

INTOLERABLE ABUSES: RENDITION FOR TORTURE AND THE STATE SECRETS PRIVILEGE

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ABSTRACT

In Mohamed v. Jeppesen Dataplan, Inc., the Ninth Circuit, sitting en banc, dismissed a complaint brought by five men claiming to have been victims of the U.S. government's extraordinary rendition program, alleged to involve international kidnapping and torture at foreign facilities. Procedurally required to accept plaintiffs' allegations as true, the court nonetheless dismissed the complaint before discovery had begun based on the state secrets privilege and the Totten doctrine, finding that the very subject matter of plaintiffs' complaint was a state secret and that the defendant corporation could not defend itself without evidence subject to the privilege. This Article contends that courts should almost never dismiss suits based on the state secrets privilege and should never do so in a case like Jeppesen Dataplan, in which plaintiffs did not need discovery to make out their prima facie case alleging torts by the government or its contractors.

While much has been written on the state secrets privilege since 9/11, this Article focuses on the role of the Totten doctrine in transforming the state secrets privilege into something like a government immunity doctrine. The Article first argues that Totten was wrongly decided because it is overprotective of state secrecy and requires dismissal with prejudice of suits that would more appropriately be dismissed without prejudice, subject to refile when the relevant secrets are declassified. The Article next contends that Totten is a very narrow doctrine that cannot and should not have any role in informing cases such as Jeppesen Dataplan in which plaintiffs did not contract with the government.

In addition, the Article argues that the state secrets privilege, as laid out in the 1953 Reynolds case and subsequently expanded by lower courts,

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permits pre-discovery dismissal of suits based on the state secrets privilege and thus exacerbates the pro-government bias already present in Reynolds. The Article explores nine ways in which lower court decisions have all tended to make it easier for the government to assert the state secrets privilege, while the lack of penalties for overly aggressive assertion of the privilege results in intolerable abuses.

While the Article thus offers fundamental critiques of both the Totten doctrine and the state secrets privilege, it does not advocate disclosure of state secrets. Rather, in a concluding Part, the Article draws on federal statutory schemes relating to the introduction of classified information in trials and offers numerous alternatives to judgment in favor of the government and its contractors before discovery has begun in cases implicating state secrets. Congress has repeatedly empowered courts to make decisions that protect government secrecy while facilitating limited access to secret information when necessary in the interests of justice and open government. In some cases, the government’s inability to defend itself may necessitate the socialization of the costs associated with national security secrets, but that result is preferable to forcing plaintiffs to bear a disproportionate share of the costs of government secrecy.

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It is but a small step to assert a privilege against any disclosure of records merely because they might prove embarrassing to government officers. Indeed it requires no great flight of imagination to realize that if the Government's contentions in these cases were affirmed the privilege against disclosure might gradually be enlarged by executive determinations until, as is the case in some nations today, it embraced the whole range of governmental activities.¹

Too much judicial inquiry into the claim of privilege would force disclosure of the thing the privilege was meant to protect, while a complete abandonment of judicial control would lead to intolerable abuses.²

I. INTRODUCTION

In *Mohamed v. Jeppesen Dataplan, Inc.*,³ five plaintiffs brought suit against the defendant corporation (Jeppesen), alleging that Jeppesen had contracted to provide transportation services and logistical support⁴ for the U.S government's extraordinary rendition program.⁵ In connection with

1. Reynolds v. United States, 192 F.2d 987, 995 (3d Cir. 1951) (upholding the district court's ruling ordering the government to produce an accident investigation report despite the government's assertion of the state secrets privilege).

2. United States v. Reynolds, 345 U.S. 1, 8 (1953) (upholding the state secrets privilege and reversing the Third Circuit).

3. 614 F.3d 1070 (9th Cir. 2010) (en banc), *cert. denied*, 131 S. Ct. 2442 (2011).

4. See First Amended Complaint at ¶ 14, Mohammed v. Jeppesen Dataplan, Inc., No. 5:07-cv-02798-JW (N.D. Cal. Aug. 1, 2007) [hereinafter Complaint] (alleging that Jeppesen "furnished essential flight and logistical support to aircraft used by the CIA to transfer terror suspects to secret detention and interrogation facilities in countries such as Morocco and Egypt").

5. *Id.* at ¶ 2. The Complaint characterizes extraordinary rendition as involving the "clandestine and forcible transportation of terrorism suspects to secret overseas detention facilities where they are placed beyond the reach of the law and subjected to torture and other forms of cruel, inhuman, or degrading treatment." *Id.* That definition is consistent with that current among scholars of the practice. See Leila Sadat, *Extraordinary Rendition, Torture and Other Nightmares from the War on Terror*, 75 GEO. WASH. L. REV. 1200, 1201 n.4 (2007) (relying on definitions of "extraordinary rendition" provided by the New York City Bar Association and Wikipedia). Recent scholarship exploring the government's extraordinary rendition program includes the following: Alan W. Clarke, *Rendition to Torture: A Critical Legal History*, 62 RUTGERS L. REV. 1 (2009) (providing a history of the development of government-sponsored rendition, which was used initially to bring fugitives to trial, and describing the significant expansion of the United States' extraordinary rendition program under the George W. Bush Administration until its abolition in January 2009); Lucien J. Dhooge, *The State Secrets Privilege and Corporate Complicity in Extraordinary Rendition*, 37 GA. J. INT'L & COMP. L. 469 (2009) (concluding that the SSP appropriately shields the policy of extraordinary rendition from judicial examination); Louis Fisher, *Extraordinary Rendition: The Price of Secrecy*, 57 AM. U. L. REV. 1405 (2008) (arguing that from the Founding Era until 9/11, it was generally understood that rendition required congressional authorization and was for the purpose of bringing a fugitive to trial); Victor Hansen, *Extraordinary Renditions and the State Secrets Privilege: Keeping Focus on the Task at Hand*, 33 N.C. J. INT'L L. & COM. REG. 629 (2008) (suggesting means of oversight of executive actions

this program, plaintiffs alleged that Jeppesen knew or should have known that it was delivering plaintiffs to be tortured abroad and to be otherwise subjected to interrogation techniques that would have been illegal if carried out by the U.S. government itself.⁶ The government moved to intervene⁷ and to dismiss the case, alleging that it could not be litigated without requiring the disclosure of state secrets vital to the national security interests of the United States.⁸ By a vote of six to five, an en banc panel of the Ninth Circuit granted the government's motion and dismissed the claim before the defendant had even filed its Answer.⁹

The district court had dismissed plaintiffs' claims based on Ninth Circuit precedent on the state secrets privilege (SSP), which provides that a court "should dismiss the plaintiff's action based solely on the invocation of state secrets privilege" if "the 'very subject matter of the action' is a

through the court's role in providing individuals the opportunity to vindicate their rights while also protecting legitimate state secrets); Jules Lobel, *Extraordinary Rendition and the Constitution*, 28 REV. LITIG. 479, 479 (2008) (relating that since 9/11, the United States has "reportedly transferred more than 100 suspected terrorists to countries that routinely torture prisoners" and focusing on the extraordinary rendition of Maher Arar); Daniel L. Pines, *Rendition Operations: Does U.S. Law Impose Any Restrictions?*, 42 LOY. U. CHI. L.J. 523 (2011) [hereinafter Pines, *Rendition Operations*] (concluding that U.S. law provides few legal restrictions and very few practical limitations on the ability of the United States in rendition operations, whether to the United States or elsewhere); Sadat, *supra* (examining the law governing rendition from U.S. territories or by U.S. agents and arguing that the extraordinary rendition program from occupied Iraq violates basic principles and precedents of international law); Margaret Satterthwaite, *Rendered Meaningless: Extraordinary Rendition and the Rule of Law*, 75 GEO. WASH. L. REV. 1333, 1334 (2007) (contending that rendition is among the antiterror techniques that the U.S. government has defended through legal arguments that intentionally "skirt[] the rule of law" by exploiting ambiguities and gaps in international human rights and humanitarian law); William G. Weaver & Robert M. Pallitto, *The Law: "Extraordinary Rendition" and Presidential Fiat*, 36 PRESIDENTIAL STUD. Q. 102 (2006) (arguing that while U.S. presidents have only recently claimed the power to authorize extraordinary renditions and U.S. history suggests that such renditions are illegal, they are tolerated under principles of judicial deference to executive expertise); David Weissbrodt & Amy Bergquist, *Extraordinary Rendition and the Humanitarian Law of War and Occupation*, 47 VA. J. INT'L L. 295 (2007) (contending that the United States' extraordinary rendition program constitutes grave breaches of the Geneva Conventions and proposing legal mechanisms to address those breaches); David Weissbrodt & Amy Bergquist, *Extraordinary Rendition and the Torture Convention*, 46 VA. J. INT'L L. 585 (2006) (contending that extraordinary rendition violates both the UN Convention Against Torture and domestic law prohibitions on torture and conspiracy to commit torture); Matteo M. Winkler, *When "Extraordinary" Means Illegal: International Law and European Reaction to the United States Rendition Program*, 30 LOY. L.A. INT'L & COMP. L. REV. 33 (2008) (focusing on the European reaction to the abduction of Abu Omar in Italy and concluding that the U.S. extraordinary rendition program violates international legal norms prohibiting torture).

6. Complaint, *supra* note 4 at ¶¶ 2, 16, 56.

7. See *Mohamed v. Jeppesen Dataplan, Inc.*, 539 F. Supp. 2d 1128, 1129–30 (N.D. Cal. 2008) (finding "good cause" to allow the United States to intervene).

8. Notice of Motion and Motion to Dismiss, or, in the Alternative, for Summary Judgment by the United States of America, *Mohamed v. Jeppesen Dataplan, Inc.*, No. C-07-02798-JW (N.D. Cal. Oct. 19, 2007).

9. Although the motion was styled as a motion to intervene, for dismissal or in the alternative for summary judgment, the district court treated the motion as one for dismissal under F.R.C.P. 12(b)(1). *Jeppesen Dataplan*, 539 F. Supp. 2d at 1136. The Ninth Circuit panel that reversed this dismissal noted that the court could not have granted summary judgment as discovery had not yet begun. *Mohamed v. Jeppesen Dataplan, Inc.*, 563 F.3d 993, 1008 (9th Cir. 2009).

state secret.”¹⁰ The “very subject matter” language used by courts in the Ninth Circuit links the SSP to an 1875 Supreme Court decision, *Totten v. United States*,¹¹ in which the Court held that the estate of a man who claimed to have been employed by the federal government as a spy during the Civil War could not sue to enforce the spy’s agreement with the government, because “[t]he secrecy which such contracts impose precludes any action for their enforcement.”¹² However, a panel of the Ninth Circuit found that neither the *Totten* doctrine¹³ nor the SSP could be applied at this early stage in the proceedings.¹⁴ The panel accordingly reversed the district court’s ruling and remanded the case for application of the proper standard of review of an assertion of the SSP, once the district court could determine which documents or information the government was claiming were privileged.¹⁵

The SSP, like *Totten*, is a court-made doctrine¹⁶ that permits the government (and only the government)¹⁷ to refuse to respond to discovery requests when there is a reasonable danger that such discovery would entail the disclosure of state secrets vital to the national security interests of the United States.¹⁸ Although the SSP is an evidentiary privilege,¹⁹ its use has

10. See *Jeppesen Dataplan*, 539 F. Supp. 2d at 1134–35 (citing *Kasza v. Browner*, 133 F.3d 1159, 1166 (9th Cir. 1998); *Al-Haramain Islamic Found., Inc. v. Bush*, 507 F.3d 1190, 1200 (9th Cir. 2007)).

11. 92 U.S. 105 (1875).

12. *Id.* at 107; see also *United States v. Reynolds*, 345 U.S. 1, 11 n.26 (1953) (citing *Totten* for the proposition that an action must be dismissed on the pleadings where the “very subject matter of the action” is a state secret).

13. See *Jeppesen Dataplan*, 563 F.3d at 1001–04 (finding *Totten* inapplicable because the very subject matter of the litigation was not a state secret and because the plaintiffs had no agreement with the government).

14. *Id.* at 1004–06 (finding no basis for dismissal of the suit based on the SSP).

15. See *id.* at 1009 (“[N]either the Federal Rules nor *Reynolds* would permit us to dismiss this case at the pleadings stage on the basis of an evidentiary privilege that must be invoked during discovery or at trial.”).

16. See EDUARD C. LIU, CONG. RESEARCH SERV., R40603, THE STATE SECRETS PRIVILEGE AND OTHER LIMITS ON LITIGATION INVOLVING CLASSIFIED INFORMATION (2009) (unpaginated summary page), available at <http://www.fas.org/sgp/crs/secretary/R40603.pdf> (calling the SSP “a judicially created evidentiary privilege”). The *Reynolds* Court established the modern version of the SSP. *Id.* (“The Supreme Court first described the modern analytical framework of the state secrets privilege in the 1953 case of *United States v. Reynolds*.”); Meredith Fuchs, *Judging Secrets: The Role Courts Should Play in Preventing Unnecessary Secrecy*, 58 ADMIN. L. REV. 131, 167 (2006) (stating that the Supreme Court first recognized the SSP in *Reynolds*).

17. *Reynolds*, 345 U.S. at 7. But see Laura K. Donohue, *The Shadow of State Secrets*, 159 U. PA. L. REV. 77, 91–138 (2010) (showing that the government often invokes the SSP at the behest of private contractors and that asserting the SSP as an affirmative defense—even if they cannot invoke it on their own behalf—is now standard practice for such contractors in response to all manner of claims).

18. See *Reynolds*, 345 U.S. at 9 (providing that, where it is established that “injurious disclosure could result” were the government to provide a response to discovery requests, “the claim of the privilege will be accepted without requiring further disclosure”).

19. See e.g., *Hepting v. AT&T Corp.*, 439 F. Supp. 2d 974, 980 (N.D. Cal. 2006) (describing the SSP as a “common law evidentiary rule that protects information from discovery when disclosure

expanded since the advent of the “War on Terror,”²⁰ and the government has relied on the privilege to seek outright dismissal of cases before any discovery has taken place whenever the government believes that the litigation of the case would inevitably implicate state secrets.²¹ As we shall see,²² the importation of the *Totten* analysis into the Ninth Circuit’s SSP decisions has led to the conflation of two separate doctrines and the expansion of the SSP to permit prediscovery dismissal in circumstances in

would be inimical to the national security”); LIU, *supra* note 16, at 1 (describing the SSP as an evidentiary privilege derived from common law); *see also* Monarch Assur. P.L.C. v. United States, 244 F.3d 1356, 1358 (Fed. Cir. 2001) (referring to the “common-law state secrets privilege”); Kasza v. Browner, 133 F.3d 1159, 1165 (9th Cir. 1998) (describing the privilege as “a common law evidentiary privilege that allows the government to deny discovery of military secrets”); *In re* United States, 872 F.2d 472, 474 (D.C. Cir. 1989) (describing the privilege as “a common law evidentiary rule”); Nat’l Lawyer’s Guild v. Att’y Gen’l, 96 F.R.D. 390, 394–95 (S.D.N.Y. 1982) (quoting 8 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE ¶ 2019 at 158 (1970)).

20. There is some dispute about the extent to which this practice is an innovation. *See* Robert M. Chesney, *State Secrets and the Limits of National Security Litigation*, 75 GEO. WASH. L. REV. 1249, 1252 (2007) (contending that “recent assertions of the privilege are not different in kind from the practice of other administrations” in terms of types of information protected, processes judges apply, or remedies sought). *But see* Amanda Frost, *The State Secrets Privilege and Separation of Powers*, 75 FORDHAM L. REV. 1931, 1939 (2007) (“The Bush Administration has raised the privilege in twenty-eight percent more cases per year than in the previous decade, and has sought dismissal in ninety-two percent more cases per year than in the previous decade.”); D. A. Jeremy Telman, *Our Very Privileged Executive: Why the Courts Can (and Should) Fix the State Secrets Privilege*, 80 TEMPLE L. REV. 499, 522 (2008) (contending that the SSP has only recently been deployed to seek dismissal before discovery has begun, thus merging the SSP and *Totten*). In a recent article, Laura K. Donohue has undertaken a massive study of both reported and unreported cases in which the SSP has arisen, even if the court did not end up addressing the issue in a written opinion. While Donohue criticizes previous scholarship for reaching conclusions about the frequency with which the SSP is asserted based on published cases alone, she concludes that the Bush Administration asserted the SSP in more than 100 cases, more than five times the number that other scholars had noted based on published opinions. Donohue, *supra* note 17, at 87. She summarizes the effect of the SSP as follows:

It has been used to undermine contractual obligations and to pervert tort law, creating a form of private indemnity for government contractors in a broad range of areas. Patent law, contracts, trade secrets, employment law, environmental law, and other substantive legal areas have similarly been affected, even as the executive branch has gained significant and unanticipated advantages over opponents in the course of litigation.

Id. at 91.

21. *See, e.g.,* Mohamed v. Jeppesen Dataplan, 614 F.3d 1070, 1079 (9th Cir. 2010) (en banc) (stating that application of the privilege may require dismissal, either because the plaintiff cannot make out a prima facie case or because the SSP deprives a party of information necessary to a valid defense); Al-Haramain Islamic Found., Inc. v. Bush, 507 F.3d 1190, 1197 (9th Cir. 2007) (describing the SSP as both an evidentiary privilege and as a rule of non-justiciability); El-Masri v. United States, 479 F.3d 296 (4th Cir. 2007) (affirming the district court’s prediscovery dismissal of a suit brought by a German national alleging extraordinary rendition and torture by the U.S. and foreign governments); Tenenbaum v. Simonini, 372 F.3d 776, 777 (6th Cir. 2004) (affirming prediscovery dismissal on state secrets grounds in a religious discrimination case); Edmonds v. U.S. Dep’t of Justice, 323 F. Supp. 2d 65, 81–82 (D.D.C. 2004) (ordering prediscovery dismissal of all of plaintiff’s constitutional and statutory claims upon finding that the litigation posed a “reasonable danger to secrets of state” (quoting *In re* United States, 872 F.2d 472, 475 (1998))); Kasza, 133 F.3d at 1166 (noting that dismissal is permissible where the SSP prevents a party from defending itself); Farnsworth Cannon, Inc. v. Grimes, 635 F.2d 268, 281 (4th Cir. 1980) (en banc) (affirming prediscovery dismissal because disclosure of state secrets at trial would have been inevitable).

22. *See infra* Parts III–IV.

which such dismissal is not required in order to protect national security secrets.

In its brief in support of its motion to dismiss before the Ninth Circuit's en banc panel, the government argued for dismissal based on the SSP and treated the *Totten* doctrine as a version of the SSP.²³ Although the en banc majority contended that the motion was not really one to dismiss, because documents other than the pleadings were considered,²⁴ the court considered the government's motion as dispositive of plaintiffs' claims²⁵ and thus had to treat plaintiffs' allegations as true for the purposes of the court's consideration of the motion.²⁶ In addition, plaintiffs attached to their complaint 1,800 pages of evidence²⁷ supporting their allegations in order to demonstrate their ability to establish their prima facie case without reliance on discovery of materials potentially covered by the SSP.²⁸

The six judges in the en banc majority thus had to treat as true the following set of facts:

- The U.S. government operated an extraordinary rendition program involving the clandestine and forcible transportation of terrorism suspects to secret overseas detention facilities;²⁹
- Over a four-year period, Jeppesen facilitated over seventy flights as part of the secret rendition program;³⁰
- At the foreign detention facilities, detainees were subject to torture and other forms of cruel, inhuman, and degrading treatment not in accordance with federal and internationally recognized standards;³¹
- The rendition program facilitated transport to states where, according to the U.S. Department of State, use of torture in interrogations was "routine";³²

23. Redacted, Unclassified Brief for the United States, Intervenor-Appellee, on Rehearing En Banc at 25–33, *Mohamed v. Jeppesen Dataplan, Inc.*, No. 08-15693 (Nov. 13, 2009).

24. *Jeppesen Dataplan*, 614 F.3d at 1093 n.16.

25. *Id.* at 1087–88 (concluding that all seven of plaintiffs' claims describe conduct by Jeppesen "absolutely protected" by the SSP).

26. *See id.* at 1073 (noting that at this procedural stage, the court is required to treat all of plaintiffs' allegations as true and to draw all reasonable inferences in their favor). The dissent treated the motion as one to dismiss. *Id.* at 1093–95 (Hawkins, J., dissenting).

27. *See id.* at 1095 n.2 & 1101–31 (Hawkins, J., dissenting).

28. *See id.* at 1087 (acknowledging that "[g]iven plaintiffs' extensive submission of public documents," the SSP did not prevent them making out their prima facie case).

29. Complaint, *supra* note 4, at ¶¶ 2, 31–39.

30. *Id.* at ¶¶ 2, 15, 236–51.

31. *Id.* at ¶¶ 2, 32.

32. *Id.* at ¶¶ 14, 40–47.

- Jeppesen knew³³ or reasonably should have known that the detainees whose rendition it facilitated would be subject to torture and other abuses in contravention of international standards;³⁴
- Plaintiffs were detained for years, interrogated without counsel, and transported to foreign prisons where they were tortured and abused;³⁵ and
- Some of the plaintiffs were subjected to criminal proceedings that did not accord with international standards for fair trials.³⁶

The Ninth Circuit treated as true plaintiffs' claims that the government and its contractors were responsible for plaintiffs' extraordinary rendition and torture. And yet, the majority still ordered dismissal of the suit based on the SSP.³⁷ In other words, the Ninth Circuit's position is that, even if it is true that Jeppesen conspired with the U.S. government to kidnap and perform acts of torture on plaintiffs, plaintiffs are without a remedy because it would undermine national security if the details of government involvement in international kidnapping and torture, which have already been established in 1,800 pages of publicly-available documents submitted by plaintiffs, were to be revealed in the course of the litigation. That result is the product of precisely the sort of intolerable abuses of the privilege about which the Supreme Court expressed concern in *Reynolds*.³⁸ A political system premised on limited government and accountability cannot

33. This claim was supported in part by the declaration of Sean Belcher, a former Jeppesen employee, who stated that the director of Jeppesen International Trip Planning Services, Bob Overby, had told him, "We do all the extraordinary rendition flights," which he also referred to as "the torture flights." According to Belcher, Overby explained that, although some employees were unhappy about the flights, the company would keep doing them because they paid very well. *Jeppesen Dataplan*, 614 F.3d at 1095 n.5 (Hawkins, J., dissenting).

34. Complaint, *supra* note 4, at ¶¶ 2, 16, 252.

35. *See id.* at ¶¶ 3–4, 59–89 (describing treatment of Plaintiff Mohamed); *id.* at ¶¶ 5–6, 94–118 (describing treatment of Plaintiff Britel); *id.* at ¶¶ 7–8, 126–49 (describing treatment of Plaintiff Agiza); *id.* at ¶¶ 9–10, 153–88 (describing treatment of Plaintiff Bashmilah); *id.* at ¶¶ 11–12, 203–27 (describing treatment of Plaintiff al-Rawi).

36. *See id.* at ¶¶ 6, 115–16 (recounting Plaintiff Britel's subjection to criminal prosecution in Morocco); *id.* at ¶¶ 8, 148 (describing Plaintiff Agiza's subjection to criminal prosecution in Egypt).

37. The Court was split 5–5, and Judge Bea cast the decisive vote in a concurring opinion, which stated that he would have permitted dismissal based on *Totten* as well as the SSP. *Jeppesen Dataplan*, 614 F.3d at 1093 (Bea, J., concurring). For the sake of simplicity, I will refer to the main opinion as the majority opinion. Judge Bea's concurring opinion adopts the reasoning of the majority as to the SSP. *See id.* (concurring in the result and with respect to the majority's analysis of *Reynolds*). Judge Bea wrote separately only to state that he believed plaintiffs' claims to be barred in their entirety under *Totten*. *Id.*

38. *United States v. Reynolds*, 345 U.S. 1, 8 (1953)

allow the government and its contractors to refuse to answer for conduct that violates fundamental human rights and constitutional values.³⁹

In the context of litigation relating to national security, courts have been all too willing to set aside their constitutional duty to provide a check on executive action.⁴⁰ The Ninth Circuit's en banc panel thus could find ample, but by no means univocal, precedent supporting its decision to dismiss the claims in *Jeppesen Dataplan*.⁴¹ Still, the decision is the product of a series of wrong turns, each of which ratchets upwards unilateral executive powers and diminishes the power of the Judiciary as a check on the exercise of that power. This Article does not seek a piecemeal response to the various upticks of executive power. Rather, this Article contends that the very mechanisms for the assertion of the SSP are faulty and require fundamental reconsideration and redress.

In Part II, this Article contends that *Totten* is a contracts doctrine and has no application where the government engages in tortious activity, even if that tortious activity arises in a contractual context. The *Totten* doctrine, which has become a component of SSP analysis, was in any case overprotective of national security interests from its very inception. Moreover, *Totten* was never intended to apply and should not apply to cases in which non-governmental parties never agreed *ex ante* that their interactions with the government would be secret. However, because courts have now interpreted *Totten* to stand for the general proposition that courts should dismiss suits whenever the government claims that the "very subject matter" of the suit is a state secret, *Totten* has infected SSP jurisprudence and helped transform an evidentiary privilege into an immunity doctrine that shields both the government and civilian contractors complicit in the government's allegedly tortious and even unconstitutional activities.

The approach of Part III of the Article is similar to that of Part II. Because the modern SSP started with *Reynolds*,⁴² Part III begins with an

39. See *Mohamed v. Jeppesen Dataplan, Inc.*, 563 F.3d 992, 1008 (9th Cir. 2009) ("The very essence of civil liberty . . . consists in the right of every individual to claim the protection of the laws, whenever he receives an injury," and "[o]ne of the first duties of government is to afford that protection.") (quoting *Marbury v. Madison*, 5 U.S. 137 (1803)); see also Fuchs, *supra* note 16, at 132, 139–47 (arguing that open government is a principle upon which our government was founded).

