

No. 20-828

In the Supreme Court of the United States

FEDERAL BUREAU OF INVESTIGATION, ET AL.,
PETITIONERS

v.

YASSIR FAZAGA, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF PROFESSOR LAURA K. DONOHUE
AS AMICUS CURIAE IN SUPPORT OF
NEITHER PARTY

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QUESTION PRESENTED

Whether Section 1806(f) of the Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. § 1801 *et seq.*, displaces the state-secrets privilege and authorizes a district court to resolve, *in camera* and *ex parte*, the merits of a lawsuit challenging the lawfulness of government surveillance by considering the privileged evidence.

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INTEREST OF AMICUS CURIAE

Laura K. Donohue is a Professor of Law at Georgetown Law and Director of Georgetown's Center on National Security and the Law. She holds her Ph.D. in History from the University of Cambridge, and her J.D. with Distinction from Stanford University. She has written extensively on national security, foreign intelligence, constitutional law, legal history, political theory, and public law. Professor Donohue's scholarship includes notable writings on the state-secrets privilege. She has served on the Board of the American Bar Association's Standing Committee on Law and National Security and is a Senior Scholar at Georgetown Law's Center for the Constitution. In 2015, the U.S. Foreign Intelligence Surveillance Court appointed her as one of five amici curiae under the USA FREEDOM Act.

Professor Donohue has a substantial interest in this case because it presents important questions about the proper application of the state-secrets privilege.*

INTRODUCTION

Amicus submits this brief in support of neither party to provide the Court with background on the origins and evolution of the state-secrets privilege. The English and American cases decided before *United States v. Reynolds*, 345 U.S. 1 (1953), as well as the decisions before and after the enactment of the Foreign Intelligence Surveillance Act of 1978 (FISA),

* The parties have consented to the filing of this brief. No counsel for any party authored this brief in whole or in part. No person or entity other than amicus curiae or her counsel made a monetary contribution to the brief's preparation or submission.

produce several observations that may help the Court to resolve this case.

First, both *Reynolds* and earlier English and American caselaw treat state secrets as an evidentiary privilege rather than a substantive rule of decision. As with other privileges, upholding an assertion of state secrets means that the case should continue, if possible, without the privileged information. *Totten v. United States*, 92 U.S. 105 (1876), in contrast, states a different rule of narrow applicability resting on the secrecy inherent in certain government contracts, as the Court made clear in *General Dynamics Corp. v. United States*, 563 U.S. 478, 485, 490 (2011), and *Tenet v. Doe*, 544 U.S. 1, 9-10 (2005).

Second, although the judiciary affords the executive branch deference in asserting state secrets, courts consistently acknowledge their own, critical role in ensuring that those invocations of privilege are justified.

Third, courts strive to find ways to avoid dismissing cases whenever possible. Often that means using *in camera* procedures to evaluate a defense, as in then-Judge Scalia's opinion in *Molerio v. FBI*, 749 F.2d 815, 822 (D.C. Cir. 1984).

Fourth, although dismissal based on the state-secrets evidentiary privilege finds no support in early English or U.S. cases before FISA (outside of the inapposite *Totten* line), a few post-FISA decisions have dismissed lawsuits regardless of their merits on the grounds that further litigation presents too great a risk of exposing state secrets. Those decisions underscore how rare that severe result should be. And they are confined primarily to circumstances in which state secrets are central, such as extraordinary rendition or

defamation, where the truth or falsity of statements about classified information is the core issue.

SUMMARY OF ARGUMENT

A. English cases around the Founding do not support dismissing an action based on the state-secrets privilege. Those decisions involved the exclusion of evidence based on a proper invocation of the privilege, rather than any rule of dismissal. Suits simply continued without the excluded material.

B. Nearly every pre-*Reynolds* U.S. decision is of the same ilk, applying state-secrets as an evidentiary privilege rather than a dismissal remedy. *Totten* is the exception. There, the entire premise of the suit—a contract binding parties to silence—was a state secret. The pre-*Reynolds* caselaw thus likewise fails to support dismissal based on the state-secrets privilege.

C. Following *Reynolds* and before FISA's enactment, courts did not dismiss actions based on the state-secrets privilege. Instead, they continued to view the state-secrets doctrine as an evidentiary privilege carrying the same consequences as any other privilege. Courts also emphasized their critical role in exercising their Article III powers to ensure that the executive branch properly invoked the privilege. When contemplated, dismissal was to be avoided wherever possible by using *in camera* procedures.

D. Since FISA, courts have continued to treat the state-secrets doctrine primarily as an evidentiary privilege. Many decisions have refused to dismiss lawsuits based on the privilege, while others center only on the evidentiary question, whatever its ultimate consequences. Some decisions have found dismissal warranted, but only because the *plaintiff* could not make out a *prima facie* case without the excluded

evidence. Still other decisions have considered the government's submissions *in camera* on the merits to conclude that they establish a valid defense. A handful of recent lower-court decisions, in contrast, have dismissed suits without apparent inspection of the merits of the claims, and even where the plaintiff could make out a *prima facie* case, on the grounds that no amount of procedural care could safeguard state secrets. It is questionable whether those cases are consistent with this Court's discussion of the separate *Totten* and *Reynolds* doctrines in *General Dynamics* and whether they adequately considered the possibility of *in camera* review, especially given the importance of the constitutional questions presented.

ARGUMENT

A. English state-secrets cases involved only exclusion of certain evidence and not the assertion of a bar to continued litigation.

The Court in *Reynolds* recognized that while “[j]udicial experience with the privilege which protects military and state secrets [was] limited” in the United States, “English experience” had been “more extensive, but still relatively slight compared with other evidentiary privileges.” 345 U.S. at 7; *see id.* at 7 n.15. The English decisions show that the common law treated state secrets purely as a matter of exclusion of evidence rather than any bar to presenting a defense or continuing a suit.

