often, courts take the government at its word. Fortunately, to remedy these problems, courts need only be more cautious in applying the privilege. A more precise reading of *Reynolds*' "very subject matter" language would prevent premature dismissal of litigation and the attendant due process concerns. And the mere recognition that ex parte in camera review is a viable option would prevent executive abuse of the privilege. The problems associated with the state secrets privilege are serious, but the tools needed to solve them are well at hand. All that is required is a careful reading of precedent, a cautious approach, and a certain amount of judicial courage.

158. Askin, *supra* note 148, at 746.

159. Askin, *supra* note 148, at 754.

160. *Id.* at 756 (quoting Kinoy v. Mitchell, 67 F.R.D. 1, 15 (S.D.N.Y. 1975)).

161. *See supra* notes 63-65 and accompanying text.

162. Hepting v. AT&T Corp., 439 F. Supp. 2d 974, 995 (N.D. Cal. 2006).

163. *Reynolds*, 345 U.S. at 9-10.

164. Marbury v. Madison, 5 U.S. 137, 163 (1803).