40. See, e.g., Deborah N. Pearlstein, *After Deference: Formalizing the Judicial Power for Foreign Relations Law*, 159 U. PA. L. REV. 783, 785 (2011) ("Historically, most scholars have accepted with little question the notion that the Court will defer to executive views in core matters of foreign relations, particularly where matters of national security are concerned."); David C. Vladeck, *Litigating National Security Cases in the Aftermath of 9/11*, 2 J. NAT'L SEC. L. & POL'Y 165, 166 (2006) (noting that "[w]ith few exceptions, the courts have shown considerable deference to executive branch actions taken in the name of fighting terrorism" and that "judicial deference to national security claims is neither new nor surprising").

41. See *supra* note 21.

42. Laura Donohue calls this claim into question, arguing that it is based on little more than scholarly disregard for *Reynolds*' pre-history. See Donohue, *supra* note 17, at 82–83 (contending that this gap in the scholarship "stunts our broader analysis, such as our ability to weigh Article II versus

evaluation of *Reynolds*, which is faulty both in its model for testing government assertions of the SSP and in its application of that model. The flaws of *Reynolds* are now so well known and undisputed that reliance on it as authority is about as scandalous as reliance on *Dred Scott*,⁴³ *Plessy*,⁴⁴ or *Korematsu*.⁴⁵ The case is flawed beyond reformation. It ought to be abandoned and a new mechanism for testing government assertions of the SSP needs to be worked out. Far from doing so, lower courts have expanded on *Reynolds*. Part III concludes with a discussion of nine ways in which lower courts have gone beyond *Reynolds* and thus expanded the SSP in ways that *Reynolds* does not require. The result has been a conflation of the SSP and the *Totten* doctrine that permits the government to seek and courts to order pre-discovery dismissal of even cases like *Jeppesen Dataplan*, in which plaintiffs do not require discovery in order to establish their prima facie claims.

Part IV lays out an alternative model for protecting state secrets while also permitting courts to adjudicate claims against the government and contracting parties associated with the government. The mechanism is simple. First, courts need to recognize that the SSP cannot be applied to torts claims the same way it applies to contracts claims. Moreover, courts need to distinguish between the application of the SSP to common law torts, such as the negligence claim at issue in *Reynolds*, and statutory or constitutional violations that suggest intentional abuses of executive power. Second, the model restores balance to the adjudicative process by treating the SSP like any other evidentiary privilege. Properly applied, the SSP's only effect is to remove privileged evidence from the case. Third, the model calls for in camera proceedings conducted by counsel with security clearance to permit the adjudication of claims that would otherwise have to be dismissed on state secrets grounds. The model here proposed for reforming the SSP borrows liberally from the Classified Information Procedures Act (CIPA),⁴⁶ a statute passed in 1980 to address problems involving classified evidence that defendants have sought to introduce in criminal proceedings.

common law assertions, our understanding of the courts' historical treatment of separation of powers, or the role of state secrets as a justiciability doctrine versus an evidentiary rule"). While future scholarship may fill the gaps that Donohue has identified, Donohue does not question that courts' analysis of the SSP universally takes *Reynolds* as its point of departure.

43. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857) (denying constitutional protections to an African-American slave suing for his freedom), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

44. *Plessy v. Ferguson*, 163 U.S. 537 (1896) (upholding laws requiring racial segregation), *overruled by* *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

45. *Korematsu v. United States*, 323 U.S. 214 (1944) (upholding legality of internment of Japanese-Americans during World War II).

46. Pub. L. No. 96-456 (Oct. 15, 1980) (codified as amended at 18 U.S.C. app. 3 §§ 1-16 (2006)).

The arguments made here are radical in two ways. First, the Article calls for the courts to revisit and limit the *Totten* doctrine, contending that most cases involving secret agreements should be dismissed without prejudice, as the secret information may be declassified in the future. Second, the Article contends that in some cases, the successful assertion of the SSP should result in judgment for the plaintiffs because the government agencies (or their contractual partners) are unable to assert their affirmative defenses without introducing evidence subject to the SSP. Faced with such consequences, the government will be less likely to assert the SSP in circumstances when the risk that litigation will result in the disclosure of national security secrets is trifling.

It is important to stress that while this Article assumes a radical position, calling for drastic revisions in the SSP not advocated for or sought by the litigants in *Jeppesen Dataplan* and other recent SSP cases,⁴⁷ nothing here proposed would entail *any* public disclosure of state secrets unless the government chose to do so. Rather, the argument is that under the current SSP regime, innocent third parties always bear the costs of state secrets. In most cases, they should not have to do so, either because their cases could proceed without the disclosure of state secrets or because their cases can proceed in camera. In some cases, this Article contends, the government may have to concede liability and pay damages in order to prevent disclosure of vital national security information unless it can assert affirmative defenses unrelated to secret evidence. If the government does have to pay damages, the result is a socialization of costs, which is a reasonable price for the nation to pay for the protection of state secrets, especially when the alternative is to heap additional costs upon those who already can claim credibly that they have been the victims of government abuse.⁴⁸

47. In *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070 (9th Cir. 2010) (en banc), the plaintiffs conceded that the SSP requires dismissal if it removed from the case information indispensable to *either party*. Reply Brief of Plaintiffs-Appellants on Rehearing En Banc at 12, *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, (9th Cir. Nov. 27, 2009) No. 08-15693; *see also* *El-Masri v. United States*, 479 F.3d 296, 308 (4th Cir. 2007) (noting that plaintiff agreed with the court's description of how the SSP operated and argued only that dismissal was not necessary in his case because facts relating to his claim were not state secrets).

48. In dismissing a claim based on the SSP, the Fourth Circuit's Judge Wilkinson made the following observation: "We recognize that our decision places, on behalf of the entire country, a burden on Sterling that he alone must bear." *Sterling v. Tenet*, 416 F.3d 338, 348 (4th Cir. 2005); *see also* *Kasza v. Browner*, 133 F.3d 1159, 1167 (9th Cir. 1998) ("While dismissal of an action based on the state secrets privilege is harsh, 'the results are harsh in either direction and the state secrets doctrine finds the greater public good—ultimately the less harsh remedy—to be dismissal.'").

II. THE NINTH CIRCUIT'S ABUSE OF *TOTTEN*

In the Ninth Circuit's en banc decision in *Jeppesen Dataplan*, Judge Bea cast the deciding vote in favor of dismissal, relying on the *Totten* doctrine.⁴⁹ While the majority did not base its decision on the *Totten* doctrine, preferring to dispose of the case based on *Reynolds* instead,⁵⁰ it left open the possibility that "some of plaintiffs' claims might well fall within the *Totten* bar."⁵¹ The fact that a federal circuit court would give such serious consideration to the application of a contracts doctrine in a torts case is a testament to the federal government's tenacity in attempting to conflate two doctrines related only by analogy.

In *Totten*, the administrator for the estate of William A. Lloyd brought a claim against the government seeking to recover for the breach of an espionage contract.⁵² The administrator alleged that Lloyd had entered into an agreement with President Abraham Lincoln pursuant to which Lloyd had infiltrated enemy territory during the Civil War in order to provide the U.S. government with vital information relating to the military forces and fortifications of the Confederacy.⁵³ For these services, Lloyd was to be paid \$200 per month plus expenses.⁵⁴ The federal government allegedly paid Lloyd only expenses.⁵⁵

Justice Field, writing in 1875, found that the subject matter of the contract was a secret and that both parties must have known at the time of their agreement that their lips would be "for ever sealed respecting the relation of either to the matter."⁵⁶ In order to protect the public interest in having an effective arm of the government that could engage in secret services, the Court ruled that there could be no claim for breach of a secret contract because the existence of the contract was itself a secret that could not be disclosed.⁵⁷

This Part first contends that *Totten* was wrongly decided. Even if that argument is persuasive, however, the Ninth Circuit could not unilaterally overturn a longstanding Supreme Court precedent. The Part further contends that the lower courts have erred in applying *Totten* beyond its original scope. The *Totten* doctrine only applies to bar claims by parties to secret agreements with the government if the purpose of the suit is to

49. *Jeppesen Dataplan*, 614 F.3d at 1093 (Bea, J., concurring).

50. *Id.* at 1084.

51. *Id.*

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

53. *Id.* at 105–06.

54. *Id.* at 106

55. *Id.*

56. *Id.*

57. *Id.* at 107.

enforce the terms of the secret agreement. The logic of *Totten* cannot and should not extend to parties whose interaction with the government was involuntary. Courts have not even applied *Totten* in cases involving statutory or constitutional torts claims brought against the government by government employees. The Ninth Circuit thus erred in a fundamental way in treating *Totten* as a sub-category of the SSP. To the extent that its discussion of the SSP was informed by its understanding of the *Totten* doctrine, its application of the SSP was misguided. But even beyond that, it is time for courts to consider clipping *Totten*'s wings.

A. *Totten Was Wrongly Decided*

1. *What Totten Stands For*

Although Justice Field's opinion in *Totten* is very short, the basis for the dismissal of *Totten*'s suit is not entirely clear. The first ground given for dismissal, and the principle for which the case is generally understood to stand, is that Mr. Lloyd's agreement with the government entailed an implied covenant of permanent secrecy.⁵⁸ The consequences of the implied term as set out in Justice Field's opinion are alarmingly broad:

This condition of the engagement was implied from the nature of the employment, and is implied in all secret employments of the government in time of war, or upon matters 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.⁵⁹

The language is alarming because it suggests that *Totten* could apply in any case that could "affect[] our foreign relations," an elastic category, and disclosure in the case need threaten only to "embarrass" our government. As discussed *infra*,⁶⁰ protecting the government against embarrassment is no longer considered a legitimate goal of government secrecy, and Justice Field likely had in mind a now antiquated connotation for "embarrass" that was closer to "undermine."⁶¹

58. See *id.* at 106 (observing that both Lloyd's employment by the government and his service to it were to "equally concealed"). Several cases have treated *Totten* as standing for the proposition that courts must enforce the implied promise. See, e.g., *Guong v United States*, 860 F.2d 1063, 1065 (Fed. Cir. 1988); *Ellsberg v. Mitchell*, 709 F.2d 51, 65 n.60 (D.C. Cir. 1983); *Hepting v. AT&T Corp.*, 439 F. Supp. 2d 974, 981 (N.D. Cal. 2006).

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

60. See *infra* notes 71–74 and accompanying text.

61. In the nineteenth century, the word "embarrass" likely still had the connotation it brought with it from its French antecedent, meaning to "encumber, hamper, impede (movements, actions,

Justice Field then quickly segues from the notion of an implied contractual provision to a public policy argument, noting that permitting suits to enforce such secret contracts would threaten “serious detriment” to the public.⁶² Even if there were no implied provision, Justice Field indicates, the contract would be unenforceable on public policy grounds. The secrecy that such contracts require is itself an insuperable barrier to their judicial enforcement, says Justice Field. But he then circles back to more conventional contracts doctrine and adds that any suit for enforcement of a secret contract is itself a breach of—one presumes—the implied covenant of secrecy.⁶³

The final paragraph of *Totten* further muddies the waters as Justice Field states that the Judiciary cannot entertain any claim the trial of which would necessarily require the disclosure of information that the law itself regards as confidential.⁶⁴ Justice Field then proceeds to draw analogies to marital and professional privileges.⁶⁵ This last paragraph presents the possibility of establishing a link between the *Totten* doctrine and the SSP. Courts have not read this last paragraph as effectively establishing such a link, perhaps because Justice Field’s characterization of the effects of marital and professional privileges is simply wrong. Those evidentiary privileges certainly bar the disclosure of certain confidential information but none of them has the effect of the *Totten* bar, which is to render claims non-justiciable.

2. *Totten and the Problem of Overclassification*

The problem with *Totten* is that it allows the government to declare secret contracts non-justiciable, and that category of contracts could be exceedingly large because governments tend to overclassify.⁶⁶ Overclassification by our federal government has been so well-

persons moving or acting).” OXFORD ENGLISH DICTIONARY, <http://www.oed.com.libdata.lib.ua.edu/view/Entry/60793?redirectedFrom=embarrass#eid> (last visited Feb. 15, 2012).

62. *Totten*, 92 U.S. at 106–07. This language, as well as the language that implies that the rule in *Totten* has to do with enforcing an implied promise of secrecy, is quoted in *Tenet v. Doe*, 544 U.S. 1, 8 (2005).

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

64. *Id.*

65. *See id.* (citing marital and confessional privileges, as well as attorney–client and doctor–patient privilege).

66. *See e.g.*, *Mohamed v. Jeppesen Dataplan, Inc.*, 563 F.3d 992, 1007 n.7 (9th Cir. 2009) (discussing several cases in which former government officials have described abuses of the classification process); *Ray v. Turner*, 587 F.2d 1187, 1209 (D.C. Cir. 1978) (citing Senator Howard Baker as summarizing the views of both Houses of Congress in noting that “the Federal Government exhibits a proclivity for overclassification of information, especially that which is embarrassing or incriminating”).

documented, that there is almost no argument on the other side.⁶⁷ In fact, the most revealing criticisms of government secrecy come from the guardians of secrecy themselves. Thus Porter Goss, speaking as a Congressman before being named to head the CIA, stated:

I believe that we do classify too much material, because it is the path of least resistance, and I know that from experience. If I get a piece of paper on my table and I am not sure what to do with it, I put a confidential stamp on it and put it in the confidential box. Then I will not have to worry about whether I released something that was classified that I should not have. So, the incentive is to do the wrong thing, and that is something we have to get at.⁶⁸

Donald Rumsfeld, writing as the Secretary of Defense, echoed this sentiment in an op-ed published in the *Wall Street Journal*.⁶⁹ Equally telling was former U.S. Solicitor General Erwin Griswold's disclosure that it was clear to him that the publication of the *Pentagon Papers* posed no threat to national security.⁷⁰

As Porter Goss has acknowledged, all of the incentives point in the direction of encouraging people with access to government information to overclassify.⁷¹ Existing checks on the tendency to overclassify are ineffective.⁷² Despite shocking and notorious abuses of the power of

67. See Fuchs, *supra* note 16, at 133–34 (noting that government officials frequently admit that far more material is declared “classified” than is really necessary for national security purposes); Adam M. Samaha, *Government Secrets, Constitutional Law and Platforms for Judicial Intervention*, 53 UCLA L. REV. 909, 940 (2006) (“There seems to be consensus that the executive habitually overclassifies as an initial matter . . .”). According to the National Archives’ Information Security Oversight Office, which is empowered pursuant to 32 C.F.R. § 2001 (2011) to collect yearly statistics on classification and declassification of materials from any agency that “creat[es] or handl[es] classified information,” the number of classified documents increased from 23.1 million in 2008 to nearly 55 million in 2009. Most of these classifications were so-called derivative classifications. INFORMATION SECURITY OVERSIGHT OFFICE, REPORT TO THE PRESIDENT 8, 19 (2009), available at <http://www.archives.gov/isoo/reports/2009-annual-report.pdf>.

68. Fuchs, *supra* note 16, at 149 n.94 (quoting Porter Goss).

69. See Donald Rumsfeld, *War of the Worlds*, WALL ST. J., July 18, 2005, at A12 (“I have long believed that too much material is classified across the federal government as a general rule . . .”).

70. Erwin Griswold, *Secrets Not Worth Keeping: The Courts and Classified Information*, WASH. POST, Feb. 15, 1989, at A25.

71. See Fuchs, *supra* note 16, at 151–55 (discussing four incentives for government officials to classify documents: avoidance of penalties for disclosure of secrets; evasion of challenges to controversial government policies; foreclosing government liability or investigation into government misconduct; and avoidance of embarrassment); see also Samaha, *supra* note 67, at 918–19 (noting the likelihood that a bureaucracy with unrestrained discretion will likely disclose information that reflects well on its work and withhold embarrassing information).

72. See Fuchs, *supra* note 16, at 148–50 (explaining that while the Information Security Oversight Office monitors the classification system, it does not entail sanctions for those who overclassify, and even statutes like FOIA that are intended to encourage disclosure impose no penalties on government officials who resist disclosure unsuccessfully).

classification,⁷³ no member of the Executive Branch of government is likely to be subject to discipline for being overprotective of state secrets.⁷⁴

Congress has stepped in repeatedly to combat overclassification, most notably through the Freedom of Information Act (FOIA),⁷⁵ and its various revisions,⁷⁶ all of which were intended to tighten controls on unnecessary classification.⁷⁷ As the Supreme Court recognized, FOIA “seeks to permit access to official information long shielded unnecessarily from public view and attempts to create a judicially enforceable public right to secure such information from possibly unwilling official hands.”⁷⁸ Courts have nonetheless been reluctant to question executive claims that information

73. See generally ERIC ALTERMAN, WHEN PRESIDENTS LIE: A HISTORY OF OFFICIAL DECEPTION AND ITS CONSEQUENCES 4 (2004) (detailing four “key presidential lies,” ranging from Franklin Delano Roosevelt and the Yalta Accords to Ronald Reagan and the Iran-Contra scandal); see Mohamed v. Jeppesen Dataplan, Inc., 563 F.3d 992, 1007 n.7 (9th Cir. 2009) (citing Griswold’s admission that the principal concern of classifiers is the avoidance of government embarrassment, former Attorney General Herbert Brownwell’s 1953 letter to President Eisenhower complaining that classification allows people to cover up mistakes and wrongdoing in the name of national security, and *Reynolds* in which “avoidance of embarrassment—not preservation of state secrets—appears to have motivated the Executive’s invocation of the privilege”). Another example of abuse of executive secrecy is the *Korematsu* case, in which it later emerged that the government suppressed key information indicating that Japanese-Americans posed no threat to U.S. security. See *Korematsu v. United States*, 584 F. Supp. 1406, 1416–20 (N.D. Cal. 1984) (summarizing the findings of The Commission on Wartime Relocation and Internment of Civilians, and describing government memoranda suppressed at the time of the original *Korematsu* decision and granting a writ of *coram nobis* to correct errors of fact that affected the outcome in the original case).

74. See Fuchs, *supra* note 16, at 148–49 (noting that administrative checks on secrecy merely create reporting obligations with no mechanism for deterring overclassification). In the summer of 2011, J. William Leonard, the former director of the Information Security Oversight Office, filed suit against the National Security Agency seeking to punish officials who classify documents that contain no secret information. Scott Shane, *Complaint Seeks Punishment for Classification of Documents*, N.Y. TIMES, Aug. 2, 2011, at A16, available at http://www.nytimes.com/2011/08/02/us/02secret.html?_r=1. Williams claims that in thirty-four years of government service, he rarely saw overclassification challenged and never saw it punished. *Id.*

75. Pub. L. No. 89-554, 80 Stat. 383 (codified at 5 U.S.C. § 552 (2006 & Supp. IV 2010)).

76. For example, in *Environmental Protection Agency v. Mink*, 410 U.S. 73, 81 (1973), the Supreme Court refused to review the substantive propriety of the government’s claim that the material sought by plaintiffs was classified. Rather, judicial inquiry was only into the procedural aspects of classification. *Id.* at 81. In the aftermath of *Mink* and the Watergate scandal, Congress revised FOIA, overriding President Ford’s veto, to expressly provide for in camera, de novo review of government claims to entitlement of a national security exemption from FOIA’s disclosure requirements. Fuchs, *supra* note 16, at 159–60.

77. See Fuchs, *supra* note 16, at 144–45 (observing that each of Congress’s amendments of FOIA has reaffirmed its purpose to encourage democratic participation and citizen oversight of government). Additional congressional actions intended to check executive secrecy include the Federal Advisory Committee Act, Pub. L. No. 92-463 (Oct. 6, 1972), codified at 5 U.S.C. App. 2 §§ 1–16 (2006 & Supp. IV 2010); the Government in the Sunshine Act, Pub. L. No. 94-409 (Sept. 13, 1976), codified at 5 U.S.C. § 552b (2006); the Presidential Records Act, Pub. L. No. 95-591 (Nov. 4, 1978), codified at 44 U.S.C. §§ 2201–2207 (2006); and the Federal Records Act, Pub. L. No. 90-620 (Oct. 22, 1968), codified at 44 U.S.C. §§ 3101–3107 (2006).

78. *Mink*, 410 U.S. at 80.

needs to be protected from disclosure,⁷⁹ despite clear legislative intent that courts serve as a check on excessive government secrecy.⁸⁰ Academics have denounced the failures of courts to weigh the value of executive secrecy against other constitutional values.⁸¹ Congress too has repeatedly sought to curtail overclassification, most recently through the Reducing Over-Classification Act, which President Obama signed into law in October 2010⁸²—to no avail.⁸³

From the government's perspective, there is no downside to relying on *Totten* when a court will not permit even in camera inquiry into the nature of the threats to national security that might follow from disclosure. But there is a downside to the United States and its citizens if there is no counterweight to the incentives for individuals and agencies within the government to overclassify. As is so often the case, the views of the

79. See Fuchs, *supra* note 16, at 163–68 (reviewing case law and concluding that courts “have generally been reluctant to probe agency explanations for decisions to withhold information on national security grounds”). Cases interpreting the national security exception to the government's disclosure obligations under FOIA have produced doctrine bordering on the Orwellian. The government is permitted to make what is known as a *Glomar* response, refusing to confirm or deny the existence or nonexistence of the requested records because the fact of their existence or nonexistence is classified. See *Phillippi v. CIA*, 546 F.2d 1009 (D.C. Cir. 2009). Are we really to believe that the government is so far-sighted that it has classified information relating to information that does not exist? What is the procedure for classifying non-existent information?

80. See Fuchs, *supra* note 16, at 159 (citing the legislative history behind FOIA, S. REP. 89-813, at 8 (1965), as calling for *de novo* review of administrative claims that documents sought under FOIA may be withheld under the national security exception lest review become a “meaningless judicial sanctioning of agency discretion”); Samaha, *supra* note 67, at 939 (characterizing the 1974 FOIA amendments as an act in which Congress enlisted “the judiciary's help in checking executive control over classified information”).

81. See, e.g., Seth F. Kreimer, *Rays of Sunlight in a Shadow “War”: FOIA, the Abuses of Anti-Terrorism, and the Strategy of Transparency*, 11 LEWIS & CLARK L. REV. 1141, 1144–47 (2007) (citing authorities ranging from James Madison to Justices Brandeis and Stewart in support of the proposition that the Constitution provides unequivocal support for neither freedom of information nor for official secrecy); Eric Lane et al., *Too Big a Canon in the President's Arsenal, Another Look at United States v. Nixon*, 17 GEO. MASON L. REV. 737, 739–40 (2010) (criticizing *Nixon* for its failure “to address the dangerous uses to which secrecy is so often put, as well as the natural human tendencies that lead government officials to seek the cover of secrecy” and for its disregard of the constitutional problems created by the presumption in favor of government secrecy); Gia B. Lee, *The President's Secrets*, 76 GEO. WASH. L. REV. 197, 203 (2008) (calling for courts to undertake a “searching review” of governmental secrecy before allowing the government to withhold information); Sudha Setty, *No More Secret Laws: How Transparency of Executive Branch Legal Policy Does Not Let the Terrorists Win*, 57 U. KAN. L. REV. 579, 622–29 (2009) (providing constitutional arguments in favor of congressional and judicial checks on executive secrecy). *But cf.* Michael Stokes Paulsen, *Nixon Now: The Courts and the Presidency After Twenty-Five Years*, 83 MINN. L. REV. 1337, 1340–41 (1999) (contending that the Judiciary should have no role in delineating the scope of executive privilege).

82. Pub. L. No. 111-258, 124 Stat. 2646 (2010).

83. As of March, 2011, only 19 of 41 federal agencies had complied with President Obama's Executive Order and implemented required de-classification regulations in final form. INFORMATION SECURITY OVERSIGHT OFFICE, REPORT TO THE PRESIDENT 2 (2010), available at <http://www.archives.gov/isoo/reports/2010-annual-report.pdf>.

Framers were divided on the need for government secrecy.⁸⁴ Still, there is significant evidence that the structure of the Constitution is designed to ensure that the government will operate in an open and transparent manner.⁸⁵

Secrecy is not without its costs; that is, secrecy is expensive.⁸⁶ In addition, there are intangible costs in the “steady evisceration of the transparency and accountability essential to a functioning democracy.”⁸⁷ More generally, the price of secrecy includes “undermining the legitimacy of government actions, reducing accountability, hindering critical technological and scientific progress, interfering with the efficiency of the marketplace, and breeding paranoia.”⁸⁸ The SSP can permit federal agents to cover up their own misconduct and thus indirectly encourages such conduct.⁸⁹ Even if it does not promote misconduct, it certainly hampers coordination and cooperation among different intelligence agencies, as the 9/11 Commission report concluded.⁹⁰ One purpose of the USA PATRIOT Act⁹¹ was to permit greater sharing of intelligence.⁹² It has not been entirely effective.⁹³

84. See David E. Pozen, *Deep Secrecy*, 62 STAN. L. REV. 257, 259 (2010) (finding evidence suggesting that the Framers opposed government secrecy, but also finding evidence suggesting that they recognized the need for government secrecy in some contexts).

85. Heidi Kitrosser, *Secrecy and Separated Powers: Executive Privilege Revisited*, 92 IOWA L. REV. 489, 518 (2007) (“[T]he relatively public and dialogic nature of the legislative, treaty-approval, and nomination processes again reflects a Constitution built on a presumptive faith in openness and dialogue between the political branches and between those branches and the people.”).

86. As of 2009, the cost of the government classification system was in excess of \$8.8 billion. INFORMATION SECURITY OVERSIGHT OFFICE, 2009 COST REPORT 2 (2010), available at <http://www.archives.gov/isoo/reports/2009-cost-report.pdf>.

87. Ellen Yaroshesky, *Secret Evidence Is Slowly Eroding the Adversary System: CIPA and FISA in the Courts*, 34 HOFSTRA L. REV. 1063, 1064 (2006).