The paucity of English caselaw noted in *Reynolds* reflected two factors. *First*, royal prerogative prevented nonconsensual suits against the Crown as a concomitant of sovereignty, the king's inability to do wrong, and the monarch's role as the “fountain of justice.” *See* 1 BLACKSTONE, COMMENTARIES *241-49, 266.

Claims against the Crown therefore could proceed, if at all, on a Petition of Right. ROBERT DORSEY WATKINS, STATE AS A PARTY LITIGANT 14-31 (1927); *see also Deare v. Attorney-General* (1835) 1 Younge & Collyer 197, 208-09. But sovereign immunity did not extend to government officers' tortious acts, such as those famously at issue in *Money v. Leach* (1765) 3 Burr. 1742 (KB), and *Entick v. Carrington* (1765) 2 Wilson 275 (KB), so state-secrets issues could arise in such contexts. *Second*, the establishment of the *nisi prius* reports 1790-1830 significantly increased the number and availability of cases on evidence. *See* John H. Wigmore, *A General Survey of the History and Rules of Evidence*, in 2 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 691, 694-97 (1908). Decisions from this period synthesize the English common-law approach to state secrets around the time of the Founding.

The seminal ruling in *Rex v. Watson* (1817) 2 Stark. 116, 148-49 (KB), for instance, held that a criminal defendant could not elicit testimony describing whether a plan of the Tower of London "found at [his] lodgings" "was a correct plan." The court explained that "allow[ing] an officer of the tower to be examined as to the accuracy of such a plan" might cause "public mischief." *Id.* Yet the court permitted testimony that the plan "was a plan of a part of the interior of the Tower," and one justice said the witness could testify "that prints containing a plan of the Tower might be purchased," even though defense counsel "could not ask the officer whether they were accurate." *Id.*

Home v. Bentinck (1820) 2 Brod. & B. 130, likewise involved an evidentiary ruling resulting in the narrow exclusion of certain evidence. In a libel trial, the court affirmed the exclusion of minutes from a military court of enquiry initiated at the direction of "the

commander-in-chief.” *Id.* at 162. The court reasoned that “on the broad rule of public policy and convenience, ... these matters, secret in their natures, and involving delicate enquiry and the names of persons, stand protected.” *Id.* at 163.

The court in *Home* looked to *Wyatt v. Gore* (1816) Holt N.P.C. 299, which similarly excluded sensitive evidence. In a libel action against the Lieutenant-Governor of Upper Canada by the territory’s surveyor-general, the court directed “the attorney-general of the province” not to testify about “the nature of some communications made to him” by the Lieutenant Governor about the surveyor-general’s conduct. *Id.* at 300-01. Those conversations “ought not be disclosed” because when “[t]he governor consults with a high legal officer on the state of his colony; what passes between them is confidential: no office of this kind could be executed with safety, if conversations between the governor of a distant province and his attorney-general, who is the only person upon whom such governor can lean for advice, were suffered to be disclosed.” *Id.* at 302. Despite the exclusion of that evidence, the plaintiff ultimately prevailed, securing “£300 on the count for a libel.” *Id.* at 305.

Cooke v. Maxwell (1817) 2 Stark. 183, 183, 185-86, followed course: The court agreed that instructions from the governor of the British colony of Sierra Leone to a military officer could not “on principles of public policy be read in evidence.” Nevertheless, the case proceeded. Although the plaintiff could not prove “the contents of the instrument,” he could prove “that what was done was done by the order of the defendant.” *Id.* at 186. The result was a “[v]erdict for the plaintiff.” *Id.* at 187.

Regina v. Russell (1839) 7 Dowl. Pr. 693, involved similar principles. The court dismissed contempt proceedings arising from the defendants' failure to produce papers subpoenaed at an earlier trial. *Id.* at 695. The court explained that the papers would have been inadmissible anyway because they "were of a public nature, and in the possession of Lord John Russell in his public character as Secretary of State." *Id.*

Finally, *H.M.S. Bellerophon* (1875) 44 LJR 5, 6-7, involved both an invocation of privilege and a decision on the merits. The court refused to allow owners of the *Flamsteed*, a ship damaged in a collision with the navy ship *Bellerophon*, to inspect the *Bellerophon's* log books or government communications about the collision. "[T]he question, whether the production of the document would be injurious to the public service, must be determined, not by the Judge, but by the head of the department having the custody of the paper." *Id.* at 7. Despite that evidentiary ruling, the case progressed "on the merits." *Id.* The court ultimately ruled against the plaintiffs because "this collision was caused by the *Flamsteed* not porting in due time, but waiting to port until she came too near to the starboard side of the *Bellerophon*." *Id.* at 9.

Prominent nineteenth century English treatise writers likewise considered state secrets to be an evidentiary privilege akin to any other. Taylor's treatise, for example, listed "[s]tate secrets" among "[t]he matters which the law says shall not be the subject of evidence in a Court of Justice," alongside marital and attorney-client communications, certain information related to judicial proceedings, and "matters of which decency forbids the disclosure." 1 JOHN PITT TAYLOR, A TREATISE ON THE LAW OF EVIDENCE AS

ADMINISTERED IN ENGLAND AND IRELAND § 909, at 589 (G. Pitt-Lewis ed., 9th ed. 1895) (emphasis omitted).

B. Early U.S. cases typically involved only the exclusion of evidence and its consequences.

Starting with the trial of Aaron Burr in 1807 and continuing through the Court's decision in *Reynolds*, early U.S. decisions involved the exclusion of evidence, not dismissal of the litigation. *Totten* is the single exception that proves the rule, and even *Totten* fits within the concept that dismissal may be a consequence of an evidentiary privilege rather than a substantive remedy.

1. Many early U.S. decisions, including *Reynolds*, involved only exclusion of evidence.

The role of the state-secrets privilege in U.S. jurisprudence traces back at least to Chief Justice Marshall's decision, while riding circuit, during Aaron Burr's historic treason and misdemeanor prosecution, *United States v. Burr*, 25 F. Cas. 187 (1807). Marshall allowed the defense to subpoena President Jefferson for a letter he received from alleged coconspirator General James Wilkinson, governor of the Louisiana Territory. *Id.* at 190-91; see Robert M. Chesney, *State Secrets and the Limits of National Security Litigation*, 75 Geo. Wash. L. Rev. 1249, 1272 (2007). While the President is "subject to the general rules which apply to others," Marshall observed, where he has "sufficient motives for declining to produce a particular paper," "those motives may be such as to restrain the court from enforcing its production." *Burr*, 25 F. Cas. at 191. Without attempting to anticipate the President's response, the Chief Justice reasoned that he

could not “precisely lay down any general rule for such a case” and that “[t]he propriety of withholding [a paper] must be decided by [the president] himself, not by another for him.” *Id.* at 192.

For many years following *Burr*, courts understood the state-secrets privilege to present an evidentiary issue. In *Firth Sterling Steel Co. v. Bethlehem Steel Co.*, 199 F. 353, 353-56 (E.D. Pa. 1912), for instance, the court ordered expunged from the record drawings relating to armor-piercing projectiles. The court explained that the Secretary of the Navy had asserted “that the drawings embodied military secrets ... that could not be disclosed without detriment to the public interests.” *Id.* at 354.

In *Pollen v. United States*, 85 Ct. Cl. 673 (1937), a patent dispute, the Court of Claims similarly determined that the state-secrets privilege barred certain testimony. But the court underscored that it was merely “passing upon a rule of evidence as it pertains to two certain witnesses” and was “not refusing and does not refuse to permit the petitioners to establish their case.” *Id.* at 680.

In *Pollen v. Ford Instrument Co.*, 26 F. Supp. 583, 583 (E.D.N.Y. 1939), the court refused to order Ford “to produce and permit plaintiffs to inspect drawings showing the construction of range keepers or other apparatus for determining sighting data for guns.” The government had intervened to assert “that the subject matter of the suit involves a military secret and that any disclosure of the structures used by the Navy or others authorized by it would be detrimental to the national defense and the public interests.” *Id.* at 584.

Reynolds fits the same pattern. The plaintiffs brought a Federal Tort Claims Act (FTCA) suit after

their husbands died in a B-29 crash, and the government invoked the military-secrets privilege in response to their request for an official accident report and statements of surviving crewmembers. 345 U.S. at 2-4. Issuing only an evidentiary ruling upholding the privilege, this Court remanded the case. The Court emphasized that there was “nothing to suggest that the electronic equipment ... had any causal connection with the accident,” such that the plaintiffs should be able “to adduce the essential facts as to causation without resort to material touching upon military secrets.” *Id.* at 11.

2. *Totten* involved dismissal premised on a secret government contract.

The sole exception to this pattern of treating state-secrets privilege exclusively as an evidentiary issue is *Totten*. In *Totten*, “the very subject matter of the action, a contract to perform espionage, was a matter of state secret,” so “[t]he action was dismissed on the pleadings without ever reaching the question of evidence.” *Reynolds*, 345 U.S. at 11 n.26.

Totten was a Court of Claims action seeking recovery under an alleged contract with President Lincoln to spy on the Confederacy. 92 U.S. at 105-06. This Court gave two reasons for affirming the dismissal of the suit. *First*, the contract itself stipulated “a secret service”—“[b]oth employer and agent must have understood that the lips of the other were to be for ever sealed respecting the relation of either to the matter.” *Id.* at 106. Not only might the “publicity produced by an action” endanger national security, but it “would itself be a breach of a contract” that would “defeat a recovery.” *Id.* at 107. *Second*, the Court went on to state “a general principle, that public policy forbids

the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of mater which the law itself regards as confidential,” just as a suit between spouses or client and counsel “cannot be maintained.” *Id.*

Totten is no ordinary evidentiary-privilege case. As the Court explained in *General Dynamics*, *Totten* represents a narrow line of precedent resting on the Court’s “common-law authority to fashion contractual remedies in Government-contracting disputes.” 563 U.S. at 485; *see also Tenet*, 544 U.S. at 3 (*Totten* “prohibit[s] suits against the Government based on covert espionage agreements”). The Court’s “refusal to enforce th[e] contract” in *General Dynamics* “captures,” just as in *Totten*, “what the *ex ante* expectations of the parties were or reasonably ought to have been”—*i.e.*, “that state secrets would prevent courts from resolving many possible disputes under the ... agreement.” 563 U.S. at 490 (citing *Totten*, 92 U.S. at 106).

3. In some criminal cases, exclusion of privileged evidence either required the case to proceed without the evidence or forced the government to cease prosecution.

The government also invoked the state-secrets privilege in some early criminal cases. Those decisions left the government with a choice: proceed without the privileged evidence, or dismiss the prosecution. “[I]n the criminal field, ... the Government can invoke its evidentiary privileges only at the price of letting the defendant go free.” *Reynolds*, 345 U.S. at 12 & n.27; *accord Jencks v. United States*, 353 U.S. 657, 670-72 (1957); *United States v. Aref*, 533 F.3d 72, 79-80 (2d Cir. 2008).

United States v. Haugen, 58 F. Supp. 436 (E.D. Wash. 1944), provides a good example of the choice put to the government. In a prosecution for fraud relating to a government contract, the Army refused to disclose information about the contract because it deemed secrecy “necessary to national defense.” *Id.* at 438. When the government subsequently “failed to present the best [alternative] evidence available,” the court dismissed the prosecution for failure to meet the burden of proof. *Id.* at 440.

C. Decisions between *Reynolds* and the enactment of FISA in 1978 did not dismiss actions based on the state-secrets privilege.