88. Fuchs, *supra* note 16, at 136–37 (citations omitted).

89. See Donohue, *supra* note 17, at 172 (discussing *In re Sealed Case*, 494 F.3d 139 (D.C. Cir. 2007), in which a DEA agent claimed the CIA illegally spied on him in order to thwart his mission in Rangoon, Burma).

90. See NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES, THE 9/11 COMMISSION REPORT 271 (2004) (recounting the frustration of one FBI agent who was ordered to delete an e-mail message suggesting that one of the eventual 9/11 hijackers, whom the agent was investigating in connection with the bombing of the *USS Cole*, had entered the country); *id.* at 276 (noting that the FBI was unable to put together the pieces of the puzzle that would have revealed the 9/11 plot and that publicity might have derailed it).

91. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT Act) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001).

92. For example, Section 905 of the USA PATRIOT Act amended the National Security Act of 1947, 50 U.S.C. § 401 *et seq.* (2006 & Supp. III 2009), to require disclosure of foreign intelligence-related information to the Director of Central Intelligence. Section 218 of the PATRIOT Act, codified at 50 U.S.C. § 1804(a)(6)(B) (2006 & Supp. III 2009), permits use by federal officers of the Foreign Intelligence Surveillance Act to apply for an order approving electronic surveillance in order to obtain foreign intelligence information.

93. See Nathan Alexander Sales, *Mending Walls: Information Sharing After the USA PATRIOT Act*, 88 TEX. L. REV. 1795, 1807–35 (2010) (describing remaining barriers to information sharing among government agencies).

The Obama administration has recognized the problem⁹⁴ and taken measures designed to encourage declassification and to curb overclassification.⁹⁵ Still, the problem remains,⁹⁶ in part because too many courts simply refuse to play the role Congress has delegated to them as a check on executive secrecy.⁹⁷

All this is not to say that there are no legitimate reasons for governments to keep secrets. Certainly, at least some of the Framers recognized the need to protect secrets vital to national security.⁹⁸ No doubt, the vast majority of classified documents are classified for good reason. Nor does this Article advocate compelling government disclosure of national security secrets. Nonetheless, there is a difference between acknowledging the need for secrecy and asserting that there should be no check on executive authority to determine what is and what is not a secret.

94. See Kathleen Clark, "A New Era of Openness?" *Disclosing Information to Congress Under Obama*, 26 CONST. COMMENT 313, 314 (2010) (noting that openness and transparency were themes of Obama's presidential campaign and have been the subject of numerous executive orders issued by the Obama Administration).

95. Declaring that "democratic principles require that the American people be informed of the activities of their Government," President Obama issued an executive order intended to streamline the classification process. Exec. Order No. 13526, 75 Fed. Reg. 707 (Dec. 29, 2009). Another executive order with the same purpose followed in November 2010. Exec. Order No. 13556, 75 Fed. Reg. 68675 (Nov. 4, 2010). Specifically with respect to the SSP, Christina Wells argues that the Obama's approach is one of "explanatory accountability," which while promising, will not be effective unless coupled with actual political accountability. Christina E. Wells, *State Secrets and Executive Accountability*, 26 CONST. COMMENT. 625 (2010) [hereinafter Wells, *State Secrets*].

96. Although its critics viewed the Bush Administration as the most secretive in U.S. history, see, e.g., Yaroshesky, *supra* note 87, at 1063; see also Pozen, *supra* note 84, at 259 (listing Bush Administration policies that departed from the Clinton Administration's policies and increased government secrecy), there are few indications that the Obama Administration is qualitatively different from its predecessors, see Clark, *supra* note 94, at 315-17 (cataloguing the ways in which the Obama Administration's policies have disappointed advocates of open government). Certainly, the tone of the two administrations is different. See Bill Keller, *Dealing with Assange and the WikiLeaks Secrets*, N.Y. TIMES MAG., Jan. 30 2011, <http://www.nytimes.com/2011/01/30/magazine/30Wikileaks-t.html?pagewanted=all> (contrasting the Bush Administration's response to the *New York Times* reporting on the government's warrantless wiretapping program with the Obama Administration's response to the *Times*'s cooperation with Wikileaks). On October 22, 2010, Wikileaks released 400,000 classified documents relating to the war in Iraq. *The Iraq Warlogs*, WIKILEAKS, <http://warlogs.owni.fr/> (last visited Feb. 15, 2012). While the CIA has denounced the release and vowed to investigate, it has only claimed that "[i]n some cases," the CIA's mission has been compromised and lives have been endangered. Sara A. Carter, *Panetta Says CIA Will Probe Wikileaks Document Release*, WASH. EXAM., Nov. 8, 2010, available at <http://washingtonexaminer.com/blogs/beltway-confidential/2010/11/panetta-says-cia-will-probe-wikileaks-document-release>. Indeed, the *New York Times* dismissed many of the U.S. government's objections to its publication of State Department cables released to Wikileaks on the grounds that the publication posed no serious threat to American interests. Keller, *supra* (categorizing government objections to information disclosed through Wikileaks and concluding that some of the documents disclosed would cause the government "some embarrassment but no real harm").

97. See Samaha, *supra* note 67, at 940 (noting that courts have adopted the approach advocated by President Ford in his statement accompanying his unsuccessful veto of the 1974 FOIA amendments).

98. See Pozen, *supra* note 84, at 298 (citing Alexander Hamilton and John Jay's "tributes to the 'secrecy and despatch' that only the executive branch can provide").

Congress has repeatedly instructed courts to act as such a check.⁹⁹ The Executive Branch does not have exclusive authority to determine when national security secrets can be disclosed to courts, security-cleared attorneys, or litigants solely for the purposes of permitting litigation to proceed. When courts too readily defer to executive determinations about secrecy in the context of the SSP, they are not being modest or humble; they are being lazy. The courts have constitutional authority and a legislative mandate to inquire into executive claims of privilege, and so they must do it.

3. *Totten Is Overbroad*

Totten is an early example of the Executive Branch's tendency to be overprotective of government secrets and of the Judiciary's willingness to defer to the Executive Branch's discretion in this area without much inquiry or even a hint of skepticism. The *Totten* Court simply stated that when Mr. Lloyd agreed to engage in espionage on behalf of the U.S. government, he "must have understood" that his lips would "be for ever sealed" with respect to that agreement.¹⁰⁰ There is no basis for the Court's conclusion that Mr. Lloyd knew that his lips would be *for ever* sealed. More likely, neither Lloyd nor the government was thinking beyond the conflict at hand. During the Civil War, both the government and Lloyd had clear incentives to treat their agreement as confidential. But by the time the case was decided, that conflict had been over for a decade.

It is actually quite difficult to imagine a world in which there would be any national security consequences if Lloyd's activities were disclosed long after the Confederacy had ceased to exist.¹⁰¹ As an initial matter, Lloyd likely did not agree to keep his role *for ever* secret, but even if he did, the government had no clear interest in maintaining that secret indefinitely. Moreover, as clarified in a later case involving a man who claimed to have undertaken sabotage for the United States during the Vietnam War,¹⁰² the analysis under *Totten* seems to turn not on whether *both* parties believed the agreement to be secret,¹⁰³ but on whether the government *unilaterally* determines the agreement to have been secret.¹⁰⁴

99. See *supra* notes 75–83 and accompanying text.

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

101. See *Guong v. United States*, 860 F.2d 1063, 1065 (Fed. Cir. 1988) (“[W]hatever military secrets *Totten* might have uncovered during the war were certainly not current military secrets in 1875.”).

102. *Id.*

103. In *Guong*, the plaintiff argued that he never intended for his sabotage activities to be secret. On the contrary, he conceived of himself as a soldier and assumed that his endeavors to blow up ships in North Vietnamese harbors, *id.* at 1064, would result in public knowledge of his activities. See Theodore Francis Riordan, *Totten Doctrine: Judicial Sabotage of Government Contract for Sabotage*

Even if we concede that there may have been some grounds for secrecy in the 1870s with respect to Lloyd's espionage agreement, those grounds are still not adequate to explain the *Totten* Court's ruling that neither parties to secret agreements with the government nor their heirs can ever bring a claim to vindicate their contractual rights. At some point, the justifications for secrecy must erode and disappear. The Second Circuit recognized this principle when it refused to dismiss a complaint on *Totten* grounds in *Clift v. United States*.¹⁰⁵ The *Clift* court recognized that dismissal of a suit was not necessary if the case involved a national security secret that had become well known by the time of trial.¹⁰⁶ As the Southern District of New York put it in refusing to dismiss a case alleging constitutional violations arising out of a government surveillance program:

In this case, the Government seeks to foreclose the plaintiff at the pleading stage. Such a result would be unfair and not in keeping with the basic constitutional tenets of this country. Here, where the only disclosure in issue is the admission or denial of the allegation that interception of communications occurred—an allegation which has already received widespread publicity—the abrogation of the plaintiff's right of access to the courts would undermine our country's historic commitment to the rule of law.¹⁰⁷

Here was a court exercising its constitutional function as a guardian of constitutional rights against government encroachment.

Services, 13 SUFFOLK TRANSNAT'L L.J. 807, 813–14 n.29 (1990) (quoting Plaintiff's Brief in Opposition to Defendant's Motion to Dismiss for Lack of Jurisdiction at 1–2, *Guong v. United States*, No. 21-86C (Ct. Cl. Sept. 30, 1987)). In addition, plaintiff protested that the mission of which he was a part had been publicized in books and memoirs published by former CIA and military officials. *Guong*, 860 F.2d at 1065.

104. *Guong*, 860 F.2d at 1065 (finding that *Totten* applies equally to secret and covert agreements and rejecting *Guong*'s argument that *Totten* applied only to matters that were still secret at the time of the litigation); see also *Kielczynski v. Cent. Intelligence Agency*, 128 F. Supp. 2d 151, 164 (E.D.N.Y. 2001) (“The decision of whether information that must be revealed is sensitive, including even an admission or denial of the existence of a secret espionage contract, is reserved under *Totten* to the United States.”); Daniel L. Pines, *The Continuing Viability of the 1875 Supreme Court Case of Totten v. United States*, 53 ADMIN. L. REV. 1273, 1280 (2001) [hereinafter Pines, *Continuing Viability*] (noting that the *Guong* court treated “secret” and “covert” agreements as synonymous for the purposes of its *Totten* analysis).

105. 597 F.2d 826 (2d Cir. 1979).

106. See *id.* at 830 (stating that the cryptographic system at issue in the case might in time become as obsolete as a World War II era computer had become and thus that information relating to it might be discoverable); see also *Ticon Corp. v. Emerson Radio & Phonograph Corp.*, 134 N.Y.S.2d 716, 721–22 (N.Y. Sup. Ct. 1954) (denying defendant's motion to dismiss and ruling *Totten* inapplicable on the ground that the data at issue in the case “may in due time be declassified”). But see *Guong*, 860 F.2d at 1066 (rejecting plaintiffs' arguments that the sabotage activities in which he had been engaged had been disclosed in publications, deferring to the government's “broader view of the world scene”).

107. *Spock v. United States*, 464 F. Supp. 510, 520 (S.D.N.Y. 1978).

But the *Totten* doctrine does not encourage judges to exercise their cognitive gifts. It creates a mechanical rule that courts apply to whatever claims the government makes. *Totten* imposed no burden on the government to demonstrate the continued need for secrecy, which means that the government is encouraged to make its assertions of secrecy as broad as possible. As discussed in the previous Subpart, the government needs no such encouragement. The government relied on *Totten* in two cases brought in the 1890s in seeking to dismiss claims brought on behalf of two other Civil War-era spies who sought to recover their pay from the government.¹⁰⁸ It is hard to imagine what secrets about Civil War espionage remained nearly three decades after the cessation of hostilities.

Permitting or requiring government intelligence agencies to share information of general concern with the public is a different matter from requiring the government to share such information with adverse litigants. However, nothing in this Article is intended to suggest it must do the latter. The procedures associated with the SSP already require in camera review of classified affidavits supporting the assertion of the SSP.¹⁰⁹ If the subject matter is so sensitive that disclosure to the plaintiff is impossible, the plaintiff may be permitted to secure counsel with security clearance and the matter may proceed in camera with all documents under seal. In earlier SSP cases, courts availed themselves of this option or found other ways to permit cases to proceed without endangering state secrets.¹¹⁰

As an initial matter, the problem with the *Totten* doctrine is twofold. First, it encourages courts to accord complete deference to governmental claims of secrecy despite strong evidence that the government overclassifies. Second, it requires dismissal of suits with prejudice, when the more logical alternative, as suggested in cases such as *Clift* and *Spock*,¹¹¹ is to dismiss suits that implicate secret agreements without prejudice, while tolling any relevant statutes of limitations so as to permit the suit to proceed once the state secrets at issue have been declassified. There has to be some check on governmental assertions of secrecy if the

108. See *De Arnaud v. United States*, 151 U.S. 483, 493 (1894) (discussing *Totten* and suggesting it would apply to “military experts” as well as to spies, although deciding for the government on other grounds); *Allen v. United States*, 27 Ct. Cl. 89 (1892) (finding plaintiff’s claim barred by *Totten* and other doctrines).

109. See *United States v. Reynolds*, 345 U.S. 1, 7–8 (1953). In *Jeppesen Dataplan*, then-director of the CIA, Michael Hayden, submitted a classified declaration in support of the government’s assertion of the SSP. *Mohamed v. Jeppesen Dataplan, Inc.*, 563 F.3d 992, 999 (9th Cir. 2009).

110. For example, in *Halpern v. United States*, 258 F.2d 36 (2d Cir. 1958), the Second Circuit responded to the assertion of the SSP by remanding the entire case for an in camera trial. See also Telman, *supra* note 20, at 519–22 (discussing courts’ creative attempts to both preserve state secrets and permit litigants their opportunity to be heard).

111. See discussion *supra* accompanying notes 105–107.

Totten doctrine is not to become a mechanism whereby the government makes unjustified claims of secrecy in order to avoid embarrassment.¹¹²

4. *Totten Can Be Harmful to National Security Interests*

Why do people contract with the government? Perhaps they do so out of a sense of patriotism or duty. Mr. Lloyd put his life on the line, and so it seems likely that commitment to the Union cause played a role in his decision to engage in espionage on behalf of the government. But clearly patriotism alone was not enough. He expected to be paid for his efforts on the government's behalf.¹¹³ That being the case, he might not have been willing to serve if he knew that the government had the option of not paying. It follows that the *Totten* doctrine could deter people from entering into agreements with the government or at least raise the cost of such agreements.

The economic disincentives to cooperation with the government associated with the *Totten* doctrine are even clearer in *Tenet v. Doe*,¹¹⁴ a case in which the Supreme Court revisited *Totten* for the first time in 130 years.¹¹⁵ The plaintiffs in *Tenet*, whom the court refers to as "John and Jane Doe," were foreign nationals. John Doe was a high-ranking diplomat in a foreign country that at the time was considered an enemy of the United States.¹¹⁶ The couple allegedly expressed interest in defecting to the United States. They were permitted to do so, but only after remaining at their posts for some time in order to conduct espionage on behalf of the United States.¹¹⁷ They alleged that the government promised them financial and personal security for life.¹¹⁸ With assistance from the government, John Doe found work in the private sector. As his salary increased, he weaned himself off of government support and ultimately agreed to a discontinuation of government benefits while he was working.¹¹⁹ He was eventually laid off due to a corporate merger, and government restrictions on his employment made it impossible for him to find a new job. He

112. See *Reynolds v. United States*, 192 F.2d 987, 995 (3d Cir. 1951) (cautioning that the SSP might become a mechanism whereby the government could prevent the disclosure of information that would cause embarrassment).

113. See *Totten v. United States*, 92 U.S. 105, 106 (1875) (indicating an agreement according to which Lloyd was to be paid \$200 a month).

114. 544 U.S. 1 (2005).

115. It was necessary for the Court to reaffirm its commitment to *Totten* in *Tenet* because district courts had been whittling away at the doctrine in the late twentieth century. See Pines, *Continuing Viability*, *supra* note 104, at 1282–98 (describing cases in which courts variously limited the applicability of the *Totten* doctrine).

116. *Tenet*, 544 U.S. at 3.

117. *Id.* at 3–4.

118. *Id.* at 4.

119. *Id.*

therefore asked to be permitted to return to work in the Department of State, but that request was denied.¹²⁰

In order to escape *Totten*, the Does sued alleging not breach of contract but promissory estoppel and due process violations.¹²¹ The Court rejected their claims, relying on the *Totten* doctrine and clarifying that the doctrine covered not only breach of contract claims but all claims involving voluntary agreements with the government.¹²²

The facts of *Tenet* make clear that plaintiffs were not likely motivated by patriotism, since they were neither U.S. citizens nor residents at the time of their agreement with the government.¹²³ They might have had some notional allegiance to what they took the United States to stand for—perhaps such ideas as personal freedom, government accountability and the free market. If such factors motivated them to defect and live in the United States, they were surely disappointed. And other similarly situated would-be agents of the United States would clearly be deterred from risking their lives, separating themselves from family and loved ones, and moving to a foreign country if they learned of the outcome in *Tenet*. In short, whenever parties contract for compensation from the government, they have an expectation of being paid, and that expectation is part of their motivation for entering into the agreement.

But *Totten* renders illusory¹²⁴ some agreements with the government that relate to national security, and given the tendency toward overclassification discussed above, the category of secret agreements can be extremely broad.¹²⁵ Because the government, in certain circumstances cannot be sued for breach of a secret agreement, it effectively gives no consideration in return for the goods or services it receives through such agreements.¹²⁶ That being the case, *Totten* puts parties on notice that when they provide goods or services to the government for purposes relating to national security, they are making bargains that the government will honor,

120. *Id.* at 4–5.

121. *Id.* at 5–6.

122. *Id.* at 8.

123. *Id.* at 4.

124. *See generally* E. ALLAN FARNSWORTH, CONTRACTS § 2.13 at 75–76 (4th ed. 2004) (describing illusory contracts as promises conditioned on events entirely within the control of the promisor). *Totten* cases seem to fall within the category, because the determination that the alleged agreement in question remains a state secret is entirely within the power of the government.

125. Even back in 1982, the scope of state secrets could be quite broad. *See Note, The Military and State Secrets Privilege: Protection for National Security or Immunity for the Executive?*, 91 YALE L.J. 570, 578 n.50 (1982) (highlighting cases involving “domestic intelligence activities widely assumed to occur, or otherwise not surprising to the public”).

126. *See* Tyler Brochstein, Comment, *The Totten Doctrine: Is the Purpose Behind Totten MIA?*, 44 HOUS. L. REV. 65, 85 (2007) (calling *Totten* devastating for national security because it makes it difficult to recruit new espionage operatives).

unless for some reason it decides not to do so. Rational actors should not enter into such agreements.

The fact that the government usually abides by its contractual obligations does not change the fact that, in some situations, the government is under no obligation to do so. It only changes the amount of consideration a party should demand in return for its performance. A party contracting with the government may conclude that there is a 3% chance that the government will breach its obligations in connection with a particular agreement relating to national security information. The contracting party with bargaining power should thus negotiate a 3% increase in its pay to protect itself against the risk of loss.¹²⁷ But people such as Lloyd have little bargaining power and they are not interested in percentages. Either they are willing to perform services for the government for free or they should be unwilling to take the risk that the government will breach.

It is reasonable to object that *Totten* has been around for 135 years, and its logic has not prevented the government from finding contracting partners. One possible explanation is that *Totten* has not deterred parties from contracting with the government, but it has raised the government's costs associated with secret agreements for the reasons given above. If it has not done so, the parties that contract with the government are either lacking in information or are subject to various cognitive biases that are leading them to expend labor and resources on behalf of a government that is entitled by law to stiff them.¹²⁸ In any case, the potential expansion of *Totten* through cases like *Jeppesen Dataplan* is troubling, as it undermines confidence in the government and could drive people who might otherwise be inclined to cooperate with the government to refuse to offer their services to the government.

127. In May 2011, the U.S. Supreme Court decided *General Dynamics Corp. v. United States*, 131 S. Ct. 1900 (2011). In that case, the Court considered “what remedy is proper when, to protect state secrets, a court dismisses a Government contractor’s prima facie valid affirmative defense to the Government’s allegations of contractual breach.” *Id.* at 1903. The Court concluded that it is proper if a court provides no remedy whatsoever. In cases that cannot proceed without the revelation of state secrets, a court must leave the parties as they are at the commencement of litigation. *Id.* at 1909. A government contractor that wants to insure itself in case of government breach would do well to demand progress payments.

128. See generally Neil D. Weinstein, *Unrealistic Optimism About Future Life Events*, 39 J. PERSONALITY & SOC. PSYCHOL. 806, 806 (1980) (“Various data suggest that people . . . tend to be unrealistically optimistic about the future.”). On the optimism bias in the contractual context, see, e.g., Oren Bar-Gill, *Seduction by Plastic*, 98 NW. U. L. REV. 1373, 1400 (2004) (noting that optimism bias leads consumers to underestimate the risk of contingencies that might result in economic hardship); Avishalom Tor, *The Fable of Entry: Bounded Rationality, Market Discipline, and Legal Policy*, 101 MICH. L. REV. 482, 505 (2002) (noting that individuals exhibit optimistic bias, leading them to overestimate their positive traits and to underestimate their vulnerability to risks); *id.* at 508–12 (discussing the desirability bias and related phenomena that exacerbate the effect of the optimism bias).

The point is not to force the disclosure of national security secrets, nor is it to permit judges, rather than qualified experts within the Executive Branch, to determine when a case implicates genuine national security secrets. Deference to the Executive Branch is perfectly appropriate in this area, but it must be deference to specific, detailed explanations and not to general principles, such as that announced by the *Totten* Court, that the government does not have to abide by its contractual obligations any time it says that the contract at issue is secret. The inquiry does not have to be particularly searching, but it must be searching enough to deter the government from relying on *Totten* in order to protect itself from embarrassment or to prevent the disclosure of conduct that does not implicate national security secrets.

B. Totten Is a Contracts Doctrine and Can Have No Application to Plaintiffs' Claims in Jeppesen Dataplan

The conflation of the SSP and the *Totten* doctrine gives rise to intolerable abuses of the SSP, as courts increasingly find that they must dismiss suits based on the SSP, even where, as in *Jeppesen Dataplan*, the government cannot show that plaintiffs are unable to make out their prima facie case without documents or information subject to the SSP.¹²⁹ In the decisive concurring opinion in *Jeppesen Dataplan*, Judge Bea concluded that the complaint should be dismissed pursuant to *Totten* because its very subject matter is a state secret.¹³⁰ But for the reasons given below, *Totten* should not apply to *Jeppesen Dataplan* or to other, similar cases.

The SSP is an evidentiary privilege that merely excuses the government, or the parties on whose behalf it intervenes, from their discovery obligations to the extent that the discovery seeks the disclosure of information subject to the privilege.¹³¹ As the D.C. Circuit noted, when the government successfully invokes the SSP, “[t]he result is simply that the evidence is unavailable, as though a witness had died, and the case will proceed accordingly, with no consequences save those resulting from the loss of the evidence.”¹³² However, because the government now frequently invokes the SSP to seek pre-discovery dismissal of lawsuits, its effects now

129. See *El-Masri v. United States*, 479 F.3d 296, 305–07 (4th Cir. 2007) (citing various cases in which the unavailability of privileged information has resulted in dismissal).

130. *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1093 (9th Cir. 2010) (en banc) (Bea, J., concurring).

131. See *United States v. Reynolds*, 345 U.S. 1, 8–9 (1953) (analogizing the SSP to the privilege against self-incrimination); see also *Mohamed v. Jeppesen Dataplan, Inc.*, 563 F.3d 992, 1000 (9th Cir. 2009) (contrasting *Reynolds* to the *Totten* bar in that the former “prevents only discovery of secret evidence when disclosure would threaten national security”).

132. *Ellsberg v. Mitchell*, 709 F.2d 51, 64 (D.C. Cir. 1983) (quoting MCCORMICK’S HANDBOOK OF THE LAW OF EVIDENCE 233 (1972)).

mimic those of the *Totten* doctrine. Such dismissals cannot be reconciled with the *Reynolds* Court's understanding of the SSP as evidentiary in nature.¹³³ The Supreme Court itself recognized the difference between the two doctrines in *Tenet*, in which it characterized *Totten* as a "unique and categorical" bar that precludes judicial inquiry.¹³⁴ The Court characterized the SSP, by contrast, as an evidentiary privilege, requiring careful balancing and representing a "formula of compromise."¹³⁵ *Totten* does not create an evidentiary privilege; it is a contracts doctrine that renders suits to enforce secret agreements non-justiciable.¹³⁶

The *Jeppesen Dataplan* majority opinion gets off to a rocky start by treating the *Totten* doctrine as a subspecies of the SSP.¹³⁷ The conflation of the SSP and *Totten* is an error, and the fact that other lower courts have made the same error does not render it any less so.¹³⁸ The reason for the error is clear. *Reynolds* cited *Totten* as authority for the principle that a suit must be dismissed when its very subject matter is a state secret.¹³⁹ The government has repeatedly capitalized on this footnote to urge a conflation of the doctrines so as to require dismissal of suits on SSP grounds

133. See Advisory Committee's Note to Preliminary Draft of Proposed FED. R. EVID. 509(e), 56 F.R.D. 183, 254 (1973) ("If privilege is successfully claimed by the government in litigation to which it is not a party, the effect is simply to make the evidence unavailable, as though a witness had died or claimed the privilege against self-incrimination, and no specification of the consequences is necessary."). The drafters of proposed Rule 509 thought they were simply codifying *Reynolds*. See Advisory Committee's Note to Preliminary Draft of Proposed FED. R. EVID. 509, 46 F.R.D. 161, 274-76 (1969) (noting that the rule aims at protection of military and state secrets as established by the law of evidence as noted in *Reynolds*).

134. *Tenet v. Doe*, 544 U.S. 1, 6 n.4.

135. *Id.* at 9-10; *Reynolds*, 345 U.S. at 9.