Outside of the *Totten* line, Amicus is unaware of any decisions between this Court’s 1953 decision in *Reynolds* and the 1978 enactment of FISA upholding dismissal of an action based on the state-secrets privilege. A number of decisions, moreover, emphasize the judiciary’s important role in determining whether the government properly has invoked the privilege. Still other decisions recognize that dismissal is a drastic remedy and attempt to avoid it.

1. Outside of the *Totten* line, decisions between *Reynolds* and the enactment of FISA did not dismiss actions based on the state-secrets privilege.

Following *Reynolds*, courts continued to treat the state-secrets doctrine as an evidentiary privilege, permitting litigation to proceed where sufficient unprivileged evidence remained.

In *Republic of China v. National Union Fire Insurance Co. of Pittsburgh, Pa.*, 142 F. Supp. 551, 552, 556-57 (D. Md. 1956), for example, the court upheld

the United States' assertion of state-secrets privilege while permitting it to continue seeking recovery on marine and war-risk insurance policies. Although the government provided "full discovery of all commercial-type information in [its] files," it withheld information regarding certain communications with the British government. *Id.* at 556. The court held that the government's refusal "to supply th[at] information" did not "bar its recovery." *Id.* at 557. The insurers "knew, or should have known, that where military secrets and similar matters are at stake, certain information is privileged." *Id.* at 556.

In *Heine v. Raus*, 399 F.2d 785, 788 (4th Cir. 1968), a defamation case, the Fourth Circuit upheld rulings permitting the defendant, a CIA agent, not to answer questions that would encroach on the CIA Director's assertion of state-secrets privilege. The Fourth Circuit noted that the district court "made sufficient inquiry—some of it *in camera*—to assure that" the privilege had been "properly invoked," and, further, that the district court "requir[ed] [the agent] to answer those [questions] which the Court thought would not impair the privilege while foreclosing answers to those questions which apparently would." *Id.* The Fourth Circuit found the district judge's balancing approach "faithful to the 'formula of compromise' taught by *Reynolds*" and vacated the summary judgment ruling against the plaintiff so that the district court could determine the case on the merits, if possible. *Id.* at 788-91.

Jabara v. Kelley, 75 F.R.D. 475 (E.D. Mich. 1977), is illustrative too. The plaintiff alleged that federal defendants "conducted an intensive investigation of his daily activities since 1967 in a manner that [had] interfered with his freedom of speech and association,

his right of privacy, and his right to be free from unreasonable searches and seizures.” *Id.* at 478. Although the court upheld the state-secrets privilege as to a number of discovery requests, *id.* at 479, 482-90, it cautioned that its inquiry “ha[d] not ended” because it still needed to “determine[] whether the warrantless electronic surveillances in this case comply with the commands of the Fourth Amendment.” *Id.* at 489. And throughout, the court took great care to disentangle material subject to privilege from “matters not clearly within its scope.” *Id.* at 492-93. For instance, given a publicly available congressional report, “it would be a farce to conclude that the name of [a particular] federal agency remains a military or state secret.” *Id.* at 493. The plaintiff had “a right to know the name of the federal agencies that have admittedly engaged in the warrantless surveillances of his personal communications and affairs.” *Id.*

2. Courts emphasized the judiciary’s important role in assessing the invocation of privilege.

In *Reynolds*, the Court observed that the state-secrets privilege “is not to be lightly invoked” or “accepted,” and that a court must “satisfy[] itself that the occasion for invoking the privilege is appropriate.” 345 U.S. at 7, 11. Lower courts subsequently emphasized that “[t]o some degree at least, the validity of the government’s assertion must be judicially assessed.” *Molerio*, 749 F.2d at 822. They explained that “[i]t is the courts, and not the executive officer claiming the privilege, who must determine whether the claim is based on valid concerns”—*i.e.*, “whether the privilege was claimed under circumstances indicating a *reasonable possibility* that military or state secrets would be revealed.” *Jabara*, 75 F.R.D. at 484.

To be sure, this Court noted in *Reynolds* that courts “should not jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence, even by the judge alone, in chambers.” 345 U.S. at 10. But in fidelity to this Court’s exhortation that “[j]udicial control over the evidence in a case cannot be abdicated to the caprice of executive officers,” *id.* at 9-10, courts often held the government “obligated to submit the information or records to the Court for its determination as to whether the claim of privilege is well founded,” *Snyder v. United States*, 20 F.R.D. 7, 9 (E.D.N.Y. 1956); *see, e.g., Westinghouse Elec. Corp.—Rsch. & Dev. Ctr. v. Brown*, 443 F. Supp. 1225, 1231-32 (E.D. Va. 1977).

That judicial check is especially important. As one judge observed of *Reynolds*, “it became apparent years later, after the claimed state secrets document was declassified, that it did not reveal the claimed state secrets.” *Mohamed v. Holder*, No. 11-cv-50, 2014 WL 11516537, at *2 n.1 (E.D. Va. Sept. 15, 2014). As Judge Skelly Wright noted, “it is *public* disclosure which is to be avoided; of necessity, *in camera* judicial inspection will often be imperative if a judge is to fulfill his own constitutional obligations.” *Zweibon v. Mitchell*, 516 F.2d 594, 625 n.80 (D.C. Cir. 1975) (en banc) (plurality). Accordingly, courts examined materials to separate information subject to privilege from information not “within its scope.” *Jabara*, 75 F.R.D. at 492.

Courts also stressed that the privilege may turn on timing. In *United States v. Ahmad*, 499 F.2d 851, 855 (3d Cir. 1974), the court explained that “[t]he passage of time has a profound effect upon such matters, and that which is of utmost sensitivity one day may fade into nothing more than interesting history within

weeks or months.” Thus, the invocation of national security “must be viewed in the light of circumstances as they exist at the time the request for disclosure is made not when the affidavit was prepared or the material filed with the court.” *Id.*; accord *Jabara*, 75 F.R.D. at 488.

3. Courts undertook significant steps to avoid dismissal based on the assertion of state-secrets privilege.

Recognizing the severity of dismissal, courts attempted whenever possible to avoid it.

Halpern v. United States, 258 F.2d 36 (2d Cir. 1958), proves illustrative. There, the Second Circuit reversed the dismissal of an Invention Secrecy Act suit seeking recovery for the United States’ alleged use of the plaintiff’s patented invention, on which the government had placed a secrecy order. The court remanded for a possible trial *in camera* with “a court reporter and other essential court personnel with the necessary security clearance.” *Id.* at 43. The court reasoned that “the privilege relating to state secrets is inapplicable when disclosure to court personnel in an *in camera* proceeding will not make the information public or endanger the national security.” *Id.* at 44.

4. Dismissal decisions rested on *Totten*’s government-contracting rule rather than *Reynolds*’ evidentiary-privilege rule.

As noted, this Court’s decision in *Totten* states a special rule for secret government contracts. After *Reynolds*, *Totten* continued to determine the outcome in several cases. *See, e.g., Tucker v. United States*, 118 F. Supp. 371 (Ct. Cl. 1954). As courts recognized, however, those cases are “inapposite” in the evidentiary-

privilege context because they “were contract actions which the Court of Claims held could not be maintained because the contracts contained covenants of secrecy as in *Totten*.” *Spock v. United States*, 464 F. Supp. 510, 520 & n.11 (S.D.N.Y. 1978).

D. Since FISA’s enactment in 1978, courts have consistently recognized limits to the state-secrets doctrine, only rarely finding dismissal warranted.

After FISA’s enactment, courts continued to refuse to dismiss cases where the plaintiff could make out a prima facie case without the privileged evidence. Courts generally reserved dismissal for the plaintiff’s failure to make out a prima facie case or the defendant’s showing *in camera* of a meritorious defense. A few dismissals in recent years have rested on a different rationale: the centrality of state secrets to the litigation. But courts have had little opportunity to grapple with whether that approach is consistent with the historical role of the evidentiary privilege or *General Dynamics*’ distinction between the *Totten* and *Reynolds* lines.

1. Courts often refuse to dismiss cases based on the state-secrets privilege.

In many instances, courts have refused to dismiss suits based on the state-secrets privilege.

In *Clift v. United States*, 597 F.2d 826, 827 (2d Cir. 1979), Judge Friendly explained that although the state-secrets privilege barred some discovery, the district court had “acted too precipitately in dismissing the complaint.” Eugene Clift had sued the government for patent damages for using his “cryptographic device,” which was subject to a secrecy order. *Id.* Although the Second Circuit deferred to the NSA

Director's assertion of military secrets, it distinguished *Totten*, on which the district court had relied to dismiss the suit, as resting on "an implied agreement of both parties 'that the lips of the other were to be for ever sealed respecting the relation of either to the matter.'" *Id.* at 830 (quoting *Totten*, 92 U.S. at 106). "Clift entered into no contract; it was the Government that imposed secrecy on his patent application," and he had "not conceded that without the requested documents he would be unable to proceed." *Id.* Judge Friendly emphasized that, in the future, "improvements in the art or other developments might make it feasible for the Government to produce some documents under some safeguards." *Id.* "In time the cryptographic systems now considered so secret may be as obsolete as the giant computer that broke the German code in World War II." *Id.* The court thus suggested that the district judge consider staying the litigation. *Id.*

Similarly, the court in *Spock* rejected the government's argument "that the defendants can neither admit nor deny the allegations" of unlawfully intercepting the plaintiffs' communications "without disclosing state secrets." 464 F. Supp. at 512, 518-20. The court reasoned that dismissal "goes beyond the traditional remedies fashioned by the courts in order to protect state secrets or other classified information." *Id.* at 519. "[T]he states secrets privilege is only an evidentiary privilege," and the plaintiff had a "constitutional right" of "access to the courts to redress violations of his constitutional and statutory rights." *Id.* Indeed, other courts had authorized trial before a special master or the judge *in camera*. *Id.* (citing *Loral Corp. v. McDonnell Douglas Corp.*, 558 F.2d 1130 (2d Cir. 1977), and *Halpern*, 258 F.2d 36).

Consequently, the court held, “foreclos[ing] the plaintiff at the pleading stage ... would be unfair and not in keeping with the basic constitutional tenets of this country.” *Id.* at 520.

Courts also began to confront cases in which plaintiffs adduced “facts sufficient to establish a *prima facie* case of violation of [their] constitutional rights” but the government’s defense turned on privileged information. *Ellsberg v. Mitchell*, 709 F.2d 51, 65, 68-69 (D.C. Cir. 1983). *Ellsberg* offered a way to address this “potential problem.” *Id.* at 68. The court first explained that “the privilege may not be used to shield any material not strictly necessary to prevent injury to national security; and, whenever possible, sensitive information must be disentangled from nonsensitive information to allow for the release of the latter.” *Id.* at 57; *see id.* at 52 (government could not withhold officials’ identities). The court concluded that, given allegations of unconstitutional wiretaps, the district court could use “*in camera* procedures” to ascertain “the nature of the defendants’ activities” for purposes of a qualified immunity defense, even “without the aid of arguments of counsel.” *Id.* at 69; *see also Monarch Assur. P.L.C. v. United States*, 244 F.3d 1356, 1360, 1364-65 (Fed. Cir. 2001).

Reaffirming this approach in *In re Sealed Case*, 494 F.3d 139, 141, 147-48 (D.C. Cir. 2007), the D.C. Circuit reversed the dismissal of Fourth Amendment claims after concluding that the plaintiff could establish a *prima facie* case that a federal agent was eavesdropping on him even without privileged information. The court further reasoned that the complaint could be dismissed only if an “appropriately tailored *in camera* review of the privileged record” revealed a

meritorious privileged defense “that would likely cause a trier to reach an erroneous result.” *Id.* at 151.