136. See *Ellsberg*, 709 F.2d at 65 n.60 (characterizing *Totten* as being about the enforcement of an implied contractual non-disclosure provision); *Terkel v. AT&T Corp.*, 441 F. Supp. 2d 899, 907 (N.D. Ill. 2006) (refusing to apply *Totten* where plaintiffs were not parties to an alleged contract but claimed that "the performance of an alleged contract entered into by others would violate their statutory rights"); *ACLU v. Nat'l Sec. Agency*, 438 F. Supp. 2d 754, 763 (E.D. Mich. 2006) (refusing to apply *Totten* because it "applies [only] to actions where there is a secret espionage relationship between the Plaintiff and the Government"), *vacated on other grounds*, 493 F.3d 644 (6th Cir. 2007).

137. *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1077-79 (9th Cir. 2010) (en banc).

138. See, e.g., *Payne v. Tennessee*, 501 U.S. 808, 842-43 (Souter, J., concurring) (citing cases for the proposition that when the "Court has confronted a wrongly decided, unworkable precedent . . . , we have chosen not to compound the original error, but to overrule the precedent"); *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406-08 (1932) (Brandeis, J., dissenting) (observing that, especially in cases with constitutional implications, courts must bow "to the lessons of experience and the force of better reasoning, recognizing that the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function"). Some scholars have made the same conflation. See Victor Hanson, *Extraordinary Rendition and the State Secrets Privilege: Keeping Focus on the Task at Hand*, 33 N.C. J. INT'L L. & COM. REG. 629, 631-33 (2008) (discussing *Totten* as a "type of state secrets privilege").

139. See *United States v. Reynolds*, 345 U.S. 1, 11 n.26 (1953) (describing *Totten* as a case in which the suit was dismissed without any inquiry into the evidence "since it was so obvious that the action should never prevail over the privilege").

whenever the government claims that the “very subject matter” of the litigation is a state secret.¹⁴⁰

To say the least, the *Reynolds* Court’s reliance on *Totten* has created a great deal of confusion, as *Totten* was never treated as a case about evidentiary privileges. *Totten* is sometimes described as a principle of “non-justiciability, akin to [the] political question doctrine.”¹⁴¹ It is better understood as exemplifying a category of contracts that are not enforceable either on public policy grounds or because of an implied term that the agreement was to remain forever a secret.¹⁴²

Even if *Totten* were not overbroad and even if it did not create powerful disincentives for cooperation with the government, *Totten* itself was clearly about a voluntary agreement with the government, as the *Jeppesen Dataplan* panel correctly noted. *Totten*’s “plain language requires [plaintiffs] (not Jeppesen) have an ‘agreement’ or ‘contract’ with the government, and an ‘underst[anding]’ that ‘the lips of the other were to be for ever sealed respecting the relation.’”¹⁴³ As discussed above, the *Totten* doctrine was revived and expanded in the more recent case of *Tenet v. Doe*. But that expansion is not so capacious as to capture cases like *Jeppesen Dataplan*, in which the plaintiffs did not enter into a voluntary relationship

140. See, e.g., *El-Masri v. United States*, 479 F.3d 296, 306 (4th Cir. 2007) (citing *Reynolds* and *Totten* for the proposition that dismissal at the pleading stage can be appropriate in some SSP cases); *Kasza v. Browner*, 133 F.3d 1159, 1170 (9th Cir. 1998) (affirming dismissal where the “very subject matter” of plaintiff’s action was a state secret); *Terkel v. AT&T Corp.*, 441 F. Supp. 2d 899, 907 (N.D. Ill. 2006) (citing government arguments that dismissal is appropriate whenever the “very subject matter” of a suit is a state secret); *Hepting v. AT&T Corp.*, 439 F. Supp. 2d 974, 985 (N.D. Cal. 2006) (explaining that the government sought dismissal of the case because its “very subject matter” was a state secret); Memorandum of the United States in Support of Motion to Dismiss or, in the Alternative, for Summary Judgment at 9–14, *Mohamed v. Jeppesen Dataplan*, 539 F. Supp. 2d 1128 (N.D. Cal. 2008) (No. C-07-02798-JW) (arguing that the case could not proceed and must be dismissed at the pleadings stage because state secrets were central to it).

141. See *Jeppesen Dataplan*, 614 F.3d at 1096 & n.7 (Hawkins, J., dissenting) (citing cases for the proposition that *Totten* is a non-justiciability doctrine); *El-Masri v. Tenet*, 437 F. Supp. 2d 530, 540 (E.D. Va. 2006) (noting that the *Totten* bar is not a privilege but “is instead a rule of non-justiciability that deprives courts of their ability to hear ‘suits against the Government based on covert espionage agreements,’ even in the absence of a formal claim of privilege”).

142. See *Riordan*, *supra* note 103, at 808 n.2 (describing *Totten* as being based on “an implied covenant prohibiting the future disclosure of the existence or nature of the contract to third parties”). Daniel Pines argues that *Totten* also can be understood as a version of the unclean hands doctrine. Pines, *Continuing Viability*, *supra* note 104, at 1274. The basis for this claim seems to be language in *Totten* stating that the publicity produced by an action for breach of a secret agreement “would itself be a breach . . . and thus defeat a recovery.” *Totten v. United States*, 92 U.S. 105, 107 (1875). But this language does not really sound like the language of unclean hands. In the alternative, Pines views *Totten* as a product of the doctrine of separation of powers. Pines, *Continuing Viability*, *supra* note 104, at 1276. But clearly this makes too bold a claim, negating any judicial authority to review administrative claims relating to the need to maintain secrets.

143. *Mohamed v. Jeppesen Dataplan, Inc.*, 563 F.3d 992, 1001–02 (9th Cir. 2009) (quoting *Totten v. United States*, 92 U.S. 105, 106 (1875)); see also *Clift v. United States*, 597 F.2d 826, 830 (2d Cir. 1979) (finding *Totten* inapplicable where plaintiff never entered into a contract with the government).

with the government.¹⁴⁴ As late as 1988, *Totten* had been successfully invoked in a grand total of six cases, all of which involved espionage contracts.¹⁴⁵

The *Jeppesen Dataplan* majority relies on *Weinberger v. Catholic Action of Hawaii* to claim that *Totten* has been expanded to apply outside of the contractual context.¹⁴⁶ The majority's reliance on *Weinberger* is misplaced. The case is neither a *Totten* case nor an SSP case. Plaintiffs in *Weinberger* sought from the government a "Hypothetical Environmental Impact Statement" (EIS) pursuant to § 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA),¹⁴⁷ in connection with the Navy's plan to transfer ammunition to various locations on Oahu, Hawaii.¹⁴⁸ Plaintiffs were concerned that nuclear weapons would be brought to the island, and sought to enjoin the building of new storage facilities until an EIS was filed.¹⁴⁹

The government took the position that no EIS was called for in the circumstances and that, in any case, § 102(2)(C) of NEPA was subject to the provisions of FOIA.¹⁵⁰ The Court found that the national security exception to FOIA was applicable in this context and excused the government from its obligations under NEPA.¹⁵¹ The result is unsurprising: NEPA is expressly subject to FOIA, and a FOIA exception clearly applies, so plaintiffs were not entitled to the EIS that they sought.

The Court then noted that there have been "other circumstances" in which the Court had held that "public policy forbids the maintenance of any suit" that would lead inevitably "to the disclosure of matters which the law itself regards as confidential."¹⁵² The Ninth Circuit uses this aside as a basis to transform *Weinberger* into a *Totten* case, but the "other circumstances" language makes clear that *Totten* provides only a loose analogy and is not a ground for the *Weinberger* decision, which is the straightforward product of the Court's interpretation of two federal statutes.

Justice Blackmun, joined by Justice Brennan, concurred in the opinion in order to make the point that the Court should have simply decided the

144. See *Jeppesen Dataplan*, 563 F.3d at 1002 (noting that *Tenet* only prohibits suits that would necessarily require the disclosure of plaintiffs' secret agreements with the government).

145. Riordan, *supra* note 103, at 807–09 (contending that in *Guong v. United States*, 860 F.2d 1063 (Fed. Cir. 1988), the Court of Appeals for the Federal Circuit extended the doctrine to include contracts for sabotage as well as contracts for espionage).

146. See *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1078 (9th Cir. 2010) (en banc) (citing *Weinberger v. Catholic Action of Hawaii*, 454 U.S. 139 (1981)).

147. See *Weinberger*, 454 U.S. at 140 (citing 42 U.S.C. § 4332(2)(C) (2006)).

148. *Id.* at 141.

149. *Id.* at 142.

150. See *id.* at 141–43.

151. *Id.* at 144–46.

152. *Id.* at 146–47 (quoting *Totten v. United States*, 92 U.S. 105, 107 (1875)).

case based on the FOIA exemption. Citation to *Totten* was unnecessary.¹⁵³ One might argue that the fact that Blackmun found the reliance on *Totten* worthy of comment suggests that *Weinberger* really is within the line of *Totten* cases, but to do so ignores the fact that *Totten* is mentioned only in an aside after the case had been decided on other grounds.

The Court cited *Weinberger* in *Tenet*, but only in order to show the continued vitality of *Totten* in the face of arguments that *Totten* had been displaced by the SSP.¹⁵⁴ While the *Jeppesen Dataplan* majority uses *Weinberger* to support its treatment of the *Totten* doctrine as a subspecies of the SSP, the Court cited *Weinberger* in *Tenet* in a paragraph devoted to distinguishing the two doctrines. Immediately after the citation to *Weinberger*, the Court concluded. “*Reynolds* therefore cannot plausibly be read to have replaced the categorical *Totten* bar with the balancing of the state secrets evidentiary privilege in the distinct class of cases that depend upon clandestine spy relationships.”¹⁵⁵ In short, while SSP cases point to the *Totten* doctrine for support of the general proposition that courts may at times have to recognize the government’s interest in protecting state secrets, it has always done so while highlighting the differences between *Totten*, which categorically bars certain kinds of suits, and the SSP, which is an evidentiary privilege attended by a complex procedure and which requires judicial balancing of the interests at stake in the litigation.

C. *Totten Is a Very Limited Contracts Doctrine*

The best evidence of the narrowness of *Totten* is provided by cases in which former government employees sue the government and have their claims dismissed based not on *Totten* but on the SSP.¹⁵⁶ These cases involve people who entered into contracts with the government, the details of which the government claimed to be state secrets.¹⁵⁷ As such, these cases seem likely candidates for the *Totten* bar. Nonetheless, because the

153. *Id.* at 149 (Blackmun, J., concurring).

154. *See* *Tenet v. Doe*, 544 U.S. 1, 9 (2005) (citing *Weinberger*’s reliance on *Totten* as evidence of its “continued vitality”).

155. *Id.* at 9–10.

156. Daniel Pines, a strong supporter of the viability of the *Totten* doctrine, acknowledges that employment cases are different and that there are good reasons not to invoke *Totten* in such cases. Pines, *Continuing Viability*, *supra* note 104, at 1294–95.

157. This Subpart is, of necessity, selective in the cases it discusses. As Laura Donohue has highlighted, what we know of the SSP is really only the tip of the iceberg, because the majority of cases in which the SSP is invoked do not result in published opinions in which the courts address SSP issues. *See* Donohue, *supra* note 17, at 79–87 (pointing out the weaknesses of existing scholarship, which focuses exclusively on published opinions). Still, Donohue’s research, which demonstrates that the SSP is invoked more regularly than existing scholarship has realized, strengthens the argument in this Subpart that the government routinely relies on the SSP rather than the *Totten* doctrine, even in cases involving disputes with parties with whom the government has a contractual relationship.

plaintiffs sued not to enforce their contracts with the government but to raise claims of government misconduct in violation of federal statutory law, the government invoked the SSP and not *Totten* in seeking dismissal of their claims. While the line of cases discussed in this Subpart indicates that courts are increasingly cowed by government demands that such claims be dismissed without discovery, the important doctrinal point is that such dismissals have always been based on the SSP and not on *Totten*. The aim of this Subpart is to provide additional evidence that *Totten*, rarely invoked even in the contractual context, could not possibly apply where plaintiffs are victims of torts perpetrated by the government and its contractors.

It bears remarking that courts used to recognize the rights of government employees to raise statutory claims against the government, even if their jobs involved state secrets. In *Molerio v. FBI*, then-Judge Scalia, on behalf of a unanimous panel of the D.C. Circuit Court of Appeals, dismissed a complaint raising statutory and constitutional issues relating to the FBI's decision not to hire Daniel Molerio as an agent.¹⁵⁸ Although the government asserted the SSP in the case and sought dismissal on that basis, it still participated in discovery, while redacting documents that it claimed contained sensitive national security information.¹⁵⁹ The court dismissed Molerio's Title VII claim and his Due Process claim on "standard summary-judgment principles" without recourse to the SSP.¹⁶⁰ Only Molerio's First Amendment claim and his Privacy Act claims were dismissed on SSP grounds,¹⁶¹ and that only after the court reviewed the government's classified declaration in camera and was convinced that the FBI's decision not to hire Mr. Molerio had nothing to do with his First Amendment claim.¹⁶² Because of the SSP, that information relating to the government's affirmative defense could not be disclosed, but as then-Judge Scalia put it, "we know that further activity in this case would involve an attempt, however well intentioned, to convince the jury of a falsehood."¹⁶³

More evidence that statutory claims brought by former government employees do not come up against the *Totten* bar is provided in *Webster v. Doe*,¹⁶⁴ in which plaintiff brought suit against then-CIA Director, William Webster, claiming that he had been discharged from the CIA because of his homosexuality.¹⁶⁵ Webster sought dismissal of the claims on statutory

158. *Molerio v. FBI*, 749 F.2d 815, 818–19, 826 (D.C. Cir. 1984).

159. *Id.* at 819.

160. *Id.* at 822–24.

161. *Id.* at 824–26.

162. *Id.* at 825. The Privacy Act Claim required a showing of harm based on the First Amendment claim and so failed when the First Amendment claim was dismissed. *Id.* at 826.

163. *Id.* at 825.

164. 486 U.S. 592 (1988).

165. *See id.* at 595–96.

grounds.¹⁶⁶ Chief Justice Rehnquist, writing for the majority, held that plaintiff's statutory claims were barred under the National Security Act.¹⁶⁷ However, plaintiff's constitutional claims were allowed to proceed.¹⁶⁸ In 1988, apparently neither *Totten* nor the SSP required dismissal of suits brought against the government by employees of the government's intelligence agencies even when their voluntary relationships with the government might lead one to believe that the suits could be subject to dismissal under *Totten*.

After 2000, courts grew more inclined to dismiss similar claims based on the SSP after in camera review of classified declarations in support of the government's motion to dismiss.¹⁶⁹ After the "War on Terror" began, courts no longer found review of such materials necessary. It was now enough for the government to simply make a plausible claim that state secrets might be implicated, and all claims could be dismissed before discovery.¹⁷⁰ Still, the fact that the government went to the trouble of filing classified declarations is significant, as that time-consuming procedure would not be necessary if the claims simply could be dismissed on *Totten* grounds.¹⁷¹

Tilden v. Tenet involved a gender discrimination suit against the CIA Director.¹⁷² In response to plaintiff's discovery requests, defendant invoked the SSP and filed both a classified and an unclassified declaration in support of the claims of privilege.¹⁷³ The plaintiff did not object to the court's in camera review of the classified documents in support of the classified declaration but did object to the fact that such review was ex parte because both plaintiff and counsel had security clearances.¹⁷⁴ The

166. *Id.* at 597 (noting that Webster sought dismissal of the complaint based on § 102(c) of the National Security Act, which precludes review of the CIA Director's termination decisions).

167. *Id.* at 601 (finding that § 102(c) of the National Security Act precluded review of the CIA Director's termination decisions to the extent that the Administrative Procedures Act grants him discretion in such matters).

168. *Id.* at 603–04 (concluding that Congress did not intend to "preclude consideration of colorable constitutional claims arising out of the actions of the [CIA] Director" and remanding for further proceedings in the district court).

169. *See infra* notes 172–177 and accompanying text (discussing *Tilden v. Tenet*, 140 F. Supp. 2d 623 (E.D. Va. 2000)).

170. *See infra* notes 181–184 and accompanying text (discussing *Sterling v. Tenet*, 416 F.3d 338 (4th Cir. 2005)).

171. *Reynolds* requires that every assertion of the SSP be supported by a declaration based on personal knowledge from the head of the department tasked with safeguarding the secret information at issue. *United States v. Reynolds*, 345 U.S. 1, 7–8 (1953). Clearly, heads of agencies such as the FBI, the CIA, and the National Security Agency have better things to do with their time than review case files so that they can make declarations based on personal knowledge. If they could avoid doing so by invoking *Totten* instead of the SSP, they would do so.

172. *Tilden*, 140 F. Supp. 2d at 624.

173. *Id.* at 625.

174. *Id.*

court did not heed plaintiff's objection and proceeded with its in camera review ex parte.¹⁷⁵ Having done so, the court dismissed the suit, despite the fact that plaintiff's counsel and plaintiff both had security clearances, on the grounds that the court could not safeguard the national security secrets that would be disclosed in the case.¹⁷⁶

The insistence on ex parte review in *Tilden* is troubling. The court dismissed a gender discrimination claim against the government after the examination of evidence to which plaintiff was denied access despite having security clearance. When plaintiff questioned the extent to which the evidence in question actually implicated national security secrets, the court responded with the "mosaic theory,"¹⁷⁷ which the *Jeppesen* majority also invoked.¹⁷⁸ Under the mosaic theory, a court can refuse to provide a party with access which is not itself classified, based on the possibility that the disclosure of such information, when combined with other disclosures, might jeopardize national security. As others have noted, when overclassification is supplemented with the mosaic theory, we are approaching a realm something like government immunity from suit.¹⁷⁹

And yet, in *Sterling v. Tenet*,¹⁸⁰ the Fourth Circuit went further still. Sterling had served as a CIA operations officer for eight years. He brought suit claiming that the CIA discriminated against him because he is African American.¹⁸¹ The Director of the CIA filed both a classified and an unclassified declaration explaining that Sterling could not prove his case without forcing disclosure of secret information. The Fourth Circuit approved of the district court's practice of dismissing based on the CIA Director's confidential declaration without requiring even that the

175. *Id.* at 626.

176. *Id.* at 627.

177. *See id.* at 627 n.1 (citing *United States v. Marchetti*, 466 F.2d 1309, 1318 (4th Cir. 1972) for the notion that information that "may seem trivial to the uninformed, may appear of great moment to one who has a broad view of the scene and may put the questioned item of information in its proper context").

178. *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1082 (9th Cir. 2010) (en banc) (citing *Kasza v. Browner*, 133 F.3d 1159, 1166 (9th Cir. 1998), for the proposition that the SSP may be invoked to bar disclosure of "seemingly innocuous information" if it is part of a mosaic, and the government cannot force the government to disentangle the secret from the seemingly innocuous information).

179. *See Note, supra* note 125, at 578 (noting that the application of the SSP in a series of cases challenging government surveillance of political activists minimizes government "liability incurred for invasions of personal rights"); *see also* Owen Fiss, *The Example of America*, 119 *YALE L.J. POCKET PART* 1, 15–16 (2009) (characterizing the SSP as having "been transformed during the Bush years into a de facto grant of immunity"); Michael P. Jensen, Note, *Torture and Public Policy: Mohamed v. Jeppesen Dataplan, Inc. Allows "Extraordinary Rendition" Victims to Litigate Around State Secrets Doctrine*, 2010 *BYU L. REV.* 117, 128–130 (2010) (arguing that, although the Ninth Circuit Court's panel permitted the *Mohamed* plaintiffs to proceed with their suit, the standard announced in that opinion still permits the SSP to be used as a sort of governmental immunity doctrine).

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

181. *Id.* at 341.

government produce any documentation underlying the declaration for in camera, ex parte review.¹⁸² In *Sterling*, the court dismissed the case because the government had come up with a good story—good enough to be persuasive to a judge who neither looks at the evidence nor hears from the other side¹⁸³—about how litigation might involve the disclosure of state secrets. Nonetheless, it is still noteworthy that, although *Sterling* was a case involving an employment agreement that involved espionage for the United States, the case was dismissed based on the SSP and not based on *Totten*.¹⁸⁴ *Totten* simply has no application where the plaintiff does not seek court enforcement of a secret agreement with the government.

*Edmonds v. United States Department of Justice*¹⁸⁵ is similar. Sibel Edmonds was a contract linguist hired by the FBI after the 9/11 attacks.¹⁸⁶ Edmonds made various whistleblowing allegations to the FBI management citing serious breaches in FBI security and poor translation work as a result of the willful misconduct and gross incompetence of the people with whom she worked.¹⁸⁷ Shortly after she made such allegations, Edmonds's employment was terminated.¹⁸⁸ She sued, citing violations of the Privacy Act, and made constitutional claims alleging retaliatory termination in violation of her First Amendment free speech rights and her Fifth Amendment due process rights.¹⁸⁹ The district court granted the government's motion for dismissal on SSP grounds after "ex parte, in camera review" of classified declarations.¹⁹⁰ Although the court discussed *Totten*,¹⁹¹ it did so in the context of a historical discussion of the evolution of the SSP going back to the trial of Aaron Burr.¹⁹² The remainder of the opinion simply followed the procedure established in *Reynolds* for judicial review of a government assertion of the SSP, and then evaluated whether the successful invocation of the SSP required dismissal of the suit.¹⁹³ In so

182. *Id.* at 342–44.

183. In order to overcome the need for in camera review of classified material, the government need only show that there exists a *reasonable danger* that state secrets will be divulged in the process of the litigation. *See* *United States v. Reynolds*, 345 U.S. 1, 10 (1953).

184. *See Sterling*, 416 F.3d at 348–39 (affirming the district court's dismissal of the suit on SSP grounds).

185. 323 F. Supp. 2d 65 (D.D.C. 2004).

186. *Id.* at 67.

187. *Id.* at 67–69.

188. *Id.* at 69–70.

189. *Id.* at 70.

190. *Id.* at 81–82 (emphasis omitted).

191. *Id.* at 71 (reviewing *Totten* almost exclusively through block quotation with almost no discussion or analysis).

192. *See id.* at 70–73 (discussing *Reynolds*, *Totten*, and *United States v. Burr*, 25 F. Cas. 30 (C.C.D. Va. 1807)).

193. *Id.* at 73–81.

doing, the court noted that both the nature of Edmonds's employment and "the events surrounding her termination" were state secrets.¹⁹⁴

Sibel Edmonds entered into a voluntary employment agreement with the government and sued upon the termination of that agreement. On its face, the case seems ripe for summary dismissal without discovery on *Totten* grounds. But the government went through the procedural complexities of the SSP. This entailed in camera review of a detailed and classified declaration of the U.S. Attorney General, based on personal knowledge,¹⁹⁵ as well as a supplemental declaration.¹⁹⁶ Both declarations set forth the reasons why Edmonds could not make out her prima facie case without discovery of materials subject to the SSP and explained that the government could not assert its affirmative defenses without disclosure of such materials.¹⁹⁷ If *Totten* were a bar to Edmonds's claims, the government could have saved itself the trouble.¹⁹⁸ *Totten* did not bar Edmonds's claims because she did not sue to enforce her agreement with the government.

Totten is a narrow doctrine. It applies only to suits to enforce secret agreements with the government. It does not even apply to statutory or constitutional claims brought by government employees or contractors. It certainly has no application in cases, such as *Jeppesen Dataplan*, brought by parties who never entered into a voluntary relationship with the government.

194. *Id.* at 79.

195. *See id.* at 73, 79 (describing the Declaration of Attorney General John Ashcroft as being based on personal knowledge); *see also* Memorandum on Practical Guidelines for Invoking the State Secrets Privilege, U.S. Army (Apr. 24, 2001), *available at* <http://www.fas.org/sgp/jud/statesec/army-ssp.pdf> (detailing a ten-week process involving dozens if not scores of people in the invocation of the SSP by the U.S. Army).

196. *See Edmonds*, 323 F. Supp. 2d at 79.

197. *See id.*

198. There is some evidence that the classified affidavits based on the personal knowledge of the head of the department asserting the SSP are not actually based on personal knowledge. *See Wells, State Secrets*, *supra* note 95, at 634 & n.50 (describing the declarations filed in SSP cases as "self-serving" and quoting Nat'l Lawyers Guild v. Attorney Gen., 96 F.R.D. 390, 396 n.11 (S.D.N.Y. 1982) for the proposition that such declarations are usually prepared by subordinates and then are signed by the departmental head "perfunctorily . . . without further consideration"); Note, *supra* note 125, at 572 n.18 (discussing a consensus among commentators that expectations of high-level review of assertions of the privilege are unrealistic and citing to a case in which the Attorney General admitted to having merely reviewed a subordinate's recommendations). The solution is to abandon *Reynolds's* requirement that declarations in support of the SSP be made by heads of departments based on personal knowledge. Officers of intelligence agencies should be able to assert the SSP on behalf of their agencies based on their own, actual personal knowledge.

III. THE NINTH CIRCUIT'S ABUSE OF THE STATE SECRETS PRIVILEGE

In *Reynolds*, the survivors of civilians who were killed when a military aircraft crashed sued the government for negligence in connection with the crash.¹⁹⁹ The government disclosed that the aircraft was testing new electronic equipment²⁰⁰ but in its Answer denied that the plane crash had been the product of any negligence.²⁰¹ In the hopes of determining whether the accident had been the product of some sort of negligence, the plaintiffs sought the Air Force's "official accident investigation report" pursuant to Rule 34 of the Federal Rules of Civil Procedure.²⁰² The fight over that accident report created the issue that brought *Reynolds* to the Supreme Court.

Although the procedural history of the case suggests that the SSP was not part of the case at the district court or circuit court level,²⁰³ the U.S. Supreme Court treated the SSP as properly invoked²⁰⁴ and noted that the government, while trying to avoid disclosure of the Air Force investigation report, had offered to make available to plaintiffs three surviving witnesses.²⁰⁵ The *Reynolds* Court held that the plaintiffs should have taken the government up on its offer.²⁰⁶ Because these witnesses were available, and because there was a "reasonable danger" that production of the report would entail the disclosure of secret information relevant to national security, the Court ruled that the government should not be forced to produce the report.²⁰⁷

199. United States v. Reynolds, 345 U.S. 1, 3 (1953).

200. See LOUIS FISHER, IN THE NAME OF NATIONAL SECURITY: UNCHECKED PRESIDENTIAL POWER AND THE REYNOLDS CASE 1–2 (2006) (stating that public relations officer at plane's air base told reporters that the bomber that crashed had been on a "mission to test secret electronic equipment").

201. BARRY SIEGEL, CLAIM OF PRIVILEGE: A MYSTERIOUS PLANE CRASH, A LANDMARK SUPREME COURT CASE, AND THE RISE OF STATE SECRETS 104 (2008).

202. *Reynolds*, 345 U.S. at 3.

203. Louis Fisher and Barry Siegel set out the full history of the *Reynolds* case, making clear that the SSP was not properly invoked at the trial or appellate level. FISHER, *supra* note 200, at 29–91; SIEGEL, *supra* note 201, at 99–156. Rather, at the district court level, the government withheld the Air Force's official accident investigation report based on the Housekeeping Statute, 5 U.S.C. § 301 (2006), and various hearsay objections. FISHER, *supra* note 200, at 36; see SIEGEL, *supra* note 201, at 106. Before the Third Circuit, the government relied on the Housekeeping Statute and on "executive immunity." FISHER, *supra* note 200, at 64–69. When the government finally did assert the SSP, it claimed that the accident report contained state secrets and was unreviewable. SIEGEL, *supra* note 201, at 130. The district court rejected this argument and ordered production of the accident report. When the government refused, the district court entered a default judgment for the plaintiffs. *Id.* at 134.

204. See *Reynolds*, 345 U.S. at 7–11 (setting forth requirements for invocation of SSP and finding procedural steps to be met).

205. *Id.* at 5.

206. *Id.* at 11.

207. See *id.* at 10–12.

Reynolds was a scandal exacerbated by a government cover-up.²⁰⁸ When the government eventually declassified the report plaintiffs sought in *Reynolds*, it contained no secret information relating to the electronic equipment aboard the aircraft.²⁰⁹ One of the original *Reynolds* plaintiffs and the children of two others petitioned the U.S. Supreme Court “for a writ of error *coram nobis*.”²¹⁰ That petition was denied.²¹¹ They then brought an action in the district court where they first brought their claim, seeking to have their settlement with the government set aside on the ground that it was procured by fraud.²¹² The district court dismissed their action on the ground that the report contained information that would have been considered sensitive at the time,²¹³ and the Third Circuit affirmed that decision.²¹⁴

In dismissing the claim, the Third Circuit explained how, aided by the mosaic theory,²¹⁵ seemingly innocuous details—in this case, the name of the squadron to which the plane was attached, the fact that B-29s drop bombs, and that they fly at an altitude above 20,000 feet—can reveal sensitive information.²¹⁶ The court noted that deference was due to the government’s claim of secrecy, given “the near impossibility of determining with any level of certainty what seemingly insignificant pieces of information would have been of keen interest to a Soviet spy fifty years ago.”²¹⁷ But none of that is relevant if the government was claiming that the need of secrecy was related to the electronic equipment on board the plane,

208. See, e.g., FISHER, *supra* note 200, (providing a complete history of *Reynolds* and criticizing the post-*Reynolds* expansion of the privilege); SIEGEL, *supra* note 201 (retelling the story of the *Reynolds* case and the plaintiffs’ and their survivors’ attempts to reveal the true causes of the military plane crash that killed three civilians).

209. See FISHER, *supra* note 200, at 167–68; *Herring v. United States*, 424 F.3d 384, 387 (3d Cir. 2005) (reporting that a daughter of one of the original plaintiffs discovered the declassified report in 2000); *id.* (recounting plaintiffs’ allegations that the declassified report contained no sensitive information).

210. *Herring*, 424 F.3d at 388.

211. *In re Herring*, 539 U.S. 940 (2003); see SIEGEL, *supra* note 201, at 245–68 (providing a full account of plaintiffs’ attorneys’ decision to petition for a writ *coram nobis* and of the denial of the writ).

212. *Herring*, 424 F.3d at 388.

213. *Id.* at 389; see SIEGEL, *supra* note 201, at 275–82 (providing a full account of proceedings in the district court).

214. *Herring*, 424 F.3d at 388–89; see also SIEGEL, *supra* note 201, at 283–308 (providing a full account of proceedings in the Third Circuit).

215. See discussion *infra* notes 276–280.

216. See *Herring*, 424 F.3d at 391–92 n.3. This information had been made public before the litigation began. SIEGEL, *supra* note 201, at 286–87 (observing that the Soviets were already familiar with the problem of engine fires aboard B-29 aircraft). Even if the information were not already public before the accident, it was disclosed by the plane’s surviving co-pilot immediately after the crash. See *id.* at 57–58 (citing newspaper interview with an Air Force public relations officer who quoted Captain Moore as saying that the plane was flying at an altitude of 20,000 feet when the engine caught fire and referencing “bomb bay doors”).

217. *Herring*, 424 F.3d at 391.

when no information relating to that information was contained in the accident report.

The court ignored the fact that the investigation report contained evidence supporting plaintiffs' claim that government negligence in the maintenance of its aircraft was the cause of their loved ones' deaths.²¹⁸ It did not consider with specificity why certain details might be subject to the privilege, like the fact that the plane that crashed had been out of commission for 97 out of the 189 days preceding the fatal flight, or that the plane had been declared unflyable just five days previous to the flight.²¹⁹ It never considered the possibility that the seemingly innocuous but potentially revelatory details that it identified could have been redacted before production of the investigation report, and that the possibility of such redaction would have occurred to the government. Moreover, the court ignored the obvious fraud in which the government had engaged. The U.S. Supreme Court had not suppressed the accident report because it was concerned that the government might be compelled to "reveal" that B-29s fly bombing missions at above 20,000 feet. It suppressed the accident report because the government had persuaded it that the accident report contained information relevant to the aircraft's secret mission, which had necessitated the presence on board of the civilian contractors who died in the crash.²²⁰ The report, however, did not contain the purported information. The Supreme Court would have discovered that fact but for the fraud perpetrated on the Court, a fraud facilitated by the *Reynolds* approach, which does not require a court to inspect the documents underlying an assertion of the SSP. With the benefit of the opportunity to review the now-declassified report, the Court should have recognized the fraud when it received the Reynolds survivors' petition *coram nobis* in 2003.

The *Reynolds* Court permitted the government to use the SSP to do precisely what court review is designed to prevent: protection of the government from embarrassment rather than protection of national security. The miscarriage of justice in *Reynolds* was not the result of bad luck. It was

218. See *Herring*, 424 F.3d 384. The full Accident Investigation Report can be found in the appendix to the court order approving settlement, beginning on page 10a. Stipulation of Counsel for Compromise Settlement and Order of Court Approving Same 10a, *Herring v. United States*, 424 F.3d 384 (3d Cir. 2005) (No. 9793), available at <http://www.fas.org/sgp/othergov/reynoldspetapp.pdf>. The report concludes that the most likely cause of the accident was failure to comply with a technical maintenance order. *Id.* at 66a.

219. SIEGEL, *supra* note 201, at 34.

220. See *FISHER*, *supra* note 200, at 52 (referring to Maj. Gen Reginald C. Harmon's claim in an affidavit connected with the government's assertion of privilege that disclosure would seriously hamper "the development of highly technical and secret military equipment"); *id.* at 53 (discussing the claim of privilege submitted by the Secretary of the Air Force, Thomas K. Finletter, who warned that the plane carried "confidential equipment" and so any disclosure of its mission, operation, or performance would be prejudicial to the public interest).

the result of bad law, and as this section argues, the law has gotten worse in the nearly six decades since *Reynolds* was decided. *Jeppesen Dataplan* is the fullest realization to date of the courts' now habitual piling of pro-government inference upon inference until it becomes possible to dismiss well-pleaded complaints based on hypothetical, affirmative defenses that a civilian contractor might potentially assert were it ever required to answer the complaint.

A. *Reynolds Created a Faulty Methodology for Evaluating Assertions of the SSP*

The *Reynolds* Court was the first to misapply its own procedure for determining whether the SSP applies.²²¹ The *Reynolds* Court described the SSP as calling for a balancing of state interests against the interests of the litigants to proceed with their suits.²²² But no balancing took place in *Reynolds*,²²³ because the Court assumed that the report at issue would contain military secrets, which it did not, and it assumed that plaintiffs could get evidence of government negligence from other sources, which they could not.²²⁴

Reynolds held that the invocation of the SSP is appropriate when it is “possible to satisfy the court, from all the circumstances of the case, that there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged.”²²⁵ The Court then concluded, without reviewing the report, that there certainly was “a reasonable danger that the accident investigation report would contain references” to secret information.²²⁶ Because witnesses were available who could provide information similar to that

221. See FISHER, *supra* note 200, at 112 (quoting Justice Vinson’s admonition that judicial control over evidence “cannot be abdicated to the caprice of executive officers” but then pointing out that a judge would never know if an executive officer acted capriciously under the procedure adopted in *Reynolds* (quoting *United States v. Reynolds*, 345 U.S. 1, 9–10 (1953))); William G. Weaver & Robert M. Pallitto, *State Secrets and Executive Power*, 120 POL. SCI. Q. 85, 101 (2005) [hereinafter Weaver & Pallitto, *State Secrets*] (contending that the “practical effect” of *Reynolds* has been to foster the very abdication of control over evidence against which the *Reynolds* Court warned).

222. See *Reynolds*, 345 U.S. at 9 (declaring the need for a “formula of compromise”).

223. Note, *supra* note 125, at 579 (observing that the *Reynolds* Court’s test is actually one-dimensional, weighing only the possibility of harm to national security and ignoring potential harm to litigants).

224. See Wells, *State Secrets*, *supra* note 95, at 634 (contending that the *Reynolds* test favors deference because “[a]sking courts to determine whether evidence that it often has not reviewed poses a ‘reasonable danger’ to national security requires speculation that weights the balance in favor of the government”).

225. *Reynolds*, 345 U.S. at 10.

226. *Id.*

contained in the report, the Court decided that it did not need to review the report to see whether that “reasonable danger” was realized.²²⁷

In essence, there are two problems with *Reynolds*. First, the “reasonable danger” standard is simply too easy a standard for the government to satisfy, especially—as argued below—when coupled with the myriad additional doctrines that all increase the likelihood that government assertions of the SSP will be successful. As a result, the government is encouraged to assert the SSP whenever it seeks to avoid the possible adverse consequences of litigation. In addition, because courts feel bound to allow the government an absolute privilege—regardless of the consequences to the litigants—whenever there is only a reasonable danger that disclosure could result in the release of state secrets, the SSP has become a vehicle for judicial abdication. In the SSP context, courts do not play their full constitutional role as the guarantors of individual rights,²²⁸ even of the rights of unpopular groups,²²⁹ such as suspected terrorists, and they fail to constrain the federal government in the exercise of its limited powers.

Second, courts cannot determine whether the assertion of the SSP is appropriate without looking at the evidence underlying a claim of privilege. In many cases, including *Reynolds* itself, the courts have allowed the assertion of the privilege based only on a declaration submitted on behalf of the government and claiming that the documents sought contain national security secrets.²³⁰ Recently, that practice has often necessitated dismissal of the suit. In cases like *Jeppesen Dataplan*, the assertion of the privilege

227. See *id.* at 10 (observing that “there was a reasonable danger that the accident investigation report would contain references to the secret electronic equipment which was the primary concern of the mission”).

228. Henry Hart famously referred to state courts as “the primary guarantors of constitutional rights, and in many cases . . . the ultimate ones.” Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1401 (1953). More recently, following tendencies in case law, scholars have characterized federal courts as serving that role. See, e.g., ERWIN CHERMERINSKY, *FEDERAL JURISDICTION* 47 (5th ed. 2007) (stating that an essential function of the courts, by constitutional design, is to serve as guarantors of federal constitutional rights); Richard H. Fallon, Jr., *Jurisdiction-Stripping Reconsidered*, 96 VA. L. REV. 1043, 1074 (2010) (noting that “federal courts have earned recognition as stalwart and sometimes necessary guarantors of constitutional rights”); C. Douglas Floyd, *The Justiciability Decisions of the Burger Court*, 60 NOTRE DAME L. REV. 862, 932 n.300 (1985) (citing the Constitution and the Reconstruction Civil Rights Statutes as sources of authority for the courts’ role as “guarantors of individual rights”). The Supreme Court has echoed this sentiment. *Mitchum v. Foster*, 407 U.S. 225, 242 (1972) (noting that the purpose of 42 U.S.C. § 1983 “was to interpose the federal courts between the States and the people, as guardians of the people’s federal rights—to protect the people from unconstitutional action under color of state law”).

229. On the role of courts in protecting the interests of unpopular individuals and groups, see generally JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

230. See Chesney, *supra* note 20, at 1315–32 (indicating in an appendix that courts did not undertake in camera review of documents other than declarations in at least thirty-four of eighty-nine cases that resulted in published opinions on the SSP between 1951 and 2006, and in many other cases, the review was limited).

has lead to dismissal because the court was unable to *imagine* a defense that would not implicate national security secrets. But if courts defer to government assertions of the SSP because they think they lack institutional competence to determine which disclosures really threaten national security, why do courts trust themselves to imagine all possible affirmative defenses? When these two problems are combined, *Reynolds* very quickly becomes a formula for judicial abdication and thus opens the way for intolerable abuses of the SSP.

B. Reynolds Has Been Expanded So As to Create Perverse Incentives for Abuse of the SSP

Reynolds actually decided very little. The government in that case asserted the SSP with respect to one document²³¹ and quickly settled with plaintiffs once the case was remanded.²³² There was no question of dismissing the action, and the Court's decision to uphold the SSP was clearly influenced by the fact that witnesses were available who could testify as to the subject matter of the document subject to the privilege, presumably without revealing state secrets.²³³ *Reynolds* tells us nothing about the consequences in civil litigation when assertion of the SSP forecloses an affirmative defense. It does not tell us how the SSP interacts with statutes that give rise to causes of action against the government, or tell us whether allegations of intentional government misconduct and constitutional violations trump the SSP. Nor does it address when or whether cases can be dismissed based on the SSP.

Subsequent SSP jurisprudence answers each of these questions in the government's favor and thus looks like a nine-level decision tree in which, at each juncture, the courts make the decisions that most favor the expansion of the SSP. The result is to allow courts to pile pro-government inference on top of pro-government inference until, as occurred in *Jeppesen Dataplan*, the plaintiffs' case cannot proceed because the government claims, but does not need to prove with actual evidence, that *any* argument that the defendant might make in establishing its affirmative defenses would implicate information subject to the SSP. Courts that dismiss cases in which plaintiffs have already made a prima facie showing of government torture based on their own speculation as to what arguments the defendant will choose to make overestimate their own powers of prognostication

231. See *Reynolds*, 345 U.S. at 3–6 (observing that the only issue in the case was whether the government was obligated to provide the Air Force's "official accident investigation report").

232. See FISHER, *supra* note 200, at 117 (detailing the terms of the 1953 settlement agreement).

233. See *Reynolds*, 345 U.S. at 11 (finding the necessity of disclosure "minimized by an available alternative").

while expanding the ability of the Executive Branch to act beyond the legal scope of its powers.

The first two branches of the decision tree are the most fundamental. First, in applying the SSP, courts do not differentiate torts claims from contracts claims. Thus, courts allow *Totten*, which should only be relevant to cases involving voluntary agreements with the government, to inform their SSP analysis in cases involving plaintiffs alleging that they are the victims of wholly unwanted attention from the government. While this Article has contended that *Totten* is in itself overbroad, its logic clearly cannot inform cases that do not involve agreements between the plaintiffs and the government.

Second, courts ignore the fact that in some SSP cases, including whistleblowing cases, discrimination cases, and FISA cases, Congress has expressly given the courts power to adjudicate matters without any suggestion that any evidentiary privilege ought to prevent them from doing so. One can imagine a range of possibilities regarding what effect congressional enactments ought to have on the applicability of a common law evidentiary rule. Courts might have concluded that Congress granted them jurisdiction to hear cases alleging government misconduct and that the SSP should not impede the exercise of that jurisdiction. Because Congress may be presumed to be aware of the SSP and chose not to create an SSP exception to the exercise of the courts' jurisdiction, courts reasonably could have concluded that the SSP was not to apply to all cases in which plaintiffs allege that government misconduct violates such congressional enactments. In the alternative, one could imagine an intermediate position that would entail close scrutiny of the congressional record pertaining to the enactment of the relevant statutes. Or perhaps the SSP should not bar allegations of constitutional violations by the government, but should bar some or all statutory claims.

Courts have not embraced any of these options, nor have they considered them. Instead, courts have generally taken the view that the SSP is a bar to all claims, regardless of Congress's intentions to create a remedy for government misconduct, or of the significance of the statutory or constitutional violations alleged.

As argued above, *Reynolds* arbitrarily established a "reasonable danger" test that is too easy for the government to meet.²³⁴ That test has become far easier to meet when coupled with other doctrines that have arisen post-*Reynolds*. For example, the third government-friendly decision consists of courts' broad construction of the "reasonable danger" test, upholding the government's assertion of the SSP, not only when national security might be endangered by the disclosure of information, but also

234. See *supra* text accompanying notes 225–231.

when disclosure poses a reasonable danger of disrupting foreign policy,²³⁵ thus blurring the line that separates protecting the country against disclosure of national security secrets and protecting the government against embarrassment.²³⁶ We likely will never know which motive was foremost in the government's motion to dismiss in *Jeppesen Dataplan*. As plaintiffs' submissions demonstrate, we know of the government's rendition program, not simply in broad outline but in substantial detail.²³⁷ Without litigating the case, it is impossible to know whether discovery is possible without revealing state secrets, since the Ninth Circuit has refused to order the district court to do the hard work of separating information that must be disclosed, or that can be disclosed in redacted form and under seal, from information that is in all circumstances covered by the SSP.²³⁸

Fourth, courts decide whether to allow the assertion of the SSP in ex parte proceedings. In most circumstances, this is not surprising, because, as the *Reynolds* Court noted, courts should not police the SSP in a way that would defeat its purpose by revealing state secrets.²³⁹ However, in some cases, as in the various cases involving suits against the government by former government employees alleging some form of unlawful discrimination,²⁴⁰ the plaintiffs themselves have security clearance and so national security concerns do not obviously justify plaintiffs' exclusion from a hearing on the SSP. While the identity of certain government agents may be classified, plaintiffs in such cases already have access to that information. They know the people they have accused of misconduct. In

235. See *Republic of China v. Nat'l Union Fire Ins. Co.*, 142 F. Supp. 551, 556 (D. Md. 1956) (permitting non-disclosure where the government gave as the only grounds for asserting the privilege its desire to avoid exacerbation of tensions arising from British recognition of the People's Republic of China); see also Note, *supra* note 125, at 574 (noting that the "reasonable danger" standard does not refer to the "likelihood of any harm . . . occurring" and does not evaluate the sensitivity of the information subject to the privilege); *id.* at 579 ("[A]lmost any information—economic, demographic, even meteorological—if disclosed, could be useful to a foreign adversary and potentially prejudicial to the nation's security.").

236. See *Griswold*, *supra* note 70, at A25 (reflecting his personal experience that "principal concern of the classifiers is . . . with governmental embarrassment of one sort or another").

237. See *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1101–31 (9th Cir. 2010) (en banc) (Hawkins, J., dissenting) (providing a summary of the 1,800 pages of supporting documents submitted with the complaint).

238. See *id.* at 1101 (calling for a remand to the district court in order to allow the district court to determine "what evidence is privileged and whether any such evidence is indispensable" to plaintiffs' claims or to the defendant's affirmative defenses).

239. See *United States v. Reynolds*, 345 U.S. 1, 8 (1953) (noting that the court must determine whether the circumstances justify a claim of privilege "without forcing . . . disclosure of the very thing the privilege is . . . to protect").

240. See, e.g., *Sterling v. Tenet*, 416 F.3d 338 (4th Cir. 2005) (involving a plaintiff who had been a CIA operations officer); *Edmonds v. U.S. Dep't of Justice*, 323 F. Supp. 2d 65 (D.D.C. 2004) (involving a plaintiff who was an FBI translator); *Tenenbaum v. Simonini*, No. 09-10612, 2009 WL 2222933 (E.D. Mich. 2009) (involving a plaintiff who was an employee of the U.S. Army Automotive Armaments Command); *Tilden v. Tenet*, 140 F. Supp. 2d 623 (E.D. Va. 2000) (involving a CIA employee).

other cases, courts have insisted on proceeding *ex parte* even where plaintiff retains security-cleared counsel.²⁴¹ Only on a few occasions have courts appointed security-cleared counsel to plaintiffs who do not themselves have security clearance.²⁴²

Fifth, *Reynolds* itself exemplifies a fatal flaw of the SSP in that courts often refuse to examine documentary evidence submitted in support of classified declarations filed in connection with assertions of the SSP. This aspect of *Reynolds* has properly been identified as an abdication of judicial duties.²⁴³ If the *Reynolds* Court had actually reviewed the accident report that the government claimed contained information relevant to national security, it would have discovered that the report contained limited information that easily could have been redacted, while still giving plaintiffs the evidence they sought of government negligence in the maintenance of the aircraft that crashed.²⁴⁴ As H. Thomas Wells, Jr., speaking on behalf of the American Bar Association, put it in recent congressional testimony,

Courts are charged with applying the law to facts in cases, not taking assertions as a matter of faith. It is as big a mistake for them to rule on the merits in a vacuum as it is for them to assess the need for secrecy without first examining the evidence.²⁴⁵

Evidence from FOIA cases suggests that, when courts actually do review documents underlying government claims that disclosure of such documents would compromise national security, such claims are sometimes without basis.²⁴⁶ Occasionally, though not in every case, when the

241. See *Tilden*, 140 F. Supp. 2d at 626.

242. See *In re Guantanamo Detainee Cases*, 344 F. Supp. 2d 174, 178 (D.D.C. 2004) (requiring that petitioners' counsel receive "necessary security clearance" to gain access to classified information relevant to cases); *Al Odah v. United States*, 346 F. Supp. 2d 1, 14 (D.D.C. 2004) (requiring that counsel have "security clearance at the level appropriate for the level of knowledge the Government believes is possessed by the detainee"); cf. *Farnsworth Cannon, Inc. v. Grimes*, 635 F.2d 268, 275–76 (4th Cir. 1980) (en banc) (suggesting that parties might identify alternative counsel who could receive necessary security clearance should present counsel be unable to obtain such clearance). But see *Donohue*, *supra* note 17, at 174–75 (citing Order Granting Motion to Dismiss, *Horn v. Huddle*, No. 94-1756, at 7–8 (D.D.C. July 28, 2004)) (discussing *Horn v. Huddle*, where the court denied plaintiff's motion to provide security clearance for one of plaintiff's attorneys).

243. See FISHER, *supra* note 200, at 253 (characterizing this aspect of the opinion as "incoherent, contradictory, and tilted away from the rights of private citizens and fair procedures and supportive of arbitrary executive power").

244. See discussion *supra* accompanying notes 208–220.

245. *Reform of the State Secrets Privilege: Hearing Before the H. Comm. on the Judiciary*, 110th Cong. 4 (2008) [hereinafter Wells Congressional Testimony] (statement of H. Thomas Wells, Jr., President-Elect, American Bar Association).

246. See Fuchs, *supra* note 16, at 164–65 (recounting a case in which the CIA claimed that it could neither affirm nor deny the existence of previously disclosed biographies of Eastern European leaders).

government is caught in a lie, it is forced to back down from its claim that disclosure would threaten national security.²⁴⁷ It follows that if the government knew that its claims of secrecy would be subject to scrupulous review, the government would be far more selective in asserting the SSP.

Undeterred, lower courts routinely refuse to review classified information that purportedly supports government assertions of the privilege based on concerns that court review itself poses a danger of disclosure.²⁴⁸ In *Zuckerbraun v. General Dynamics Corp.*,²⁴⁹ plaintiff was the administrator of the estate of a crewman who was killed aboard a U.S. naval vessel when it was struck by two Iraqi missiles while patrolling the Persian Gulf.²⁵⁰ The suit alleged that the American casualties were caused by the defendants' negligence in designing, manufacturing, testing, and marketing the ship's anti-missile defense system.²⁵¹ Reviewing only the declaration of the Secretary of the Navy submitted in support of the government's assertion of the SSP, the trial court dismissed Zuckerbraun's claims, finding that he could not make out his claims without access to information barred from disclosure.²⁵² The Second Circuit affirmed and rejected plaintiff's request for in camera review.²⁵³ Such review was unnecessary in this case, the court found, because any documents that the government would produce would of necessity either be subject to the

247. Compare *id.* at 174–75 (describing how after the appointment of a special master, the government released 85% of the documents that it claimed were exempt from FOIA in *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973)), with *id.* at 165 (noting that the government ultimately was permitted to withhold its biographies of Eastern European leaders despite the fact that some of them had already been disclosed). In one SSP case, when the court learned that the government had been mistaken about one of the defendants' under cover status and had concealed the extent of its knowledge of that mistake, the court reinstated plaintiff's claims against the defendant and also treated the government's subsequent invocations of the SSP with skepticism, eventually forcing the government into a settlement ending fifteen years of litigation. See Donohue, *supra* note 17, at 175–84 (discussing *Horn v. Huddle*); *Horn v. Huddle*, 699 F. Supp. 2d 236, 238, 243 (D.D.C. 2010) (approving stipulation of dismissal and payment of \$3 million to plaintiff). In *Crater Corp.*, see *infra* text accompanying notes 366–389, the district court expressed skepticism that all 26,000 documents responsive to plaintiffs' discovery requests, including publicly-available court records, were as the government claimed, subject to the SSP, but nonetheless dismissed most of plaintiffs' claims, concluding that it would be unable to make out its prima facie case without documents subject to the SSP. *Crater Corp. v. Lucent Techs., Inc.*, No. 4:98CV00913 ERW, 2004 WL 3609347, at *4 (E.D. Mo. Feb. 19, 2004), *rev'd* by 423 F.3d 1260 (Fed. Cir. 2005) (finding that state secrets privilege was properly invoked but dismissal was premature). In reviewing that determination, the Federal Circuit did not examine the 26,000 documents at issue. Davida H. Isaacs & Robert M. Farley, *Privilege-Wise and Patent (and Trade Secret) Foolish? How the Courts' Misapplication of the Military and State Secrets Privilege Violates the Constitution and Endangers National Security*, 24 BERK. TECH L.J. 785, 797 & n.52 (2009).