2. Other decisions center only on the evidentiary privilege, whatever the ultimate consequences may be.

Numerous decisions since FISA’s enactment deal solely with the state-secrets evidentiary privilege without addressing the consequences of excluding evidence. The most immediate “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.” *Sealed Case*, 494 F.3d at 145 (quoting *Ellsberg*, 709 F.2d at 64).

A good example is *Northrop Corp. v. McDonnell Douglas Corp.*, 751 F.2d 395, 397 (D.C. Cir. 1984), where the court sustained the government’s claims of privilege as the suit proceeded. Northrop had sued McDonnell Douglas over the companies’ work on what became the F-18 jet, and McDonnell Douglas sought to defend itself with documents it subpoenaed from the government relating to the sale of military equipment to other countries. *Id.* at 397-98. Although the D.C. Circuit upheld the order quashing the subpoena, it observed that McDonnell Douglas’ defense was not “impossible” without the desired documents, because the company had already “obtained substantial discovery” from the government. *Id.* at 400 n.7.

Other decisions similarly recognize that “through discovery plaintiffs may be able to gather unprivileged information that, when combined with their other evidence, is sufficient to establish a prima facie case.” *Monarch Assurance P.L.C. v. United States*, 36 Fed. Cl. 324, 329 (1996). And many others reflect only

evidentiary rulings in ongoing litigation. *See, e.g., Frost v. Perry*, 161 F.R.D. 434, 440-41 (D. Nev. 1995); *Kronisch v. United States*, No. 83-cv-2458, 1995 WL 303625, at *10-13 (S.D.N.Y. May 18, 1995); *Maxwell v. First Nat'l Bank of Md.*, 143 F.R.D. 590, 599-600 (D. Md. 1992); *Foster v. United States*, 12 Cl. Ct. 492, 495-96 (1987); *In re Agent Orange Prod. Liab. Litig.*, 97 F.R.D. 427, 430-33 (E.D.N.Y. 1983); *Am. Tel. & Tel. Co. v. United States*, 4 Cl. Ct. 157, 162 (1983).

3. Most dismissals rest on the plaintiff's inability to make out a prima facie case or carry his burden.

After FISA's enactment, courts found dismissal appropriate in several state-secrets cases. In most cases, the common link was that the *plaintiff* could not make out a prima facie case or carry the burden of persuasion without the privileged information. In other words, dismissal was a consequence of the evidentiary rule, but not a substantive remedy.

In *Bareford v. General Dynamics Corp.*, 973 F.2d 1138, 1140 (5th Cir. 1992), for example, the Fifth Circuit upheld the dismissal of "a manufacturing and design defect suit against the manufacturer of a military weapons system." The plaintiffs alleged that a Navy frigate's defense systems failed to prevent the death of crewmen from missiles fired by an Iraqi fighter jet. *Id.* at 1140-42. Although the plaintiffs "ha[d] succeeded in producing considerable evidence," the court reasoned, they could "not establish a prima facie case" without privileged "proof of what the Phalanx system was intended to do and the ways in which it fails to accomplish these goals." *Id.* at 1142. *Bareford* followed the Second Circuit's parallel decision on "almost identical ... claims," *id.*, in *Zuckerbraun v.*

General Dynamics Corp., 935 F.2d 544, 547-48 (2d Cir. 1991), where there was likewise “no evidence available to the appellant to establish a prima facie case.” See also 755 F. Supp. 1134, 1139 (D. Conn. 1990) (decision below); *Nejad v. United States*, 724 F. Supp. 753, 754, 756 (C.D. Cal. 1989) (similar).

Other decisions fall into this category too. In *Halkin v. Helms*, 690 F.2d 977, 996-99 (D.C. Cir. 1982), the D.C. Circuit affirmed the dismissal of a suit where the plaintiffs could not establish standing without privileged information about whether the NSA had intercepted their communications. See also *Al-Haramain Islamic Found., Inc. v. Bush*, 507 F.3d 1190, 1205 (9th Cir. 2007) (similar). In *Sealed Case*, the court affirmed dismissal of a Fourth Amendment claim against one of the defendants because the plaintiff could not establish a prima facie case without privileged information. 494 F.3d at 147. And in *Black v. United States*, 62 F.3d 1115, 1118 (8th Cir. 1995), *aff'g* 900 F. Supp. 1129, 1135-37 (D. Minn. 1994), the Eighth Circuit upheld the district court’s dismissal of FTCA and *Bivens* claims for inability to establish a prima facie case without privileged information. See also, e.g., *Frost v. Perry*, 919 F. Supp. 1459, 1468 (D. Nev. 1996); *Bentzlin v. Hughes Aircraft Co.*, 833 F. Supp. 1486, 1496 (C.D. Cal. 1993).

These decisions acknowledge that “the state secrets privilege is only an evidentiary privilege.” *Spock*, 464 F. Supp. at 519. Thus, although it “will often impose a grievous hardship, for it may deprive parties to civil actions, or even to criminal prosecutions of power to assert their rights or to defend themselves”—“a consequence of any evidentiary privilege”—that does not mean a court should “allow [a party] to fill a gap in his own evidence by recourse to what he suppresses.”

United States v. Coplon, 185 F.2d 629, 638 (2d Cir. 1950) (Learned Hand, J.) (dictum).

Courts sometimes use broad language suggesting that the state-secrets privilege bars an action. But in many instances such formulations are imprecise or unnecessary because the plaintiffs simply cannot prove their case without the privileged information. In *El-Masri v. United States*, 479 F.3d 296, 302 (4th Cir. 2007), for instance, the court stated that the suit should be dismissed due to “the centrality of state secrets.” But that decision rested first and foremost on the unremarkable proposition that the plaintiff could not establish a prima facie case using only “admissible evidence.” *Id.* at 309; *see also Sterling v. Tenet*, 416 F.3d 338, 346-47 (4th Cir. 2005) (“There is no way for Sterling to prove employment discrimination without exposing at least some classified details of the covert employment that gives context to his claim.... Sterling’s retaliation claims similarly depend on proof of facts that are state secrets.”).