248. See *Bentzlin v. Hughes Aircraft Co.*, 833 F. Supp. 1486, 1495–96 (C.D. Cal. 1993); *Zuckerbraun v. General Dynamics Corp.*, 755 F. Supp. 1134, 1139 (D. Conn. 1990); Chesney, *supra* note 20, at 1315–32.

249. 935 F.2d 544 (2d Cir. 1991).

250. *Id.* at 545.

251. *Id.* at 545–46.

252. *Id.* at 546.

253. *Id.* at 548.

privilege or irrelevant.²⁵⁴ Any other evidence plaintiff might introduce “would of necessity be of no greater reliability than dockside rumor, if that.”²⁵⁵

However, in another case, *Bareford v. General Dynamics Corp.*,²⁵⁶ arising out of the same incident, plaintiffs introduced “2,500 pages of affidavits and other documents” substantiating their claims of negligence.²⁵⁷ In affirming dismissal based on the SSP, the Fifth Circuit acknowledged that plaintiffs’ submissions amounted to far more than “dockside rumor.”²⁵⁸ Nevertheless, based on its review of plaintiffs’ submissions, the same declaration submitted in *Zuckerbraun*, and the Navy’s investigation report, the court confidently concluded that the case must be dismissed because plaintiffs could not establish their claim without threatening disclosure of state secrets.²⁵⁹ Courts thus insist on dismissing claims rather than proceeding with discovery and letting justice take its course even in the face of evidence of their inability to predict what kinds of non-classified evidence plaintiffs might introduce.

*Farnsworth Cannon, Inc. v. Grimes*²⁶⁰ is instructive in this regard. The district court granted the government’s motion to intervene in a tortious interference case, upheld the government’s assertion of the SSP, and dismissed the suit.²⁶¹ A panel of the Fourth Circuit reversed the dismissal and remanded the case for trial to determine whether or not plaintiff could make out a prima facie case without recourse to information subject to the SSP.²⁶² The en banc court reinstated the dismissal. Writing in dissent, Judge Phillips remarked on the inappropriateness of an appellate court determining “the probable course of trial” and warned that the questionable practice “invites repetition in future cases.”²⁶³ In a separate dissent, Judge Murnaghan, who authored the panel opinion, remarked on the danger that “[a]ny litigant . . . whose proof is hampered by the invocation of state secrets can hereafter be turned away from his efforts to obtain justice on the

254. *See id.* at 548 (finding that in camera review “would . . . not alter the disposition of the case”).

255. *Id.*

256. 973 F.2d 1138 (5th Cir. 1992), *vacated in part on reh’g*, 973 F.2d 1138, 1145 (5th Cir. 1992).

257. *Id.* at 1140.

258. *Id.* at 1142 (quoting *Zuckerbraun v. General Dynamics Corp.*, 935 F.2d 544, 548 (2d Cir. 1991)).

259. *Id.* at 1143.

260. 635 F.2d 268 (4th Cir. 1980) (en banc).

261. *See id.* at 281.

262. *Id.*

263. *Id.* at 282 (Phillips, J., dissenting).

questionable grounds that, for reasons as to which he must remain uninformed, he *might* stumble intrusively into a protected area.”²⁶⁴

The general operative principle informing these decisions is that it is often impossible to separate classified and unclassified information that might arise in the course of litigation.²⁶⁵ In response to plaintiffs’ contention in *Bareford* that dismissal was an unduly harsh remedy given the other options, the court insisted that “[n]o intermediate solution . . . can fully protect the United States’ interest in keeping its state secrets undisclosed.”²⁶⁶ This perspective is well articulated by Daniel Pines, a CIA attorney who has written on the SSP:

Sealed proceedings are also not fool-proof. Listening devices can be placed inside courtrooms during times when the courtroom is open for public proceedings. Foreign intelligence services can monitor who comes in and out of courtrooms, or even courthouses, in an attempt to identify covert operatives. Court files and computers can be breached to discover classified information. And court personnel, as well as lawyers and their staffs, are always susceptible to innocent slips of the tongue, as well as to manipulation or inducement by persons interested in the classified information at issue.²⁶⁷

Pines’s concerns are probably sufficient to satisfy the *Reynolds* Court’s “reasonable likelihood” test, but it might be a close call. After all, Pines’s scholarship is richly footnoted, but the paragraph provided above cites to no authority except for one lonely court case in which the court, like Pines, raised only the *hypothetical* possibility that a court could be the source of a leak of national security information.²⁶⁸

As of May 2009, at least 2.4 million people had security clearance in the United States.²⁶⁹ It is hard to see why federal judges should be

264. *Id.* at 282–83 (Murnaghan, J., dissenting).

265. *See Bareford v. General Dynamics Corp.*, 973 F.2d 1138, 1144 (5th Cir. 1992) (refusing to allow testimony by people with access to classified information even on non-classified matters because “privileged and non-privileged material are inextricably linked”).

266. *Id. Bareford* exemplifies a court’s tendency to assume that some danger will arise and to preclude the introduction of evidence rather than allowing its introduction in camera and then addressing issues as they arise. *See Fitzgerald v. Penthouse Int’l, Ltd.*, 776 F.2d 1236, 1243 (4th Cir. 1985) (refusing to allow plaintiffs to produce a government official to speak on non-classified matters based on the “considerable danger” that either the direct testimony or cross-examination would lead to leaks of classified information).

267. Pines, *Continuing Viability*, *supra* note 104, at 1297.

268. *See id.* at 1297 n.103 (“Protective orders cannot prevent inadvertent disclosure” (quoting *Halkin v. Helms*, 598 F.2d 1, 7 (D.C. Cir. 1978))).

269. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-09-488, PERSONAL SECURITY CLEARANCES: AN OUTCOME-FOCUSED STRATEGY IS NEEDED TO GUIDE IMPLEMENTATION OF THE REFORMED

blackballed from such a non-exclusive club. As the Third Circuit noted in *Reynolds*,

The judges of the United States are public officers whose responsibility under the Constitution is just as great as that of the heads of the executive departments. When Government documents are submitted to them *in camera* under a claim of privilege the judges may be depended upon to protect with the greatest of care the public interest in preventing the disclosure of matters which may fairly be characterized as privileged.²⁷⁰

There appears to be no evidence that courts have ever been responsible for the leaks of national security secrets. On the contrary, each year, the Foreign Intelligence Surveillance Court (FISC), a special court established under the 1978 Foreign Intelligence Surveillance Act (FISA),²⁷¹ reviews thousands of applications for secret warrants.²⁷² There has never been a leak of classified information because of judicial involvement in this intelligence-gathering process. In addition, the Classified Information Procedures Act (CIPA), enacted in 1980, allows for precisely the sort of *in camera* review and proceedings in criminal cases that Pines contends would pose a risk of public disclosure of national security secrets.²⁷³ There is no evidence that any court operating under CIPA has ever publicly disseminated any secret information disclosed in such *in camera* proceedings.

Moreover, Pines's argument ignores important post-*Reynolds* developments, including the CIPA and Congress's revision of FOIA in 1974 to encourage judicial review of executive claims of secrecy.²⁷⁴ As the

CLEARANCE PROCESS 1 (2009), available at <http://www.gao.gov/assets/290/289932.pdf>. This number does not include "some of those with clearances who work in areas of national intelligence." *Id.*

270. *Reynolds v. United States*, 192 F.2d 987, 997 (3d Cir. 1951) (emphasis omitted) *rev'd by* 345 U.S. 1 (1953).

271. Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1783 (codified as amended in scattered sections of 50 U.S.C.) The creation of the FISC is authorized under 50 U.S.C. § 1803(a) (2006 & Supp. II 2008).

272. In 2008, for example, the government made over 2,000 applications to engage in electronic surveillance, or physical searches, or both. The FISC approved all but one of these applications. Letter of Ronald Weich, Assistant Attorney General, to Congressional Leaders 1-2 (May 14, 2009), available at http://www.wired.com/images_blogs/threatlevel/2009/05/doj-report-to-congress-on-fisa-and-nsls.pdf. Other FISA reports are available from the Federation of American Scientists' website. *Foreign Intelligence Surveillance Act*, FEDERATION OF AMERICAN SCIENTISTS, <http://www.fas.org/irp/agency/doj/fisa/#rept> (last updated May 26, 2011).

273. See Classified Information Procedures Act, 18 U.S.C. app. 3 § 6 (2006) (mandating *in camera* proceedings to determine admissibility of classified information).

274. See 5 U.S.C. § 552(a)(4)(B) (2006 & Supp. IV 2010) (providing that the court must review claims of exemptions to FOIA *de novo* and may examine agency records *in camera* to determine whether the agency can meet its burden to sustain its action seeking an exemption from its obligations under FOIA).

D.C. Circuit noted in 1978, in amending FOIA, Congress “stressed the need for an objective, independent judicial determination, and insisted that judges could be trusted to approach the national security determinations, with common sense, and without jeopardy to national security.”²⁷⁵ Congress has entrusted the courts with the authority to review government submissions and to make independent determinations about the dangers disclosures would pose to national security.²⁷⁶

Sixth, in some SSP cases, there is significant question whether the information at issue is secret. Courts upholding the SSP have repeatedly done so in reliance on the so-called “mosaic theory.” This is “the notion that the government may withhold otherwise trivial or innocuous information because it *might* prove dangerous if combined with other information by a knowledgeable actor (especially a hostile intelligence agency).”²⁷⁷ Courts have frequently invoked the mosaic theory in support of government assertions of the SSP.²⁷⁸ As a result, the SSP can be invoked to prevent the disclosure of information that is not even classified if the government can persuade the court that there is a reasonable danger that the disclosure of such unclassified information, combined with other information, which may be classified, would somehow compromise national security. Resort to mosaic theory has expanded in the twenty-first century,²⁷⁹ even as some courts have recognized the risks attendant to the theory.²⁸⁰

275. Ray v. Turner, 587 F.2d 1187, 1193–94 (D.C. Cir. 1978).

276. See *id.* at 1209–10 (quoting Senator Baker as favoring the “minimal risks that a Federal judge might disclose legitimate national security information” over the “potential for mischief and criminal activity under the cloak of secrecy”); *id.* at 1209 n.35 (quoting Senator Muskie as regarding federal judges as equally able to sort out “valid from invalid claims of executive privilege” in both criminal proceedings and in “matters allegedly connected to the conduct of foreign policy”).

277. Christina E. Wells, CIA v. Sims: *Mosaic Theory and Government Attitude*, 58 ADMIN. L. REV. 845, 846 (2006). For a FOIA case involving mosaic theory, see, e.g., Ctr. for Nat’l Sec. Studies v. U.S. Dep’t of Justice, 331 F.3d 918, 921–22, 928 (D.C. Cir. 2003) (relying on mosaic theory in denying non-governmental organization (NGO) access to list of names of 1000 individuals detained in post-9/11 round-ups).

278. See, e.g., Kasza v. Browner, 133 F.3d 1159, 1170 (9th Cir. 1998) (finding that the Air Force’s claim of privilege was not overbroad in that the mosaic theory justified application of the SSP to both classified and unclassified information); Halkin v. Helms, 598 F.2d 1, 8 (D.C. Cir. 1978) (likening foreign intelligence gathering in the computer age “to the construction of a mosaic” and noting that “[t]housands of bits and pieces of seemingly innocuous information can be analyzed and fitted into place to reveal with startling clarity how the unseen whole must operate”); Edmonds v. U.S. Dep’t of Justice, 323 F. Supp. 2d 65, 77–78 (D.D.C. 2004) (citing Ellsberg v. Mitchell, 709 F.2d 51, 58–59 & n.31 (D.C. Cir. 1983)).

279. See David E. Pozen, Note, *The Mosaic Theory, National Security, and the Freedom of Information Act*, 115 YALE L.J. 628 (2005) (contending that the mosaic theory has been applied by courts post 9/11 in ways that are unfalsifiable, inconsistent with both FOIA’s text and purpose, and “susceptible [of] abuse,” and arguing “for greater judicial scrutiny of mosaic theory claims”).

280. See e.g., Detroit Free Press v. Ashcroft, 303 F.3d 681, 709 (6th Cir. 2002) (finding that the speculation involved in the mosaic theory should not become “the basis for . . . drastic restriction of the

Seventh, information made public but still classified is treated as classified and subject to the SSP. Indeed, the government can still claim that information that *it has previously disclosed* is classified and unavailable to litigants.²⁸¹ The D.C. Circuit long ago held that the government is not estopped from asserting the SSP selectively if it concludes that disclosure is permissible in one case but not another.²⁸² Such a rule permits the Executive to protect itself by refusing to provide information in one case while using the same information to its advantage in separate litigation when disclosure suits its purposes.²⁸³

The ability of the government to assert that information already made public is still classified is crucial in cases such as *Jeppesen Dataplan* in which plaintiffs required no discovery from the government in order to establish a factual basis for their claims. As early as 2006, the U.S. government disclosed the fact that it operated an extraordinary rendition program in connection with the “War on Terror.”²⁸⁴ An investigation into the complicity of European governments in the United States’

public’s First Amendment rights”); *Am. Friends Serv. Comm. v. Dep’t of Def.*, 831 F.2d 441, 445 (3d Cir. 1987) (identifying a “‘slippery slope,’ problem” in the mosaic theory).

281. This occurred in *Wilson v. Central Intelligence Agency*, 586 F.3d 171 (2d Cir. 2009). That case involved the CIA’s insistence on redacting from Valerie Plame Wilson’s memoir, *Fair Game: My Life as a Spy, My Betrayal by the White House* (2007), any reference to her pre-2002 service in the CIA on the ground that such information remained classified. *Id.* at 173–74. Ms. Wilson argued that the CIA should be estopped from denying that her service pre-dated 2002 because it had itself disclosed the dates of her service in a letter to her that was published in the Congressional Record. *Id.* at 187–91. The Second Circuit ruled unanimously that, to paraphrase the concurring opinion of Judge Katzmann, Ms. Wilson’s dates of service were originally properly classified, were never officially declassified, and were never officially disclosed by the CIA. That being the case, the court had no power to order their publication. *Id.* at 196 (Katzmann, J., concurring); *see also id.* at 174 n.2 (quoting Judge Katzmann’s language as signaling his agreement with the main opinion). A similar outcome resulted from the National Security Archives’ attempts to get CIA biographies of Eastern European leaders in *Nat’l Sec. Archives v. CIA*, No. 99-1160 (D.D.C. July 31, 2000). Despite the court’s finding that “national security can only be harmed by the lack of trust engendered by a government denial of information that it has already admitted,” the court ultimately permitted the government to withhold the biographies whose existence it had acknowledged. Fuchs, *supra* note 16, at 165.

282. *See Halkin v. Helms*, 598 F.2d 1, 9 (D.C. Cir. 1978) (allowing the government to assert the SSP to prevent plaintiffs from discovering the subjects of government surveillance although the government had admitted to such surveillance in a similar case).

283. Thus, for example, even while the government refused to comply with FOIA requests and disclose the number of investigations undertaken by the FBI pursuant to § 215 of the USA PATRIOT Act, the Department of Justice declassified a memorandum indicating that the FBI had never used its power under that section. *See Fuchs, supra* note 16, at 155. The case of Valerie Plame Wilson provides more evidence that the government uses doctrines of state secrecy to both shield itself from liability or embarrassment and as a political weapon that it unsheathes at will. In their suit against Lewis Libby, the Wilsons claimed that Libby had informed reporter Robert Novak of Valerie Plame Wilson’s position as a CIA agent in order to destroy her career in retaliation for Joseph Wilson’s criticisms of the veracity of one of the Bush Administration’s key factual claims underlying its justification for the 2003 invasion of Iraq. *Wilson v. Libby*, 535 F.3d 697, 701–02 (D.C. Cir. 2008).

284. *See Sadat, supra* note 5, at 1200 (citing President Bush’s first public acknowledgment of the program, President’s Remarks on the War on Terror, 42 WEEKLY COMP. PRES. DOC. 1569, 1570 (Sept. 6, 2006)).

extraordinary rendition program resulted in a report of the European Parliament, which provides extensive details about the program.²⁸⁵ Plaintiffs provided further details derived from disclosures by the Swedish²⁸⁶ and Egyptian governments²⁸⁷ of their respective roles in the extraordinary rendition program. On July 25, 2007, the United Kingdom Parliamentary Intelligence and Security Committee published a report that fully corroborated the allegations in the Complaint relating to Mr. al-Rawi.²⁸⁸ Despite these disclosures, courts still treat the U.S. extraordinary rendition program as a state secret, the details of which may not be disclosed in litigation.²⁸⁹

Eighth, the government increasingly does not merely assert the privilege in order to escape its discovery obligations; it seeks pre-discovery dismissal of the entire case.²⁹⁰ If the SSP operates like an evidentiary privilege, making the evidence unavailable, it may well be the case that dismissal is necessary on SSP grounds when plaintiff's lack of access to secret evidence prevents her from making out a prima facie case.²⁹¹ That

285. Temporary Committee on the Alleged Use of European Countries by the CIA for the Transport and Illegal Detention of Prisoners, EUR. PARL. DOC. PE 380.593v04-00 4 (2006) (cited in Sadat, *supra* note 5, at 1204 n.18).

286. See Complaint, *supra* note 4, at ¶ 232 (“The [Office of the Parliamentary] Ombudsman [of the Swedish Government’s] report concluded that U.S. and Egyptian officials involved in the rendition had violated Swedish criminal law by subjecting Mr. Agiza to ‘degrading and humiliating treatment’ and by exercising police powers on Swedish soil. And the [Swedish Parliament’s] Standing Committee on the Constitution concluded that Swedish government actions violated Swedish immigration laws prohibiting the transfer of anyone from Sweden to a country where there is a substantial likelihood of his being subjected to torture.”).

287. See *id.* at ¶ 37 (“On May 15, 2005, the Egyptian Prime Minister stated publicly that Egypt had assisted the United States in the rendition of sixty to seventy terrorist suspects since the September 11 attacks.”).

288. *Id.* at ¶ 233.

289. See, e.g., *El-Masri v. United States*, 479 F.3d 296, 308–09 (4th Cir. 2007) (finding that, in order to prevail in court, plaintiff would need far more specific evidence of defendants’ roles in the extraordinary rendition program acknowledged by U.S. officials than had been made publicly available).

290. See, e.g., *id.* at 310–11 (affirming pre-discovery dismissal on state secrets grounds of suit brought by German national who alleged that U.S. agents and others had subjected him to torture, unlawful detention, and inhumane treatment); *Sterling v. Tenet*, 416 F.3d 338, 348–49 (4th Cir. 2005) (affirming pre-discovery dismissal on state secrets grounds of suit against Central Intelligence Agency for race discrimination under Title VII); *Tenenbaum v. Simonini*, 372 F.3d 776, 777 (6th Cir. 2004) (affirming pre-discovery dismissal on state secrets grounds in religious discrimination case); *Farnsworth Cannon, Inc. v. Grimes*, 635 F.2d 268, 281 (4th Cir. 1980) (en banc) (affirming pre-discovery dismissal because disclosure of state secrets at trial would have been inevitable); *Terkel v. AT&T Corp.*, 441 F. Supp. 2d 899, 917–20 (N.D. Ill. 2006) (dismissing before discovery challenge to National Security Agency’s warrantless wiretapping program on state secrets grounds); *Edmonds v. U.S. Dep’t of Justice*, 323 F. Supp. 2d 65, 81–82 (D.D.C. 2004) (dismissing before discovery wrongful termination suit against Federal Bureau of Investigation on state secrets grounds).

291. That would be the case, for example, in surveillance cases because plaintiffs are deprived of standing to challenge the government’s warrantless wiretapping programs unless they can first establish that they were victims of such a government program. See, e.g., *Am. Civil Liberties Union v. Nat’l Sec. Agency*, 493 F.3d 644 (6th Cir. 2007) (remanding for dismissal after finding that the plaintiffs could not

would seem to be the law in the Ninth Circuit even if plaintiff's lack of access to vital evidence is wholly fanciful.²⁹²

However, in cases like *Jeppesen Dataplan*, plaintiff can make out a prima facie claim without any discovery, and the court still dismisses based on speculation. The court cannot know before the defendant has answered the complaint what state secrets will be implicated in the case because it cannot yet know what defenses might be raised. As the *Jeppesen Dataplan* panel observed, the court cannot "determine whether the parties will be able to establish their cases without use of privileged evidence without also knowing what *non-privileged* evidence they will marshal."²⁹³ The panel recognized the impropriety of dismissal "at the *pleadings stage* on the basis of an evidentiary privilege that must be invoked *during discovery* or *at trial*."²⁹⁴

In fact, it could not be that Jeppesen could not defend itself without seeking to introduce evidence subject to the privilege. According to Daniel Pines, none of the conduct alleged in *Jeppesen Dataplan* is clearly illegal.²⁹⁵ In Pines's view, Jeppesen could thus concede all of the factual allegations in the complaint and still argue that, as a matter of law, it is not liable for any harm suffered by plaintiffs.²⁹⁶ Having the case litigated on

establish their standing because they were barred from discovery under the SSP); *Halkin v. Helms*, 690 F.2d 977, 998 (D.C. Cir. 1982) (finding that without access to evidence subject to the SSP, plaintiffs lack standing to seek relief); *Halkin v. Helms*, 598 F.2d 1, 11 (D.C. Cir. 1978) (barring plaintiffs from seeking discovery relating to a government-acknowledged surveillance program and thus preventing them from proving that their communications had been intercepted); *Terkel*, 441 F. Supp. 2d 899 (dismissing for lack of standing claim brought by telephone subscribers alleging that their records had been illegally disclosed to the National Security Agency).

292. In *In re NSA Telecomm. Records Litig.*, 564 F. Supp. 2d 1109, 1111 (N.D. Cal. 2008), plaintiffs were a non-profit organization, and its attorneys sought to establish their standing to challenge surveillance in violation of FISA. Through an inadvertent government disclosure, plaintiffs came into possession of a classified document (the "sealed document") that would apparently have established that plaintiffs were "aggrieved persons" with standing to bring claims against government agencies for FISA violations. *Id.* at 1130. However, because plaintiffs were not permitted to rely on the sealed document to establish their status as aggrieved persons, *id.* at 1130-31; see *Al-Haramain Islamic Found., Inc. v. Bush*, 507 F.3d 1190, 1205 (9th Cir. 2007), they were unable to establish their standing, and their claims were dismissed. *In re NSA*, 564 F. Supp. 2d at 1137. In short, even though plaintiffs could prove that they had been subject to surveillance and even though the government had acknowledged a warrantless wiretapping program that was not in conformity with FISA, *id.* at 1113-14, the court had to blind itself to those facts and dismiss the case. The full story of the Bush Administration's Terrorist Surveillance Program is told in an official report, OFFICES OF INSPECTORS GEN. OF THE DEP'T OF DEF., DEP'T OF JUSTICE, CENT. INTELLIGENCE AGENCY, NAT'L SEC. AGENCY, OFFICE OF THE DIR. OF NAT'L INTELLIGENCE, UNCLASSIFIED REPORT ON THE PRESIDENT'S SURVEILLANCE PROGRAM (2009), available at http://judiciary.house.gov/hearings/pdf/IGTSP_Report090710.pdf.

293. *Mohamed v. Jeppesen Dataplan, Inc.*, 563 F.3d 992, 1009 (9th Cir. 2009).

294. *Id.*

295. See Pines, *Rendition Operations*, *supra* note 5, at 523 (contending that the U.S. extraordinary rendition program violates few if any currently existing U.S. laws and that the remedies for such violations as might exist are extremely limited).

296. *Id.* at 580.

that basis would be a very important exercise and would offer courts the opportunity to clarify a troublesome area of law that various abstention doctrines have prevented the courts from addressing. If the courts in the end reject Pines's argument, we would at least know what the law is, and there would be no harm to Jeppesen, as its motion for judgment on the pleadings would simply be rejected and the case could then proceed to discovery, the appropriate stage for assertions of various privileges.

Finally, ignoring the *Reynolds* court's comparison of the SSP to evidentiary privileges such as that against self-incrimination, courts have allowed dismissal of suits such as *Jeppesen Dataplan* in which plaintiffs do not need to rely on evidence subject to the privilege in order to make out their prima facie case.²⁹⁷ Both courts and Congress have recognized the proper response to the assertion of the SSP: It simply makes the evidence unavailable and the case proceeds without it.²⁹⁸ And yet, in *Jeppesen Dataplan*, the Ninth Circuit majority found that *Reynolds* requires dismissal when the SSP makes it impossible for the government or its contractors to defend against the plaintiffs' claims.²⁹⁹

Reynolds itself certainly does not require such a result. It could not, as it was not a case in which the government sought dismissal of a claim. Moreover, the evidence at issue in *Reynolds* related to plaintiffs' claims and not to any possible government defense. Still, the *Reynolds* Court suggested that suits against the government constitute an exception to sovereign immunity and claimed that where the government creates such an exception, it controls the conditions under which it subjects itself to suit.³⁰⁰ But *Reynolds* overlooks the fact that it was Congress that created the exception to sovereign immunity at issue in *Reynolds*, as well as other exceptions that are at issue in other SSP cases. Where Congress creates the exception, to permit the Executive to determine the scope of that exception violates the principle of checks and balances that is crucial to our constitutional design.³⁰¹

297. See *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1087 (9th Cir. 2010) (en banc) (assuming that plaintiffs could make out their prima facie case without relying on evidence subject to the privilege).

298. *Ellsberg v. Mitchell*, 709 F.2d 51, 64 (D.C. Cir. 1983); Advisory Committee's Note to Preliminary Draft of Proposed FED. R. EVID. 509(e), 56 F.R.D. 183, 254 (1973).

299. *Jeppesen Dataplan*, 614 F.3d at 1087–90.

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

301. See *Webster v. Doe*, 486 U.S. 592, 604 (1988) (remarking on the district courts' ability to control the discovery process and to balance one party's need for access to proof in support of colorable claims against the government's need to protect confidentiality); FISHER, *supra* note 200, at 258 (rejecting broad judicial deference to the Executive Branch as undermining "the judiciary's duty to assure fairness in the courtroom and to decide what evidence may be introduced"); Weaver & Pallitto, *State Secrets*, *supra* note 221, at 90 (contending that the SSP prevents courts from exercising their constitutional duty to oversee the Executive).

IV. FIXING THE STATE SECRETS PRIVILEGE

In 2008, Senator Ted Kennedy and twelve co-sponsors introduced a bill to reform the SSP, the State Secrets Protection Act (SSPA).³⁰² Although the SSPA garnered the support of the American Civil Liberties Union, which has played a leading role in criticizing the government's use of the SSP,³⁰³ others contended that it would have amended the current SSP regime only slightly.³⁰⁴ Nonetheless, the Bush Administration opposed the SSPA and prevented it from being enacted.³⁰⁵ Although the SSPA was reintroduced in the 111th Congress, no action was taken on it, and SSP reform now seems to be safely off the congressional agenda. The SSPA was a valiant effort that could have made abuse of the SSP more difficult. However, this Article contends that the complexities of the SSP cannot be adequately addressed through congressional legislation. Moreover, although legislation could certainly help to nudge courts in the right direction, no such legislation is necessary, as courts already possess the power and authority to restore the SSP to its proper and limited scope.

This final Part makes three arguments. First, the Part explains why, contrary to the *Jeppesen Dataplan* majority, courts are the appropriate place to address claims of government conduct. Second, courts should follow *Reynolds* and treat the SSP as an evidentiary privilege. As such, if the plaintiff is unable to make out her prima facie claim because vital information is unavailable, she may not be able to survive a motion to dismiss. However, if the government (or its contractor) cannot assert an affirmative defense because of the SSP, the defendant might be subject to a successful motion for judgment on the pleadings, which would result in a judgment for the plaintiff.

In the final Subpart, the Article contends that it should almost never be necessary to dismiss a case because of the assertion of the SSP. Courts can hold in camera trials, appoint counsel with security clearance or appoint a special master to sort out what evidence gets in. It is time for courts to recognize in the SSP context, as they have in other contexts, that holding

302. See Donohue, *supra* note 17, at 79 n.4.

303. See *State Secrets Protection Act, Hearing on H.R. 5607 Before the House Subcomm. on the Constitution, Civil Rights, and Civil Liberties* 8–9 (July 31, 2008) (statement of Steven R. Shapiro, Legal Director, American Civil Liberties Union), available at <http://judiciary.house.gov/hearings/pdf/Shapiro080731.pdf> (expressing the ACLU's support for the SSPA).

304. See *Examining the State Secrets Privilege: Protecting National Security While Preserving Accountability, Hearings Before the Senate Judiciary Comm.* 12–13 (Feb. 13, 2008) (statement of Louis Fisher) (noting ways in which, in Mr. Fisher's view, the SSPA would be overly protective of executive power).

305. See Letter from Michael Mukasey, U.S. Attorney General, to Senator Patrick Leahy, Chairman, S. Comm. on the Judiciary (Mar. 31, 2008), available at <http://www.justice.gov/archive/ola/views-letters/110-2/03-31-08-ag-ltr-re-s2533-state-secrets.pdf> [hereinafter Mukasey Letter].

the government accountable for its actions is at least as important to a functioning democracy as the protection of state secrets. In so doing, courts need not balance litigants' rights against national security interests. Courts can protect national security interests without dismissing cases because they have the means in almost all cases to find mechanisms to permit the judicial process to continue without disclosing state secrets.³⁰⁶

A. *The Solution Lies with the Judiciary*

In a bizarre coda to the main opinion in *Jeppesen Dataplan*, the Ninth Circuit suggests that its dismissal of the action is not intended to preclude plaintiffs from seeking "other remedies"; that is, non-judicial relief.³⁰⁷ The alternatives to judicial relief are as follows: 1) the government itself may provide a remedy through reparations or otherwise without disclosing state secrets;³⁰⁸ 2) Congress may investigate and "restrain excesses by the executive";³⁰⁹ 3) Congress can enact private bills and thus provide non-judicial remedies for uncompensated injuries;³¹⁰ and 4) Congress can enact remedial legislation authorizing causes of action to address claims like those brought by the plaintiffs in *Jeppesen Dataplan*.³¹¹

There are three problems with this reasoning. Most obviously and least significantly, the likelihood of any of these alternative remedies becoming available to a group of foreign suspected terrorists is so slight as to be risible.³¹² The fact that six judges on a U.S. Court of Appeals would subscribe to the notion that Congress would bestir itself (through a private bill no less!) on behalf of such people does not speak well for the political acumen of the Judiciary.³¹³

The aftermath of one SSP case, *Tenenbaum v. Simioni*,³¹⁴ illustrates the futility of seeking help from the Legislature. The Tenenbaums sued various

306. See Wells Congressional Testimony, *supra* note 245, at 3 (arguing that courts should protect "legitimate national security interests while permitting litigation to proceed with non-privileged evidence, and that cases should not be dismissed based on the state secrets privilege except as a very last resort").

307. *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1091 (9th Cir. 2010) (en banc).

308. See *id.* (citing the precedent of reparations for Japanese Latin Americans abducted and interned in the United States during World War II).

309. *Id.*

310. *Id.* at 1091–92.

311. *Id.* at 1092.

312. See *id.* at 1101 (Hawkins, J., dissenting) (stating that the majority's suggestion of payment of reparations to the victims of extraordinary rendition "elevates the impractical to the point of absurdity").

313. See Alberto B. Lopez, *\$10 and a Denim Jacket? A Model Statute for Compensating the Wrongly Convicted*, 36 GA. L. REV. 665, 669–701 (2002) ("[T]he availability of legislative compensation through private bills is limited by the realities of politics and influence.").

314. Donohue, *supra* note 17, at 190.

federal employees alleging that they had been subject to a criminal espionage investigation based only on their race and ethnicity.³¹⁵ The district court dismissed the claim on SSP grounds and the Sixth Circuit affirmed.³¹⁶ Thwarted by the SSP in their quest for justice, David Tenenbaum then enlisted his Senator, Carl Levin, to uncover the relevant facts.³¹⁷ In response to Levin's inquiries, the Department of Defense conducted an investigation and determined that Mr. Tenenbaum's race and ethnicity had "contributed to the unusual and unwelcome scrutiny" to which he had been subjected.³¹⁸ Armed with this information, Tenenbaum filed a second case, alleging that an improper invocation of the SSP had deprived him of access to the courts. His claims were found barred under the doctrine of *res judicata*.³¹⁹

The result in the Sibel Edmonds case against the FBI was similar.³²⁰ Senators Patrick Leahy and Charles Grassley asked the FBI to investigate Edmonds' allegations. The resulting report concluded that: 1) the FBI was unable to demonstrate that Edmonds would not have been terminated but for her whistleblowing activities; and 2) the FBI's investigations of her claims had been inadequate.³²¹ While the report did lead to certain reforms within the FBI's translation operations, it did not bring any relief to Ms. Edmonds, whose case was subsequently dismissed by the D.C. Circuit.³²²

Second, the proposed remedies are inadequate to the extent that they can provide only monetary damages—and to some extent those monetary damages would come so far in the future as to be cold comfort.³²³ Thus, for

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

316. *Id.*

317. Donohue, *supra* note 17, at 191.

318. *Id.*

319. *Id.* (citing Tenenbaum v. Ashcroft, No. 09-10612, 2009 WL 2222933, at *9 (E.D. Mich. July 23, 2009)).

320. See discussion *supra* notes 185–198; Edmonds v. U.S. Dep't of Justice, 323 F. Supp. 2d. 65 (D.D.C. 2004).

321. Donohue, *supra* note 17, 193–95 (citing OFFICE OF OVERSIGHT & REVIEW, OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, A REVIEW OF THE FBI'S ACTIONS IN CONNECTION WITH ALLEGATIONS RAISED BY CONTRACT LINGUIST SIBEL EDMONDS: UNCLASSIFIED SUMMARY (2005), available at <http://www.usdoj.gov/oig/special/0501/final.pdf>).

322. Donohue, *supra* note 17, at 195–96.

323. Reparations for Japanese Latin Americans came more than fifty years after their internment and were grossly inadequate to fully redress the wrongs done to those interned. The original settlement cited to by the *Jeppesen Dataplan* majority, *Mochizuki v. United States*, 43 Fed. Cl. 97 (1999), was intended to provide only a "symbol of restitution rather than actual monetary damages." *Id.* at 97. By the time that settlement was announced, over one-third of the Japanese Latin American internees were already dead. See Sean D. Murphy, *U.S. Compensation to Persons of Japanese Ancestry Interned During Second World War*, 93 AM. J. INT'L L. 654, 655 (1999) (noting that only 1300 of an estimated 2000 internees were still alive in 1998). Many of the survivors refused to participate in the settlement, preferring to pursue a more satisfactory form of justice under the Torture Victims Protection Act. See *id.* (observing that the government expected only about 550 Japanese Latin Americans to participate in the settlement); Natsu Taylor Saito, *Justice Held Hostage: U.S. Disregard for International Law in the*

example, even in the unlikely event that Congress were to pass a private bill to compensate a person who had been subjected to extraordinary rendition and torture, such a bill would raise constitutional issues and likely be vetoed if it sought to identify or punish the people responsible for the tortious conduct.³²⁴ But the identification and punishment of wrongdoers is a significant part of what litigants seek in bringing torts claims. Plaintiffs who are barred from seeking justice because of the SSP often seek not only money damages but legal vindication and public acknowledgment of the wrong that has been done them.³²⁵ Thus, Jose Padilla has sued John Yoo for his alleged role in promoting government torture seeking \$1 in damages.³²⁶

Another good illustration of the point is the case of Maher Arar.³²⁷ Mr. Arar has already received \$10 million Canadian³²⁸ in compensation for the harms done to him when he was detained at JFK International Airport and subjected to extraordinary rendition and torture in Syria.³²⁹ He nonetheless pursued civil claims against the U.S. government as well.³³⁰ He did so not because he needs more money but because he wants to force the United States to own up to its misconduct as the Canadian government has done.³³¹

World War II Internment of Japanese Peruvians—A Case Study, 40 B.C. L. REV. 275 (1998) (providing a full account of the inadequacies of the settlement).

324. See Jack M. Beermann, *Congressional Administration*, 43 SAN DIEGO L. REV. 61, 91 (2006) (“Any attempt to use a private bill to punish a particular person would raise constitutional concerns under the Due Process and Bill of Attainder clauses . . .”).

325. See generally JULES L. COLEMAN, *RISKS AND WRONGS* (1992) (developing a theory of corrective justice according to which an individual has a duty to make good another’s wrongful loss if she is responsible for having brought that loss about); Ernest Weinrib, *Corrective Justice*, 77 IOWA L. REV. 403 (1992) (providing an Aristotelian account of corrective justice). It follows that justice is served when the party responsible for the harm (and not, e.g., the federal government through legislative enactment) is required to accept blame and provide the remedy that justice demands. See Jules L. Coleman, *The Practice of Corrective Justice*, 37 ARIZ. L. REV. 15, 27 (1995) (“[I]n every account of corrective justice, there is presumed to be a relationship between the parties that makes the claims of corrective justice appropriate to them—and not to others.”).

326. First Amended Complaint at 19–21, *Padilla v. Yoo*, 633 F. Supp. 2d 1005 (N.D. Cal. 2009) (No. 3:08-cv-00035), 2008 WL 2433172.

327. *Arar v. Ashcroft*, 414 F. Supp. 2d 250 (E.D.N.Y. 2006), *vacated and superseded*, 585 F.3d 559 (2d Cir. 2009).

328. George D. Brown, *Accountability, Liability & the War on Terror—Constitutional Tort Suits as Truth & Reconciliation Vehicles*, 63 FLA. L. REV. 193, 203 (2011).

329. See Jane Mayer, *Outsourcing Justice*, NEW YORKER, Feb. 14, 2005, at 106, available at http://www.newyorker.com/archive/2005/02/14/050214fa_fact6?currentPage=all (recounting that Arar was apprehended in New York as a suspected terrorist and sent to Syria, where he was subjected to months of brutal interrogation, including torture).

330. Arar alleged violations of substantive due process and the Torture Victim Protection Act, and sought declaratory judgment in addition to compensatory and punitive damages. *Arar*, 414 F.Supp. 2d at 257–58.

331. His case was dismissed on statutory and abstention doctrines that mooted the government’s assertion of the SSP, and the Second Circuit sustained that dismissal. *Arar v. Ashcroft*, 585 F.3d 559, 568 (2d Cir. 2009) (en banc) (affirming dismissal of Arar’s Torture Victims Protection Act as

The alternative remedies suggested by the *Jeppesen Dataplan* majority, even if they were available, would not provide the full relief that plaintiffs seek.

Finally, as noted by the *Jeppesen Dataplan* dissenters, courts abdicate their constitutional duties when they defer to the political branches in this realm.³³² The SSP is a creation of the courts, and it is well within their power and their institutional competences to repair it.³³³ Moreover, while the political branches could step in to fix the SSP, they are unlikely to do so in a timely manner.

While some defenders of an expansive SSP have stressed its “constitutional underpinnings,”³³⁴ there are also constitutional interests that speak in favor of the courts’ power to check the Executive’s otherwise unrestrained assertions of the SSP. Congress has constitutional power to act in this realm and repeatedly has enacted legislation empowering courts to address claims of executive secrecy that arise in the context of litigation.³³⁵ Clearly, this is not a realm of plenary executive power. Rather, we are in Justice Jackson’s “zone of twilight” of concurrent executive and congressional powers,³³⁶ and Congress has used its powers to call for judicial review of executive claims of secrecy.³³⁷

There should be nothing shocking about the idea that courts can be involved in settling questions of public access to state secrets. Many

insufficiently pled); *id.* at 581 (affirming dismissal of Arar’s *Bivens* claims on the ground that Congress rather than the Judiciary has the institutional competence to provide an appropriate remedy).

332. See Mohamed v. Jeppesen Dataplan, Inc., 614 F.3d 1070, 1101 (9th Cir. 2010) (en banc) (Hawkins, J., dissenting) (chastising the majority for “disregard[ing] the concept of checks and balances,” depriving the Judiciary of its role and depriving plaintiffs “of a fair assessment of their claims a neutral arbiter”).

333. See Telman, *supra* note 20, at 506–07 (addressing courts’ constitutional powers to deal with government secrecy); *id.* at 507–10 (addressing institutional competence issues).

334. Mukasey Letter, *supra* note 305, at 2–3 (questioning whether Congress has constitutional authority to legislate in the area of the SSP). Memorandum in Support of the United States’ Assertion of State Secrets Privilege at 3–4, Arar v. Ashcroft, No. 04-CV-240-DGT-VVP (E.D.N.Y. Aug. 11, 2005); Chesney, *supra* note 20, at 1261; see also United States v. Nixon, 418 U.S. 683, 708 (1974) (calling executive privilege “inextricably rooted” in the separation of powers); United States v. Reynolds, 345 U.S. 1, 6 n.9 (1953) (indicating that the SSP is rooted in the notion of the separation of powers); El Masri v. Tenet, 437 F.Supp.2d 530, 535 (E.D. Va. 2006) (describing the privilege as deriving from the President’s constitutional authority over foreign and military affairs).

335. See Neil Kinkopf, *The State Secrets Problem: Can Congress Fix It?*, 80 TEMP. L. REV. 489, 498 (2008) (concluding that Congress has ample constitutional authority to reform the SSP).

336. See *Youngstown Sheet & Tube v. Sawyer (Steel Seizure)*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring) (describing a “zone of twilight” in which the President and Congress have concurrent authority or in which the division of powers is uncertain).

337. See Samaha, *supra* note 67, at 915 (noting that Congress and the Executive Branch have constructed a system for addressing claims for access to secret information and that this system enlists the Judiciary); see also Hamdi v. Rumsfeld, 542 U.S. 507, 536 (2004) (“Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake.”).

countries have constitutional mechanisms designed to strike a balance between public access and government secrecy, and they assign to courts a role in policing that balance.³³⁸ The U.S. Supreme Court has upheld the constitutional power of the courts to serve as a check on executive claims of secrecy, even when the government claims that such secrecy is necessary to safeguard national security.³³⁹ In short, there is no need for further congressional action to provide a right of action for people like the *Jeppesen Dataplan* plaintiffs, because Congress has already designated courts as the appropriate venue for the vindication of rights violated through government misconduct.

B. *The SSP As a Shield, Not a Sword*

The problem with the SSP, as with government secrecy more generally, is that all of the incentives point in the same direction. No government agency has ever been disciplined in any meaningful way for abuse of the SSP.³⁴⁰ The worst thing that could happen—and this happens exceedingly rarely—is that the court will simply find that the government’s assertion of the SSP is not justified.³⁴¹ When first confronted with the government’s assertion of the SSP in *Reynolds*, the Third Circuit was appropriately concerned that “the privilege against disclosure might gradually be enlarged by executive determinations until . . . it embraced the whole range of governmental activities.”³⁴² While the SSP has not yet become the exception that has swallowed the rule of governmental accountability, it has become a major obstacle to democratic processes that seek to determine what exactly the government has been up to in the name of the people.

In order to deter abuse of the privilege, courts should apply the SSP even-handedly. If the SSP deprives plaintiffs of information necessary to their claim, the court may have to dismiss the complaint; although for reasons discussed below, that extreme remedy should rarely be necessary. If the SSP deprives the government or its contractors of information necessary to an affirmative defense, the result may be a judgment for plaintiffs; although that too, for the same reasons, ought to be a rarity.³⁴³

338. See Samaha, *supra* note 67, at 924–32 (surveying foreign constitutional provisions governing access to information and describing the roles of courts recognized under such provisions).

339. See *United States v. U.S. Dist. Ct., E.D. Mich.*, 407 U.S. 297, 316–17 (1972) (finding that the Fourth Amendment requires judicial review of domestic security surveillance).

340. See *Weaver & Pallitto*, *supra* note 221, at 86 (concluding that only possible cost to government of excessive assertions of privilege is “bad publicity”).

341. As of 2001, the SSP had been invoked in over fifty reported cases, and in only four of those cases did the courts reject the assertion. *Id.* at 101–02.

342. *Reynolds v. United States*, 192 F.2d 987, 995 (3d Cir. 1951).

343. This very issue was before the Supreme Court this term in two consolidated cases, *Boeing Company v. United States* and *General Dynamics Corp. v. United States*. In those cases, Petitioners

The *Reynolds* court called for a balancing of interests in connection with the SSP, and an even-handed application of the SSP is a way to achieve that goal. Evidence that such an approach is workable is provided by CIPA, which was enacted in 1980 to address the problem of the introduction of secret evidence in criminal prosecutions.³⁴⁴ Several authorities suggest that CIPA could provide a model for the reform of the SSP.³⁴⁵

CIPA is especially relevant, given the argument that treating the SSP like other evidentiary privileges would encourage claims against the government that seek not justice but quick settlement.³⁴⁶ CIPA was introduced with graymail by criminal defendants specifically in mind,³⁴⁷ and it struck a far more reasonable balance than has the SSP between the interests of the government in protecting state secrets and the interests of the adverse litigant of bringing to light facts relevant to her case.³⁴⁸ In the CIPA context, the statute provides for the full panoply of options short of

contended that the government had, in the same case: (1) sought dismissal of petitioners' claims because the SSP precluded it from asserting an affirmative defense; and (2) sought to preclude petitioners from asserting their prima facie valid affirmative defense to the government's contractual claims based on the SSP. Petitioners contended that it is unfair, and in fact a due process violation, to permit the government "to use the state secrets privilege both offensively and defensively in the same case, always to Contractors' disadvantage." Petition for Writ of Certiorari 28-34, *Boeing Co. v. United States*, 131 S. Ct. 62 (2010) (No. 09-1302); *see also* Petition for Certiorari 15, *Gen. Dynamics Corp. v. United States*, 131 S. Ct. 62 (2011) (No. 09-1298) (arguing that it is "pernicious" to allow the government to pursue its own claim while using the SSP to preclude affirmative defenses). The Court determined that in a case such as this one, in which neither party can prevail without reliance on materials subject to the SSP, a court must leave the parties where it found them. *Gen. Dynamics Corp.*, 131 S. Ct. at 1909. Although this may seem even-handed, it is not, because the government can decide whether or not to declassify material that is useful to it in litigation while still maintaining that material useful to the other party is barred from discovery due to the SSP.

344. *See* LARRY M. EIG, CONG. RESEARCH SERV., CLASSIFIED INFORMATION PROCEDURES ACT (CIPA): AN OVERVIEW 1 (1989), available at <http://www.fas.org/sgp/crs/secretcy/89-172.pdf> (last visited Feb. 16, 2012) ("Congress enacted the Classified Information Procedures Act (CIPA) to provide a means for determining . . . whether a prosecution may proceed that both protects information the Executive regards as sensitive to security and assures the defendant a fair trial consistent with the mandates of the Constitution.").

345. Senator Kennedy, in introducing the State Secrets Protection Act, called it a "civil version of CIPA." Press Release, Office of Senator Edward M. Kennedy, *Kennedy Introduces State Secrets Protection Act* (Jan. 22, 2008), available at http://www.fas.org/irp/congress/2008_cr/statsec.html (last visited Feb. 16, 2012); *see also* *Fitzgerald v. Penthouse Int'l, Ltd.*, 776 F.2d 1236, 1243-44 (4th Cir. 1985) (citing CIPA as evidence of the court's ability to fashion procedures to protect against the disclosure of classified information); Wells Congressional Testimony, *supra* note 245, at 6-7 (proposing a modified CIPA structure as a model for the reform of the SSP). In *Horn v. Huddle*, 636 F. Supp. 2d 10, 18 (D.D.C. 2009), Judge Lamberth rejected the government's assertion of the SSP and instituted pre-trial procedures modeled on CIPA.

346. *See* Pines, *supra* note 104, at 1282-83 (contending that plaintiffs dislike the *Totten* doctrine because it deprives them of the opportunity to graymail the government).

347. Victor Hansen & Lawrence Friedman, *The Case Against Secret Evidence*, 12 ROGER WILLIAMS U. L. REV. 772, 786 (2007) (stating that CIPA was designed to address graymail cases "in which defendants threatened to disclose classified information at trial to force the government to dismiss the case").

348. *Id.* at 788 (characterizing CIPA as forcing the government to choose between disclosing classified information and foregoing prosecution of the defendant).

acquittal in order to facilitate prosecution while protecting state secrets. Under CIPA, courts have discretion to determine how necessary the classified information is to the defendant's case;³⁴⁹ whether it is useful, relevant and admissible;³⁵⁰ whether such information can be introduced in whole or in part;³⁵¹ or whether some other evidence establishing the same facts may be proffered by the government.³⁵² The government can also request that the prosecution proceed in camera and that the record of such proceedings be placed under seal³⁵³ so as to protect classified information.³⁵⁴ If the government will not agree to the release of classified information, it bears the burden of proving that dismissal of the case does not serve the interests of justice.³⁵⁵

The standard objection to arguments in favor of reforming the SSP using CIPA as a model is that the civil and criminal contexts are fundamentally different.³⁵⁶ Long before CIPA was passed, courts recognized that the government must forego any claim of privilege with respect to secret documents relevant to a criminal prosecution.³⁵⁷ For example, the *Reynolds* Court invoked the distinction between civil and criminal suits, noting it would be unconscionable to allow the government "to undertake prosecution and then invoke its governmental privileges to deprive the accused of anything which might be material to his defense."³⁵⁸ The Second Circuit reached the same conclusion, although it termed such a turn of events a denial to the defendant of his constitutional rights, rather than relying on the fuzzier notion of unconscionability.³⁵⁹

349. See *United States v. Moussaoui*, 382 F.3d 453, 476 (4th Cir. 2004) (district court must determine whether "the information the Government seeks to withhold is material to the defense"); *United States v. Libby*, 429 F. Supp. 2d 1, 7–8 (D.D.C. 2006) (same) (citing *United States v. Yunis*, 867 F.2d 617, 623 (D.C. Cir. 1989)).

350. See Classified Information Procedures Act, 18 U.S.C. app. 3, § 6(a) (2006) (providing for a hearing upon motion by government at which the court is to "make all determinations concerning the use, relevance, or admissibility of classified information that would otherwise be made during the trial or pretrial proceeding.").

351. § 8.

352. § 6(c). In *Reynolds*, the SSP worked similarly. The Court was persuaded that the allegedly privileged Accident Investigation Report need not be produced in part because it believed that the same information could be provided through witness testimony. *United States v. Reynolds*, 345 U.S. 1, 11 (1953).

353. § 6(a).

354. § 6(d).

355. § 6(e).

356. See *Gen. Dynamics Corp. v. United States*, 131 S. Ct. 1900, 1905–06 (2011) (citing *Reynolds*, 345 U.S. at 12).

357. See *United States v. Andolschek*, 142 F.2d 503, 506 (2d Cir. 1944) (stating that the government may not suppress documents in a criminal proceeding); see also Donohue, *supra* note 17, at 205 n.671 (citing cases pre-dating CIPA).