As the D.C. Circuit has observed, that rule may apply even where the plaintiff possesses sufficient material to prove an affirmative case. “[W]here a plaintiff has proof of a defendant’s liability that is inaccessible because of privilege, the courts are powerless to afford a remedy.” *Sealed Case*, 494 F.3d at 150; *see also Ellsberg*, 709 F.2d at 65 & n.59 (discussing *Farnsworth Cannon, Inc. v. Grimes*, 635 F.2d 268, 281 (4th Cir. 1980) (en banc) (per curiam)). Such was the case in *Farnsworth Cannon*, a brief en banc opinion affirming the “dismissal of the complaint upon a finding that the plaintiff could not make out a prima facie case of tortious interference [with a contract] without resort to the information within the excluded state secrets.” 635 F.2d at 281. (Thus, although the opinion contains

vague, broad language about how “an attempt to make out a prima facie case during an actual trial” would “inevitably” threaten “disclosure of state secrets,” *id.*, courts have understood *Farnsworth Cannon* to stand for the uncontroversial proposition that dismissal was warranted because the “plaintiff could not make out [a] prima facie case of tortious interference with contract without resort to privileged information.” *In re United States*, 872 F.2d 472, 476 (D.C. Cir. 1989); *accord Zuckerbraun*, 935 F.2d at 547.)

4. Other decisions finding dismissal warranted rest on *in camera* review of privileged information to ascertain whether the government’s defense is meritorious.

Courts have sometimes found dismissal appropriate even where the plaintiff could make out a prima facie case. In such instances, however, courts sometimes rely not on the mere invocation of state-secrets privilege, but instead on independent review of privileged materials, to find a meritorious defense.

The leading decision is *Molerio*, 749 F.2d 815. There, in an opinion by then-Judge Scalia, the D.C. Circuit affirmed the dismissal of Daniel Molerio’s First Amendment claim only after reviewing privileged materials *in camera* to independently determine the real reason the FBI had failed to hire Molerio. *Id.* at 825. Molerio had sued the FBI for failing to hire him despite ranking him an “outstanding candidate.” *Id.* at 819. The Bureau did not tell Molerio the reason for its decision but intimated that a background investigation had revealed “something in New York having to do with [Molerio’s] father,” who was believed to have been a member of a Cuban political organization.

Id. After upholding the government’s invocation of privilege, the court was forced to address “the difficult issue of the [privilege’s] effect.” *Id.* at 822, 824.

The difficulty was that, even without the privileged materials, Molerio *had* made out a prima facie “circumstantial case permitting the inference that his father’s political activities” were a motivating factor for the failure to hire, in violation of the First Amendment. *Id.* at 824-25. The court nonetheless affirmed summary judgment in the defendants’ favor. After “independently” examining an “in camera affidavit” (but noting that an affidavit may not “always be sufficient to determine the validity” of a state-secrets privilege claim), *id.* at 822 & n.2, the court explained that it was satisfied the “affidavit set forth the genuine reason for denial of employment,” *id.* at 825. Because “the court [knew] that the reason Daniel Molerio was not hired had nothing to do with [his father’s] assertion of First Amendment rights,” it could not risk permitting a jury to reach that “erroneous conclusion.” *Id.*

Molerio represents a line of precedent holding that “when the district court can determine that the defendant will be deprived of a valid defense based on the privileged materials, it may properly dismiss the complaint.” *Sealed Case*, 494 F.3d at 149. A “valid defense” means a defense that “is meritorious and not merely plausible and would require judgment for the defendant.” *Id.*; *see id.* (citing *Kasza v. Browner*, 133 F.3d 1159, 1166 (9th Cir. 1998), and *Tenenbaum v. Simonini*, 372 F.3d 776, 777-78 (6th Cir. 2004), as adopting the “valid defense” standard). Determining whether “the defendant will be deprived of a valid defense based on ... privileged materials” requires “appropriately tailored *in camera* review of the privileged record.” *Id.* at 149, 151; *see also Kasza*, 133 F.3d

at 1165, 1169-70 (reviewing classified materials *in camera* to affirm summary judgment); *Tenenbaum*, 372 F.3d at 777 (affirming summary judgment after “review[ing] the materials Defendants produced under seal”). Without that judicial check, the D.C. Circuit has cautioned, “virtually every case in which the United States successfully invokes the state secrets privilege would need to be dismissed,” trading “the practice of deciding cases on the basis of evidence” for “a system of conjecture.” *Sealed Case*, 494 F.3d at 150. Adopting a presumption based on an evidentiary privilege “would invariably shift the burdens of proof,” contrary to Congress’ command that evidentiary rules “cannot modify litigants’ substantive rights.” *Id.* at 143, 150 (citing 28 U.S.C. § 2072(b)).

This approach need not burden courts much beyond *Reynolds*’ requirements for ensuring that claims of privilege are well-founded in the first place. They must be evaluated to determine “whether each challenged document’s disclosure would threaten national security,” often requiring “examin[ation of] the privileged materials *in camera*.” *Linder v. Dep’t of Def.*, 133 F.3d 17, 23 (D.C. Cir. 1998) (citing *Ellsberg*, 709 F.2d at 63-64). In Freedom of Information Act cases, by comparison, courts often review sensitive materials *in camera*, even when those materials implicate national security, to determine whether those materials properly are being withheld. *See, e.g., ACLU v. DOJ*, 90 F. Supp. 3d 201 (S.D.N.Y. 2015); *Elec. Frontier Found. v. DOJ*, 57 F. Supp. 3d 54 (D.D.C. 2014); *Elec. Frontier Found. v. DOJ*, No. 11-cv-05221, 2014 WL 3945646 (N.D. Cal. Aug. 11, 2014); *ACLU v. Office of the Director of Nat’l Intelligence*, No. 10-cv-4419, 2011 WL 5563520 (S.D.N.Y. Nov. 15, 2011). The result is often to narrow the scope of what remains classified.