358. *Reynolds*, 345 U.S. at 12.

359. See *United States v. Coplon*, 185 F.2d 629, 638 (2d Cir. 1950) (finding that a refusal to allow defendant access to evidence was a denial of a constitutional right).

Here, the government tries to have it both ways. In the SSP context, the government argues that civil litigants are not entitled to the same protections as are criminal defendants, because civil litigants have chosen to sue the government.³⁶⁰ But in the criminal context, the government makes various arguments to persuade courts to deny defendants access to secret information.³⁶¹ The most common mechanism for doing so is a strenuous claim that the secret information is not relevant to the defense.³⁶² In addition, some courts have allowed the government to assert the SSP in the criminal context and then withhold the documents despite their relevance.³⁶³

As with concerns that courts will make inadvertent disclosures that will compromise national security, the concerns here that plaintiffs will try to graymail the government appear to be wholly hypothetical. The SSP has generally arisen in one of four contexts, none of which are likely to be conducive to graymail.³⁶⁴ First, there are SSP cases in which plaintiffs worked for the government and allege that they were the victims of some sort of employment discrimination.³⁶⁵ If the government has a non-discriminatory ground for the adverse employment decision, it can easily state that affirmative defense in an in camera proceeding or through some other mechanism that protects secret information. Suing the government is

360. In a recent argument before the Supreme Court, there was much discussion of the question of whether the Petitioners were the “moving party,” because the Justices seemed to think that the government as the non-moving party was entitled to assert the SSP. *See* Transcript of Oral Argument at 5, *General Dynamics*, 131 S. Ct. 1900 (No. 1298), available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/09-1298.pdf (statement of Mr. Phillips, counsel for Petitioners) (arguing that the government must suffer the consequences of the SSP when it is the “moving party”); *id.* at 16 (statement of Justice Ginsburg) (suggesting that with respect to their own claims, Petitioners are the “moving party”); *id.* at 26 (statement of Justice Breyer) (noting that *Reynolds* indicates that the SSP cannot foreclose government action where the government is not the moving party); *id.* at 33–34 (statement of Justice Scalia) (contending that the government is the moving party in these cases). Only Justice Kagan really seemed to grasp the government’s position on the effects of the SSP when she told the Acting Solicitor General that his position “really does sound like a tails you win, heads you win.” *Id.* at 45. Ultimately, Justice Scalia, writing for the unanimous Court, concluded that the question of which party is the moving party is irrelevant. *General Dynamics*, 131 S. Ct. at 1906 (observing that *Reynolds* is not really applicable to the case at bar, and that its dictum regarding moving parties is less so).

361. *See generally* Donohue, *supra* note 17, at 204–13 (discussing the ambiguous status of the SSP in criminal prosecutions).

362. *See* *United States v. Aref*, 533 F.3d 72, 80–81 (2d Cir. 2008) (finding that, in denying defendant access to secret information, the district court had not denied the defendant any material evidence).

363. *See* Donohue, *supra* note 17, at 212–13 (discussing motion for a protective order in *SEC v. Nacchio*, 614 F. Supp. 2d 1164 (D. Colo. 2009)).

364. Laura Donohue identifies a broader array of SSP cases, including allegations of environmental degradation and defamation and two criminal cases in which the government successfully invoked the SSP. Donohue, *supra* note 17, at 89. The classification provided here is thus an oversimplification, but the likelihood of graymail in these other contexts appears either equally remote or equally unlikely to be addressed through the SSP.

365. *See* discussion *supra* Part ILC (discussing *Molerio*, *Webster*, *Tilden*, *Sterling*, and *Edmonds*).

uphill litigation in which the odds are long.³⁶⁶ It seems unlikely that someone would risk their chances of future employment on a scheme to force the government into settlement through the threat of legal action. The threat of running to the press seems a much less risky and less costly endeavor, and the chances of success seem at least as good.³⁶⁷

A second context in which the SSP arises involves people who claim to have been the victims of illegal government surveillance.³⁶⁸ For the most part, these people do not have the means to graymail the government, because the SSP prevents them from getting the facts that they need to establish their causes of action, and thus of necessity also prevents them from gaining access to materials with which to threaten the government with graymail.³⁶⁹ In any case, they are unlikely to engage in graymail because there is no evidence that the people who bring these suits are interested in money. They have alleged violations of their privacy rights and they seek injunctions and declaratory relief, not monetary damages.³⁷⁰

The third context in which the SSP arises is in suits brought by people claiming to have been victims of extraordinary rendition.³⁷¹ Some of these people might be interested in money damages, but most likely their main interests in the litigation are dignitary. They seek official government

366. See Stewart Macaulay, *Almost Everything That I Did Want to Know About Contract Litigation: A Comment on Galanter*, 2001 WIS. L. REV. 629, 635 (2001) (“The employee suing a corporation that formerly employed her is involved in uphill litigation, and the game is very likely to involve a one-shotter suing an institution that has all the advantages of a repeat player.”).

367. While there may be some cases in which the SSP has protected the government against graymail, at least one plaintiff whose quest for justice was thwarted by the SSP seems to have disclosed secret information through a mechanism far more straightforward than graymail. According to a federal indictment unsealed in January 2011, former CIA agent Jeffrey Sterling, who unsuccessfully sued the government for discrimination, is accused of leaking classified information about Iran to *New York Times* reporter, James Risen. Adam Goldman, *Jeffrey Sterling, Ex-CIA Officer, Charged with Leak to Times Reporter*, HUFFINGTON POST (Jan. 6, 2011, 7:23 PM) http://www.huffingtonpost.com/2011/01/06/jeffrey-sterling-leak-charge_n_805397.html.

368. See, e.g., *ACLU v. NSA*, 493 F.3d 644 (6th Cir. 2007) (involving plaintiffs who claimed that they were wrongfully subjected to government surveillance as part of the Bush Administration’s Terrorist Surveillance Program); *Halkin v. Helms*, 690 F.2d 977 (D.C. Cir. 1982) (involving claims of illegal government surveillance during the Vietnam era); *In re NSA Telecomm. Records Litig.*, 564 F. Supp. 2d 1109 (N.D. Cal. 2008) (alleging that the National Security Agency violated FISA through warrantless surveillance); *Terkel v. AT&T Corp.*, 441 F. Supp. 2d 899 (N.D. Ill. 2006) (involving plaintiffs who claimed that their telephone records were illegally disclosed to the National Security Agency); *Hepting v. AT&T Corp.*, 439 F. Supp. 2d 974 (N.D. Cal. 2006) (alleging constitutional and statutory violations arising from the government’s warrantless wiretapping program).

369. See *supra* notes 291–292 and accompanying text.

370. See, e.g., *ACLU v. NSA*, 493 F.3d at 649–50 (observing that plaintiffs sought declaratory judgment and injunctive relief); *Terkel*, 441 F. Supp. 2d at 900 (noting that plaintiffs sought only injunctive and declaratory relief).

371. See, e.g., *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070 (9th Cir. 2010) (en banc); *El-Masri v. United States*, 479 F.3d 296 (4th Cir. 2007); *Arar v. Ashcroft*, 414 F. Supp. 2d 250 (E.D.N.Y. 2006).

acknowledgment of the wrongs it has committed.³⁷² Like those who claim that they are the victims of illegal government surveillance, these plaintiffs lack both the motivation and the means to graymail the government. They make their allegations based on public information or based on their own experiences. If the SSP did not function to immunize government agents and government contractors for their allegedly unlawful conduct, the government would simply be forced to either defend that conduct or refuse to cooperate and face whatever sanctions the court would choose to impose. But note that such sanctions would only be necessary in cases in which plaintiffs could make out a prima facie case without the use of privileged information and the government would be unable to assert its affirmative defenses because no such defense could be mounted without recourse to privileged information. Here, there is a very small risk that a very crafty and well-positioned party could attempt to use the threat of litigation to extort a payment from the government. Given the small chance of such a scenario playing out, the resulting graymail payments might be viewed as a reasonable cost for the government to pay for the benefit of protecting national security secrets.

Finally, there are cases involving disputes either between the government and parties with whom it contracts or among parties to such contracts who are in possession of secret information. While it is certainly imaginable that defense contractors, for example, might use the threat of disclosures in the context of litigation as a tool to extract payments from the government, that scenario also seems highly unlikely. The companies with whom the government contracts usually are or would like to be repeat players. Staying in the good graces of the government is absolutely essential to their business. Suing your main customer in search of short-term gains is not a wise business strategy. In any case, as indicated in the discussion of the *Totten* doctrine *supra*, government contractors already may extract extra consideration from the government as a sort of insurance policy against a government breach, because recovery for such a breach may well be barred by *Totten* or the SSP. In any case, contractors, like former employees, do not need to use the courts if they are interested in extracting graymail from the government. But if they do, recent scholarship indicates that government contractors routinely use the threat of disclosure to entice the government to intervene in suits and assert the SSP.³⁷³ In short, the current iteration of the SSP invites rather than deters graymail.

372. See discussion of Maher Arar's and Jose Padilla's cases, *supra* text accompanying notes 326-331.

373. See Donohue, *supra* note 17, at 88, 136 (arguing that contractors may be using a form of graymail, threatening to disclose classified information in litigation if the government does not intervene and assert the SSP to protect its contractors).

While the arguments that the government needs the SSP in order to protect itself against graymail are weak, there is strong evidence that the SSP has enabled the government and its contractors to engage in unconstitutional takings and thus deter individuals and entrepreneurs from developing technological innovations that can contribute to national defense.³⁷⁴ This social cost associated with the SSP is well illustrated in *Crater Corp. v. Lucent Technologies*, in which the Federal Circuit upheld the dismissal of the plaintiff corporation's claims on SSP grounds.³⁷⁵

The case involved an invention by the principals behind Crater Corporation ("Crater"), which they patented in 1991.³⁷⁶ Lucent approached Crater, thinking that the invention could help in the creation of an airtight coupling for use in underwater fiber optic networks.³⁷⁷ Lucent allegedly sought technical data, drawings and other information that constituted trade secrets, subject to various representations that it would not share the information or produce a device using Crater's intellectual property until a license agreement could be finalized.³⁷⁸ In a suit filed in 1998, Crater alleged that Lucent violated this agreement by using Crater's intellectual property to make a coupling and disseminating Crater's intellectual property to third parties. Crater alleged patent infringement and state law claims sounding in breach of contract and misappropriation of trade secrets.³⁷⁹ The government moved to intervene in 1999 and asserted the SSP to prevent Crater from conducting any discovery relating to the use or manufacture of Crater's coupling device by the United States.³⁸⁰

The government eventually identified 26,000 documents potentially responsive to Crater's discovery requests and concluded that every single one of them was subject to the SSP.³⁸¹ The district court dismissed all of Crater's claims, either because it could not make out its claim without documents subject to the SSP or because Lucent could not establish its defenses without recourse to documents subject to the SSP.³⁸² The Federal Circuit Court of Appeals upheld the district court's finding that the SSP

374. See Isaacs & Farley, *supra* note 247, at 801 (discussing *Crater Corp. v. Lucent Technologies*, a case in which a technology corporation's claims relating to Lucent's alleged misappropriation of the plaintiffs' intellectual property was dismissed because of the SSP). For a quick review of the increasing importance of collaborations involving the U.S. military and technology companies beginning during the Cold War, see Donohue, *supra* note 17, at 92-99.

375. *Crater Corp. v. Lucent Techs., Inc.*, 423 F.3d 1260 (Fed. Cir. 2006).

376. See Isaacs & Farley, *supra* note 247, at 789 (describing patent application of Philip French and his co-inventors).

377. *Crater Corp.*, 423 F.3d at 1262.

378. *Id.*

379. *Id.*

380. *Id.* at 1263.

381. *Id.* at 1264.

382. *Id.* at 1265.

was properly invoked,³⁸³ but it reinstated Crater's state law claims because the district court had not adequately determined their nature and thus was not in a position to determine what impact, if any, the SSP would have on those claims.³⁸⁴ On remand, the district court dismissed the Crater's claims for lack of evidence³⁸⁵ and the Federal Circuit affirmed.³⁸⁶

The case illustrates the dangers that invocation of the SSP can pose to small technology firms. If the facts alleged in Crater are taken as true, a well-established firm such as Lucent can make use of a small firm's innovations to design something for the government and then use the SSP to shield itself from liability for the breach of contract, misappropriation of trade secrets or patent violation, or both. The result could be that "[s]maller companies that specialize in cutting-edge technologies . . . may become reluctant to partner with corporations who essentially steal their technologies and then draw the veil of state secrets over the dispute."³⁸⁷ As Judge Newman pointed out in her partial dissent in the case, it is not in the nation's interest to bar judicial relief when disputes arise among parties involved in projects in the public interest,³⁸⁸ especially when the costs of dismissal of such suits fall disproportionately on the inventors themselves.³⁸⁹

C. Alternatives to Dismissal

In the CIPA context, courts have demonstrated repeatedly that handling protected national security information is not beyond their capacities.³⁹⁰ FOIA also assigns to courts a role in reviewing executive claims that classified material may not be disclosed.³⁹¹ Courts have the institutional competence, the experience, and the constitutional authority under the doctrine of checks and balances to perform the same function with respect to the SSP.

Courts were inventive in this area before 9/11, and it is instructive to remind ourselves of the sorts of creative solutions that are possible if courts are willing to reassert their constitutional authority to review executive claims of privilege. Procedures adopted by courts to test invocations of the

383. *Id.* at 1266.

384. *Id.* at 1267–69.

385. *Crater Corp. v. Lucent Techs., Inc.*, 625 F. Supp. 2d 790, 807 (E.D. Mo. 2007).

386. *Crater Corp. v. Lucent Techs., Inc.*, 319 F. App'x 900 (Fed. Cir. 2009) (per curiam).

387. Donohue, *supra* note 17, at 131.

388. *Crater Corp.*, 423 F.3d at 1270–71 (Newman, J., concurring in part and dissenting in part).

389. Isaacs & Farley, *supra* note 247, at 807.

390. Hansen & Friedman, *supra* note 347, at 793.

391. See discussion *supra* accompanying notes 75–83.

SSP include in camera hearings and bench trials, appointments of special masters, protective orders, redaction of names, and use of sealed testimony.

For example, in *Halpern v. United States*,³⁹² the Second Circuit responded to the assertion of the SSP by remanding the entire case for an in camera trial.³⁹³ Such a remedy may only be appropriate in cases in which keeping secrets from the plaintiffs or from witnesses is not a significant concern.³⁹⁴ Simply eliminating the jury and trying the case before a special master may suffice. In *Loral Corp. v. McDonnell Douglas Corp.*,³⁹⁵ the Second Circuit was persuaded that a jury trial was inappropriate because a “large amount of material properly classified confidential and secret must be submitted to the trier of fact in the case.”³⁹⁶ The Second Circuit therefore upheld the trial court’s decision to refer the case to a special master pursuant to Rule 53(b) of the Federal Rules of Civil Procedure.³⁹⁷ Similarly, in the recent case of *Hepting v. AT&T Corp.*,³⁹⁸ which relates to alleged NSA wiretapping and data-mining programs, the court contemplated the appointment of a special expert “pursuant to [Federal Rule of Evidence] 706 to assist the court in determining whether disclosing particular evidence would create a ‘reasonable danger’ of harming national security.”³⁹⁹

In some cases, it may be possible to protect state secrets by adding an attorney to plaintiffs’ legal team who has security clearance or by granting security clearance to one of plaintiffs’ current counsel.⁴⁰⁰ For example, in cases relating to a Guantánamo detainee, the District Court for the District of Columbia required that a plaintiff have access to counsel with the appropriate level of security clearance,⁴⁰¹ and the court worked out a

392. 258 F.2d 36 (2d Cir. 1958).

393. *Id.* at 43 (holding that district court should proceed in camera if it could do so “without running any serious risk of divulgence of military secrets”).

394. The court was persuaded that trial in camera was feasible in *Halpern* because plaintiff and all witnesses were already familiar with the secret invention at the heart of the case. *Id.*

395. 558 F.2d 1130 (2d Cir. 1977).

396. *Id.* at 1132.

397. *Id.* at 1132–33.

398. 439 F. Supp. 2d 974 (N.D. Cal. 2006).

399. *Id.* at 1010 (quoting FED. R. EVID. 706(a)); see also *AI-Haramain Islamic Found. v. Bush*, 451 F. Supp. 2d 1215, 1233 (D. Or. 2006) (suggesting the appointment of a national security expert as a special master to assess the impact of disclosure of the alleged secrets), *rev’d*, 507 F.3d 1190 (9th Cir. 2007), *remanded* to 564 F. Supp. 2d 1109 (N.D. Cal. 2008).

400. A request to do so was denied by the court in *Horn v. Huddle*, No. 94-1756, at 3–4 (D.D.C. July 28, 2004) (order granting motion dismiss). See discussion in Donohue, *supra* note 17, at 174–75.

401. See *Al Odah v. United States*, 346 F. Supp. 2d 1, 14 (D.D.C. 2004) (requiring that counsel have “security clearance at the level appropriate for the level of knowledge the Government believes is possessed by the detainee”); *In re Guantanamo Detainee Cases*, 344 F. Supp. 2d 174, 178 (D.D.C. 2004) (requiring that petitioners’ counsel receive “necessary security clearance” to gain access to classified information relevant to cases); cf. *Farnsworth Cannon, Inc. v. Grimes*, 635 F.2d 268, 275–76 (4th Cir. 1980) (en banc) (suggesting that the parties might identify alternative counsel who could receive the necessary security clearance should present counsel be unable to obtain such clearance).

special framework designed to safeguard national security while also securing the individual right of access to counsel.⁴⁰² A court may also issue a protective order requiring that depositions be conducted in a secure facility and in the presence of government security officers who advise deponents as to what information may be revealed.⁴⁰³

Another approach is for courts to place reasonable time restrictions on the scope of the SSP. In *In re United States*,⁴⁰⁴ the D.C. Circuit was unconvinced that the disclosure of twenty-year-old secrets relating to government surveillance of a Communist Party member created a reasonable danger to national security,⁴⁰⁵ and it expressed its confidence that the district court could “disentangle” the sensitive from the nonsensitive information as the case unfolds.⁴⁰⁶ It follows that, as argued *supra* with respect to *Totten* cases, even if courts have to dismiss cases on state secrets grounds, they should do so without prejudice to the refiling of the case upon declassification of the relevant information.⁴⁰⁷ Courts should suspend any relevant statutes of limitations so as to permit cases to be brought after the dangers attendant to disclosure lapse.

Other courts have taken a more radical approach, which some would argue pushes beyond the boundaries of permissible judicial checks on executive powers, but which was not expressly foreclosed by *Reynolds*. In *Black v. Sheraton Corp. of America*,⁴⁰⁸ the District Court for the District of Columbia stated that no evidence concerning the government’s illegal acts, nor any evidence refuting allegations of government illegality, can be privileged.⁴⁰⁹ Such an approach would clearly prevent the transformation of the SSP into a form of executive immunity. In *Elson v. Bowen*,⁴¹⁰ the Supreme Court of Nevada found *Reynolds* to be “the key to the roomful of

402. See *Al Odah*, 346 F. Supp. 2d at 13–14 (permitting unmonitored meetings between petitioner and counsel but requiring petitioner’s attorney to submit any information derived from such meetings to government classification review if counsel wished to disclose such information to anyone else); *In re Guantanamo Detainee Cases*, 344 F. Supp. 2d at 183–91 (setting forth procedures for counsel access to Guantánamo detainees, including requirements that such counsel have or obtain security clearance).

403. See *In re Under Seal*, 945 F.2d 1285, 1287 (4th Cir. 1991) (noting that the trial court granted a protective order filed by the government that allowed depositions to be conducted in secure facilities and in the presence of government security officers).

404. 872 F.2d 472 (D.C. Cir. 1989).

405. *Id.* at 479 (finding itself, for myriad reasons, unable to determine based on its in camera review of a government affidavit that the disclosure of information relating to decades-old government activities would reveal state secrets).

406. *Id.* (citing *Ellsberg v. Mitchell*, 709 F.2d 51, 57 (D.C. Cir. 1983)).

407. A similar approach is that of the district court in *Hepting*, which refused to allow certain discovery, but invited plaintiffs to revisit the issue as continuing disclosures regarding the challenged NSA surveillance program might make public the information with respect to which the government was asserting the Privilege. *Hepting v. AT&T Corp.*, 439 F. Supp. 2d 974, 997–98 (N.D. Cal. 2006).

408. 371 F. Supp. 97 (D.D.C. 1974).

409. *Id.* at 101–02.

410. 436 P.2d 12 (Nev. 1967).

obscurity in this difficult area,” but stressed that cases caution that “[j]udicial control over the evidence in a case cannot be abdicated to the caprice of executive officers.”⁴¹¹ In *Elson*, the trial court reviewed the claims of privilege and determined that government security was not endangered by disclosure.⁴¹² The Nevada Supreme Court nonetheless felt compelled to advise the parties as follows: “Government cannot break the law to enforce the law . . . and it follows that government should not be allowed to use the claims of executive privilege and departmental regulations as a shield of immunity for the unlawful conduct of its representatives.”⁴¹³

In *Tilden*, the court cautioned that revealing state secrets, even in camera, posed a threat of leaks.⁴¹⁴ The court pointed out, logically enough, that the more people who have access to secret information, the less secret the information becomes.⁴¹⁵ The problem with this argument is that it turns *Reynolds* on its head. As Judge Skelly Wright pointed out,

the principle of *Reynolds* was not that military or diplomatic information may not be reviewed by a trial judge, but that a trial judge should not *unnecessarily* require disclosure in situations where he is satisfied, based on other information, that the documents requested should in fact be accorded a privileged status.⁴¹⁶

Moreover, in *Tilden*, neither the court, nor any other sources that I have been able to locate cite to a single example of a court being the source of a national security leak. Such leaks are much more likely to come from the Executive or Legislative Branch, as Wikileaks has now demonstrated.⁴¹⁷ An argument can be made that courts are far better guardians of national security information than are either the Legislative⁴¹⁸ or the Executive Branches.⁴¹⁹

411. *Id.* at 16 (quoting *United States v. Reynolds*, 345 U.S. 1, 9–10 (1953)).

412. *Id.* at 16–17.

413. *Id.* at 16 (citation omitted).

414. *Tilden v. Tenet*, 140 F. Supp. 2d 623, 627 (E.D. Va. 2000).

415. *Id.* at 627 n.1.

416. *Zweibon v. Mitchell*, 516 F.2d 594, 625 n.81 (D.C. Cir. 1975) (en banc).

417. The main source for the classified documents published by Wikileaks seems to have been a 23-year-old private in the Marine Corps, Bradley Manning. See Scott Shane, *Accused Soldier in Brig as Wikileaks Link Is Sought*, N.Y. TIMES, Jan. 13, 2011, available at http://www.nytimes.com/2011/01/14/world/14manning.html?_r=1&scp=2&sq=bradley%20manning&st=cse.

418. Leaks by the Legislature, while not as common as leaks by members of the Executive Branch, are not infrequent. To take just one recent example, on January 26, 2011, Representative Ron Paul read excerpts from a classified U.S. State Department cable into the Congressional Record. See 157 CONG. REC. H503 (daily ed. Jan 26, 2011) (statement of Rep. Paul), available at <http://www.fas.org/sgp/congress/2011/paul012611.html> (last visited Feb. 16, 2012) (arguing that the documents classification was not justified given that its purpose was “to hide the truth from the

CONCLUSION

The Ninth Circuit's *en banc* decision in *Jeppesen Dataplan* should alert the nation to the outrages and absurdities resulting from the conflation of the SSP and *Totten*. Taking as true the plaintiffs' allegations that a contractor working for the U.S. government had kidnapped plaintiffs and delivered them for torture abroad, the court nonetheless dismissed plaintiffs' claims without even waiting for the defendant to answer the complaint, despite the fact that plaintiffs attached to the complaint ample evidence in support of their claims. This Article contends that such dismissals are not necessary. Following *Reynolds*, the Ninth Circuit should have remanded the case and permitted discovery to proceed. Only once the parties had exchanged discovery requests and Jeppesen had asserted its affirmative defenses, if any, should the district court have entertained the government's claims of privilege. The case then should have proceeded either without the privileged evidence or in a manner that protected that evidence from disclosure.

The SSP is an evidentiary privilege. As such it should only rarely lead to the dismissal of claims, and then only when plaintiffs are unable to make out their prima facie case without evidence removed by the SSP. Dismissals are occurring in cases like *Jeppesen Dataplan* because, at the government's urging, judges have confused the SSP and *Totten*, and because *Totten*, overbroad from the start, has been extended to cases to which it ought not apply. The result is that courts have abdicated their roles as fora in which parties can vindicate their rights and demand redress. Granting the government and its agents immunity from suit for intolerable abuses of human rights is an intolerable abuse of the SSP.

American people and keep our government from being embarrassed"). According to the Federation of American Scientists' Secrecy News Blog, this conduct violated House Rules. See Steven Aftergood, *Rep. Paul Quotes Classified Cable on House Floor*, SECRECY NEWS, Jan. 31, 2011, http://www.fas.org/blog/secrecy/2011/01/paul_classified.html#comments. The incident is perhaps trivial, since the information had already been made public by Wikileaks, but judges have frequently treated as classified information that has been made public but is still classified and have refused to allow it to be entered into evidence.

419. In the aftermath of the outing of Valerie Plame Wilson as a CIA agent, there was some discussion of the extent of leaks of such sensitive information by the Executive Branch. The consensus quickly emerged that there was no workable mechanism for controlling such leaks because they were often authorized by the persons responsible for the original classification of the information. See William E. Lee, *Deep Background: Journalists, Sources, and the Perils of Leaking*, 57 AM. U. L. REV. 1453, 1470 (2008) (observing that previous investigations into leaks of classified information by the Executive Branch often resulted in the discovery that the leaks were authorized by a White House or cabinet official).