See, e.g., *Elec. Frontier Found.*, 57 F. Supp. 3d at 59; *Elec. Frontier Found.*, 2014 WL 3945646 at *2.

5. Courts have sometimes dismissed cases based on the state-secrets privilege, but only after recognizing the severity of that result and searching for alternatives.

In rare cases of recent vintage, but most often before *General Dynamics*, courts have dismissed cases on the narrow but imprecise ground that “litigating the case to a judgment on the merits would present an unacceptable risk of disclosing state secrets.” *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1083 (9th Cir. 2010) (en banc). When taking that “drastic” action, courts “emphasize that it should be a rare case when the state secrets doctrine leads to dismissal at the outset of a case” given “the impact on human rights” and “the importance of constitutional protections.” *Id.* at 1089, 1092.

In its 6–5 en banc decision in *Mohamed*, the Ninth Circuit dismissed a complaint against Jeppesen Dataplan, a corporation that allegedly played a role in plaintiffs’ extraordinary rendition and torture. *See id.* at 1073-75. The court stated that it was “precluded from explaining precisely which matters the privilege covers lest [it] jeopardize the secrets [it was] bound to protect,” but explained that it had “independently and critically confirmed that their disclosure could be expected to cause significant harm to national security.” *Id.* at 1086. “Because the facts underlying plaintiffs’ claims are so infused with these secrets,” the court reasoned, “any plausible effort by Jeppesen to defend against them would create an unjustifiable risk of revealing state secrets, even if plaintiffs could make a

prima facie case on one or more claims with nonprivileged evidence.” *Id.* at 1088. The court found “precious little Jeppesen could say about its relevant conduct and knowledge without revealing information about how the United States government does *or does not* conduct covert operations.” *Id.* at 1089.

The Fourth Circuit has stated a similarly demanding test. In *Fitzgerald v. Penthouse International, Ltd.*, 776 F.2d 1236, 1244 (4th Cir. 1985), the court held that “[o]nly when no amount of effort and care on the part of the court and the parties will safeguard privileged material is dismissal warranted.” Scientist James Fitzgerald claimed that Penthouse Magazine libeled him by writing that he was trying to sell dolphin-based weapons systems abroad “to make some fast bucks on the side by turning small countries into ‘instant naval powers.’” *Id.* at 1237. After learning that Fitzgerald intended to call an expert to testify about whether his dolphin research was classified, the Navy intervened to assert the state-secrets privilege over “the potential military uses of marine mammals.” *Id.* at 1238, 1242-43. In the court’s view, the case fell within a “narrow category” requiring dismissal “due to the centrality of the privileged material to the very question upon which a decision must be rendered.” *Id.* at 1244. The court found no “less drastic options” given its concern “with the parties’ ability to prove the truth or falsity of the alleged libel without disclosing state secrets.” *Id.* at 1243 & n.11. *See also Bowles v. United States*, 950 F.2d 154, 155-56 (4th Cir. 1991) (per curiam) (following *Fitzgerald* in affirming the “drastic action” of dismissing FTCA claims); *Abilt v. CIA*, 848 F.3d 305, 317 (4th Cir. 2017) (affirming dismissal of disability-discrimination claims).

The proposition in these decisions is that “dismissal is appropriate where further litigation would present an unjustifiable risk of disclosure.” *Abilt*, 848 F.3d at 314. As a threshold matter, it is questionable that courts must go so far, because those same courts sometimes also note serious doubts about whether the plaintiff “can make his prima facie case” in the first place “without resort to privileged information.” *Id.* at 315-16; see *Mohamed*, 614 F.3d at 1087 n.11 (“we are not so sure” plaintiffs can “establish a prima facie case”); cf. *El-Masri*, 479 F.3d at 309.

It is unclear, moreover, how much these decisions rely on the erroneous notion that “the *Totten* bar and the *Reynolds* privilege form a ‘continuum of analysis.’” *Mohamed*, 614 F.3d at 1089. Under that approach, the *Totten* rule “has evolved into the principle that where the very subject matter of a lawsuit is a matter of state secret, the action must be dismissed without reaching the question of evidence.” *Al-Haramain*, 507 F.3d at 1197. But that understanding predates this Court’s guidance in *General Dynamics* that *Reynolds* and *Totten* represent distinct doctrines. 563 U.S. at 485-86. “*Reynolds* was about the admission of evidence. It decided a purely evidentiary dispute by applying evidentiary rules: The privileged information is excluded, and the trial goes on without it.” *Id.* at 485. *Totten*, in contrast, rested not on procedural evidentiary rules, but the courts’ “common-law authority to fashion contractual remedies in Government-contracting disputes.” *Id.*; accord *Tenet*, 544 U.S. at 3 (*Totten* “prohibit[s] suits against the Government based on covert espionage agreements”).

* * *

Courts' care with the state-secrets privilege reflects their critical constitutional role in deciding cases and controversies, particularly in the context of potential Article II violations of individual rights. As one court explained, "allowing the mere prospect of a privileged defense to thwart a citizen's efforts to vindicate his or her constitutional rights would run afoul of th[is] Court's caution against precluding review of constitutional claims." *Sealed Case*, 494 F.3d at 151. In short, "the abrogation of the plaintiff's right of access to the courts would undermine our country's historic commitment to the rule of law." *Spock*, 464 F. Supp. at 520.

CONCLUSION

The Court should consider the historical development and role of the state-secrets privilege in reaching its decision.

Respectfully submitted.

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